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The Lender's Labyrinth and the Banker's Burden: The Real Estate Settlement Procedures Act of 1974 and the 1975 Amendents

Lachlan K. Murphy

COMMENTS

THE LENDER'S LABYRINTH AND THE BANKER'S BURDEN: THE REAL ESTATE SETTLMENT PROCEDURES ACT OF 1974 AND THE 1975 AMENDMENTS

INTRODUCTION

The Real Estate Settlement Procedures Act of 1974[1] (hereinafter referred to as "RESPA") was signed into law in December, 1974, and became effective on June 20, 1975. RESPA emerged after two years of congressional scrutiny of real estate settlement costs. The purpose of the Act was to eliminate unreasonably high settlement costs by disclosing to the homebuyer and seller an itemized list of the settlement services and their costs, thus enabling the buyer to shop for a better deal.[2] Some of the principal supporters of this legislation were the suppliers of these services[3] yet less than four months after the effective date of RESPA these same suppliers came back to Congress crying that RESPA increased their costs, caused delays, and had not succeeded in getting homebuyers to shop for cheaper settlement services.[4] The Real Estate Settlement Procedures Act Amendments of 1975[5] (hereinafter referred to as "the Amendments"), which was signed into law on January 2, 1976, resulted from the barrage of criticisms directed at RESPA. The Amendments repealed the features of RESPA most objectionable to the real estate industry—the advance disclosure provision and the provision requiring disclosure of the previous selling price. The Amendments were overwhelmingly passed by Congress[6] with very little consideration of the consequences of the Amendments or of alternative approaches to the problem. The present Act is subject to change not only because it is in the volatile area of consumer law but because within five

1. 12 U.S.C. §§ 2601 to 2616 (Supp. IV, 1974).
2. S. REP. No. 93-866, 93d Cong., 2d Sess. 3 (1974).
3. *Id.* at 13.
4. *See Hearings on the Real Estate Settlement Procedures Act of 1974 Before the Subcomm. on Housing and Community Development of the House Comm. on Banking, Currency and Housing,* 94th Cong., 1st Sess. (1975). (Hereinafter cited as *Hearings on RESPA*).
5. Real Estate Settlement Procedures Act Amendments of 1975, Pub. L. No. 94-205, 89 Stat. 1157 (January 2, 1976).
6. 121 CONG. REC. H11290 (daily ed. Nov. 17, 1975); 121 CONG. REC. S17912 (daily ed. Oct. 9, 1975).

years of the effective date of RESPA a report will be submitted to Congress analyzing the effectiveness of the Act in controlling unreasonably high settlement costs.

BACKGROUND

Section 701 of the Emergency Home Finance Act of 1970,[7] was the first legislative effort to deal with settlement costs. It gave the Secretary of Housing and Urban Development (hereinafter referred to as "HUD") and the Administrator of Veterans' Administration (hereinafter referred to as "VA") the authority to regulate settlement costs for VA guaranteed and FHA insured loans. It also authorized HUD and VA to study settlement costs to see if any action could be taken to reduce and standardize such costs. The agencies were to report to Congress and make recommendations based on the study. Pursuant to this authority, the HUD-VA Report on Mortgage Settlement Costs was transmitted to Congress in February, 1972. The conclusions and recommendations in the Report initiated a two year congressional inquiry into settlement costs that culminated in RESPA.[8] Included among the conclusions in the Report was the finding that although settlement costs appeared to be high in some areas, unreasonable costs probably occurred in fewer areas than popularly assumed.[9] The HUD-VA Report was the most thorough and comprehensive study in the area of settlement

7. Emergency Home Finance Act of 1970, Pub. L. No. 91-351, 84 Stat. 450, 461 (July 24, 1970).
8. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT AND VETERANS' ADMINISTRATION, REPORT ON MORTGAGE SETTLEMENT COSTS, SENATE COMM. ON BANKING, HOUSING AND URBAN AFFAIRS, 92d Cong., 2d Sess. (Comm. Print 1972) (Hereinafter cited as HUD-VA REPORT).
Some of the more alarming conclusions in the Report are set out below. *Urbanization has a definite effect on costs*—settlement costs in metropolitan areas average almost 10 percent of the contract sales price as compared with eight percent outside metropolitan areas (at 42). In comparing different urban areas four conclusions were reached: 1) some local differences in cost could not be attributed to different practices; 2) fragmentation of services among specialists adds significantly to costs; 3) in some areas charges for services are unnecessary or excessive; and 4) rates of charge are based on factors unrelated to the risk involved or to the cost of providing the services (at 32). The finding was made that kickbacks and referral fees represent an important aspect of the problem of high costs (at 67). Multiple and complex systems of conveyancing, recording, and assuring validity of title to real estate were found to contribute substantially to *the high settlement costs* (at 2). *A complete list of the findings* of the study can be found on pages 2 and 3 of the Report.
9. *Id.* at 2.

costs;[10] yet, according to the finding referred to above, even after the report no one knew how widespread the abuses of overcharging for settlement services were. With little knowledge as to whether settlement costs were unreasonably high throughout the nation, Congress affirmatively decided that this was a problem of sufficient magnitude to demand federal regulation.[11]

Congress identified three problem areas that had to be dealt with to keep settlement costs within reasonable limits: 1) abusive and unreasonable practices; 2) lack of understanding on the part of homebuyers about the settlement process and its cost, which makes it difficult for a free, competitive market to exist for settlement services; and 3) complexities and inefficiencies in the present land title recordation system, which were identified as the most significant barriers to reducing settlement costs.[12]

Congress had three alternatives to choose from in deciding on a final solution. The HUD-VA Report proposed that HUD and VA establish maximum allowable charges for all individual settlement cost items. If charges exceeded the maximum allowable, the Government insurance or guarantee would not issue. As a result of this proposal a bill was introduced in Congress giving HUD the authority to establish maximum amounts of settlement charges in all mortgage transactions.[13] Another alternative, advocated by Senator

10. S. REP. No. 93-866, 93d Cong., 2d Sess. 16 (1974) (additional views of Senator Proxmire).
11. A brief history of the type of information available to the legislators when they were investigating this problem is found in H.R. REP. No. 94-667, 94th Cong., 1st Sess. 17 (1975) (dissenting views of Representative Leonor K. Sullivan).
12. S. REP. No. 93-866, 93d Cong., 2d Sess. 2 (1974).
13. *Id.* at 2-3.
The rationale behind rate regulation as a solution to high settlement costs is explained by Senator Proxmire. The settlement process is inherently an uncompetitive situation where the buyer generally has little experience in homebuying and has no basis for determining whether or not he is being charged an unreasonable fee for the services he is receiving. Also local suppliers of settlement services tend to charge uniform prices and tend to discourage price competition (at 21-22). Thus the only way to reduce costs is to regulate them, rather than to disclose the costs which theoretically encourage homebuyers to shop around.
The reasons that rate regulation was not adopted by the Senate committee are explained on pages 4 and 5 of the Report and include the idea that regulation is an alternative only to be resorted to when everything else fails because of the costs involved in setting up an adequate administrative bureaucracy. This type of process should not be undertaken unless it is clear that the abuses are widespread and constant.

Proxmire, was the lender pay approach[14] requiring the mortgage lender to pay all the costs of settlement services it required as a condition for extending credit.[15] Regulating the underlying business relationships and procedures of which the costs are a function was the alternative adopted by Congress in RESPA.[16] The real estate settlement industry supported this approach over the rate regulation and lender pay alternatives.

RESPA's approach to solving the problem of unreasonably high settlement costs is three pronged; first, abuses such as kickbacks, unearned fees, and unreasonable escrow accounts are regulated or prohibited; second, homebuyers are supplied more information about the settlement process and its cost components; and third, steps will be taken in an attempt to simplify the land title recordation system.[17] The purpose of a disclosure approach is to inform homebuyers of the cost of settlement services and enable them to shop for the lowest price. The intended result of the shopping is an overall lowering of the costs of the services. An important corollary effect of this itemized cost disclosure is informing the homebuyer of the amount of money needed at closing to consummate the deal.

RESPA did not disturb HUD's authority under Section 701 of the Emergency Home Finance Act to regulate the cost of settlement services on VA guaranteed and FHA insured loans. The provision is presently dormant but it could be resurrected in the future.

RESPA AND RESPA AMENDMENTS

It is necessary to analyze RESPA's provisions and the resulting problems to understand why the Act was amended and what problems still exist in the Act as amended.

14. *Id.* at 23 (additional views of Senator Proxmire).
The lender pay approach assumes that the lenders will initially raise their interest rates to cover their increased costs but that the lenders will force a reduction of excessive or unnecessary settlement costs by utilizing their superior economic bargaining power, and that this savings will eventually be passed on to the homebuying public as a result of the competition between lenders (at 23).
15. *Id.*
16. H.R. REP. NO. 93-1177, 93d Cong., 2d Sess. 4 (1974).
17. *Id.*

The RESPA Amendments were enacted as a compromise between the real estate industry and the consumers. They eliminated two of the most controversial sections of the Act. Section 6, requiring advance disclosure, and Section 7, requiring disclosure of the previous selling price, were both repealed. Congress felt the advance disclosure provisions were unworkable and that other provisions in the Act accomplished the same result with less hardship on the lenders.[18] Congress thought the disclosure provisions of Section 7 were unrealistic because their coverage was broader than needed to solve the problem.[19]

The RESPA Amendments became effective upon enactment, January 2, 1976, except as suspended by the Secretary. RESPA's provisions not mentioned as being amended or repealed remain the same. The Secretary was given the authority to suspend Sections 4 and 5 of RESPA.[20] Pursuant to such authority, Section 4(b), relating to the borrower's inspection rights of the uniform settlement statement, and Section 5, requiring an information booklet and a good faith estimate of the closing costs, were both suspended until June 30, 1976.[21]

A. *Coverage*

RESPA's coverage after the Amendments is similar to its coverage under the original Act. Any changes are outlined in subsection 2 below.

1. Coverage Under RESPA

RESPA's requirements are triggered by a "federally related mortgage loan" which is defined in the statute.[22] A more detailed statement of when the Act applies is found

18. H.R. REP. NO. 94-667, 94th Cong., 1st Sess. 2-4 (1975).
19. *Id.* at 5.
20. Real Estate Settlement Procedures Act Amendments of 1975, § 12, Pub. L. No. 94-205, 89 Stat. 1157 (January 2, 1976).
21. 24 C.F.R. §§ 82.6, 82.7, and 82.10 (1976) *as set forth in* 41 Fed. Reg. 1674-75 (January 9, 1976).
22. 12 U.S.C. § 2602(1) (Supp. IV, 1974). The Amendments' additions are italicized and the deletions are bracketed.

(1) the term "federally related mortgage loan" includes any loan (*other than temporary financing such as a construction loan*) which—

in Regulation X.[23] Under Regulation X the lender and any other person whom the Act covers must comply with its requirements in relation to any loan if the following conditions are satisfied:

> *First,* the loan is secured by a security interest in real estate (including fee simples, life estates, remainders or leaseholds) upon which there is located a structure or mobile home designed principally for the occupancy of from one to four families which is also covered by the mortgage. Loans secured by real estate, where the loan proceeds are used either to construct a structure or purchase and place a mobile home on the property are covered. Also included are loans secured by condominium units and the stock of residential cooperatives.[24] However, if the loan is to finance the sale of vacant land, RESPA is not applicable.[25]
>
> *Second,* the proceeds of the loan are used to purchase or effect a transfer of the title of the mortgaged property. Mortgage assumptions in connection with the purchase or transfer of title are not covered unless the first homebuyer of the property assumes a construction loan and converts it to a

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(A) is secured by a *first lien on* residential real property . . . designed principally for the occupancy of from one to four families; and

(B) (i) is made in whole or in part by any lender the deposits or accounts of which are insured by any agency of the Federal Government, or is made in whole or in part by any lender which is regulated by any agency of the Federal Government; or

(ii) is made in whole or in part, or insured, guaranteed, supplemented, or assisted in any way, by the Secretary or any other officer or agency of the Federal Government or under or in connection with a housing or urban development program administered by the Secretary or a housing or related program administered by any other such officer or agency; or

(iii) [is eligible for purchase by] *is intended to be sold by the originating lender to* the Federal National Mortgage Association, the Government National Mortgage Association, [or] the Federal Home Loan Mortgage Corporation, or [from any] *a* financial institution from which it [could] *is to* be purchased by the Federal Home Loan Mortgage Corporation; or

(iv) is made in whole or in part by any "creditor", as defined in . . . the Consumer Credit Protection Act . . . who makes or invests in residential real estate loans aggregating more than $1,000,000 per year, *except that for the purpose of this Act, the term "creditor" does not include any agency or instrumentality of any State;*

23. 24 C.F.R. Part 82 (1975). HUD adopted regulation to interpret RESPA.
24. 24 C.F.R. § 82.2(e)(2) (1975).
25. CCH REAL ESTATE SETTLEMENT PROCEDURES, 4834, at 37 (1975).

permanent loan.[26] Refinancing, home improvement loans, junior mortgages, and other consumer borrowings are not covered by RESPA if there is no transfer of title.[27]

Third, the mortgaged property is located in a state. This requirement means the property can be located in any territory or possession of the United States as well as the continental United States and Puerto Rico.[28]

Fourth, the loan is made by a federal lender,[29] or is made in whole or in part, or insured, guaranteed, supplemented or assisted in any way by any agency of the federal government, or is made in connection with any housing or urban development program administered by any federal agency, or was eligible for purchase on the secondary mortgage market.[30] RESPA covers almost all residential real estate mortgages given in the United States when there is a purchase or transfer of title. Congress and HUD brought these mortgage loans within the Act's coverage because it was felt persons buying this type of property are subject to being taken advantage of by unscrupulous providers of settlement services.

2. Coverage under the Amendments

Under the Amendments, the conditions for RESPA to be applicable are the same as the four set out in the previous subsection, except for the following changes. First, the mortgage loan must now be made by the originating lender with

26. 24 C.F.R. § 82.2(e)(1) (1975); 24 C.F.R. § 82.2(a) (1975) *as amended in* 40 Fed. Reg. 47792-93 (October 10, 1975).
27. 24 C.F.R. § 82.4(a) (1975); CCH REAL ESTATE SETTLEMENT PROCEDURES, 4834, at 37 (1975).
28. 24 C.F.R. §§ 82.2(e) (3) and (m) (1975).
29. 24 C.F.R. § 82.2(d) (1975).
A federal lender means:
(1) a lending institution, the deposits or accounts of which are insured by any agency of the Federal Government; or
(2) a lending institution which is regulated by an agency of the Federal Government; or
(3) a creditor who regularly extends or arranges for the extension of credit for which a finance charge is required if he makes or has made investments in residential real estate loans aggregating more than $1,000,000 in either the year of settlement or in the year prior to settlement.
30. 24 C.F.R. § 82.2(e)(4) (1975).

the intent to sell it (directly or indirectly) in the secondary mortgage market instead of the mortgage just being eligible to be purchased in the market.[31] Prior to the change the lender had to determine the eligibility of the mortgage loan for the secondary market which necessitated a knowledge of the laws governing such eligibility. Now, the determination is simpler but the coverage is probably just as broad because most lenders trade on the secondary market. Second, the term "creditor" included in the definition of "federal lender" was redefined to exclude any agency or instrumentality of any state.[32] Even if a state agency invests more than $1,000, 000 a year in residential real estate loans the Act does not require compliance. The premise of this exemption must be that the government is honest, or the government does not want to spend the time or money to comply with the provisions of the Act as other lenders and creditors must.

The Amendments expressly limit the coverage of the Act. Temporary financing, such as a construction loan, is exempted from the Act.[33] The Act is now specifically limited to loans secured by first mortgages,[34] thus excluding any second mortgage that might have been covered prior to the Amendments. The revised regulations exempt certain transactions from the Act's coverage:[35]

> *First*, a home impovement loan, refinancing loan, or other loan where the proceeds are not used to finance the purchase or transfer of the property;
> *Second*, a loan to finance the purchase or transfer of property of 25 acres or more;
>
> *Third*, a loan to finance the purchase or transfer of a vacant lot if the loan proceeds are not used to construct a one to four family dwelling unit or to purchase a mobile home for such lot;

31. Real Estate Settlement Procedures Act Amendments of 1975, § 2(3), Pub. L. No. 94-205, 89 Stat. 1157 (January 2, 1976).
32. Real Estate Settlement Procedures Act Amendments of 1975, § 2(6), Pub. L. No. 94-205, 89 Stat. 1157 (January 2, 1976).
33. Real Estate Settlement Procedures Act Amendments of 1975, § 2(1), Pub. L. No. 94-205, 89 Stat. 1157 (January 2, 1976).
34. Real Estate Settlement Procedures Act Amendments of 1975, § 2(2), Pub. L. No. 94-205, 89 Stat. 1157 (January 2, 1976).
35. 24 C.F.R. § 82.5(d) (1976) *as set forth in* 41 Fed. Reg. 1674 (January 9, 1976).

Fourth, an assumption, novation, or sale or transfer subject to a pre-existing loan—however, the Act will apply if a construction loan is converted into a permanent mortgage loan to finance the purchase by the first user;

Fifth, a permanent loan if the proceeds are used for construction on a lot already owned by the borrower—closing costs are incurred in this situation but there is no transfer of title so one of the four required conditions for RESPA to apply is missing;

Sixth, a loan to finance the purchase of property where the purpose of the purchase is for resale.

B. *Uniform Settlement Statement*

Many of RESPA's requirements relating to the uniform settlement statement are unchanged by the Amendments. The changes and the new problems they cause are noted in subsection 2 below.

1. Uniform Settlement Statement under RESPA

Section 4 of RESPA[36] provides for a uniform settlement statement, HUD Form 1,[37] to be used as the standard form in all transactions covered by the Act. Pages one and two of the form summarize the transaction for both the borrower and the seller and itemize and disclose all of the charges imposed upon both relative to the settlement. Page three contained information required to be disclosed under Truth-in-Lending.

Regulation X sets out specific rules relating to the requirement of a uniform settlement statement. After the October 8, 1975, amendments to the regulations, the Truth-in-Lending portion of HUD Form 1 was not required to be included when the form was used as a uniform settlement

36. 12 U.S.C. § 2603 (Supp. IV, 1974).
37. 24 C.F.R. Part 82, Appendix A and Appendix B (1975). The same form was used for both the uniform settlement statement and the advance disclosure statement.

statement.[38] The only charges exempted from disclosure on the uniform statement were those also exempted from advance disclosure and those which the borrower or seller contracted to pay for separately outside of settlement.[39] The statement has to be mailed or delivered to the borrower and seller on the date of settlement or as soon thereafter as practicable.[40]

One criticism of the uniform settlement statement is that confidential information of both the buyer and the seller is on the form and that each party's information is disclosed to the other for no purpose.[41] Regulation X permits the blocks of information relating to the seller to be deleted on the form received by the buyer and vice versa; however, the regulation is not mandatory. Lenders may still combine the forms since it will be cheaper to have only one printed. This result is probable because Section 12 of the Act forbids the lender from imposing any charge on any person as the result of preparing and providing the statement.

The uniform statement is also criticized as being incapable of taking into account all the local differences in settlement services, procedures, market conditions, and laws throughout the country.[42] However, under the regulations a lender can delete certain blocks of information if they are not used locally or are not used by the lender.[43] Thus the statement can be shortened, simplified, and tailored to local differences without losing the benefits of its uniformity.

The uniform statement serves the function of assembling standardized, statistical material, which is a prerequisite to future analysis and conclusions about the cost of settlement services.[44] This information will be an invaluable aid in determining the effectiveness of RESPA as a method of reducing settlement costs.

38. 24 C.F.R. § 82.8(a) (1975) *as amended in* 40 Fed. Reg. 47792-93 (October 10, 1975).
39. 24 C.F.R. § 82.8(b) (1975).
40. 24 C.F.R. § 82.8(c) (1975) *as amended in* 40 Fed. Reg. 47792-93 (October 10, 1975).
41. *Hearings on RESPA*, at 248.
42. *Id.* at 247.
43. 24 C.F.R. § 82.6(b)(6) (1975) *as amended in* 40 Fed. Reg. 47792-93 (October 10, 1975).
44. *Hearings on RESPA*, at 189.

Another advantage of a uniform statement is that homebuyers and sellers and their attorneys will become familiar with the form and its requirements, thus eliminating time spent going through and figuring out different lenders' forms. This proposition will only hold true if lenders gradually eliminate their own forms in favor of HUD Form 1 instead of requiring both forms.

2. Uniform Settlement Statement under the Amendments

Under the Amendments, HUD Form 1 will still be used to disclose the settlement costs.[45] The decision to eliminate Truth-in-Lending disclosures as part of the uniform statement is carried into the new regulations. With the repeal of the advance disclosure provision which also required Truth-in-Lending information, there is no longer any requirement under RESPA that Truth-in-Lending disclosures be made. However, disclosures will still be required for all real estate transactions which come within the coverage of Truth-in-Lending. Under the Amendments the statement is required to disclose all charges imposed upon the borrower and the seller including those paid for separately outside of the formal settlement.[46] The requirement that the statement be mailed or delivered to the seller and the buyer on the date of settlement or as soon thereafter as practicable is left in tact by the Amendments.[47] HUD's position that the seller's and buyer's settlement information does not have to be furnished to the other is incorporated into the statute.[48] However, lenders may still combine the statements, and they might for the sake of cost efficiency and convenience. If the lender receives enough customer complaints so that he feels confidentiality is a real problem, separate statements will undoubtedly be used. Variation of the statement to accomodate local differences will now be easier to accomplish because the Secretary is statutorily authorized to allow modifications.[49]

45. 24 C.F.R. § 82.8(a) (1976) *as set forth in* 41 Fed. Reg. 1674 (January 9, 1976).
46. 24 C.F.R. § 82.8(b) (1976) *as set forth in* 41 Fed. Reg. 1674 (January 9, 1976).
47. 24 C.F.R. § 82.8(c) (1976) *as set forth in* 41 Fed. Reg. 1674 (January 9, 1976).
48. Real Estate Settlement Procedures Act Amendments of 1975, § 3(3), Pub. L. No. 94-205, 89 Stat. 1157 (January 2, 1976).
49. Real Estate Settlement Procedures Act Amendments of 1975, § 3(3), Pub.

The statement is to be completed and made available for inspection by the borrower at or before settlement by the person conducting the settlement, not necessarily the lender. Additionally, the borrower has an absolute right upon request to inspect the statement during the business day preceding the settlement.[50] However, the lender is only required to make available the information which is known by him on the day prior to settlement.[51] These two requirements create an ambiguity as to what is required to be disclosed the business day before settlement. According to the first statutory requirement the statement will be "completed and made available" to the borrower at or before settlement. It appears from this wording that all the information required by the statement should be available to the borrower on the day preceding settlement. Yet under the second statutory requirement it sounds like all the required information does not have to be gathered nor the form completed until the day of settlement, and that all that is required to be disclosed on the day before settlement is what information the lender has at that time. The better practice for the lender is to have the statement fully completed on the preceding day.

A determination of what time during the preceding business day this information must be available to the borrower is a problem not dealt with by the Amendments. Congress feels the statute only requires the information to be made available *sometime* during the business day immediately preceding the settlement day.[52] Under this interpreta-

L. No. 94-205, 89 Stat. 1157 (January 2, 1976); 24 C.F.R. § 82.9 (1976) *as set forth in* 41 Fed. Reg. 1674-75 (January 9, 1976).

§ 82.9(a)(4)—The Secretary has specified that certain items if not used locally may be deleted from the form in order to shorten it;

§ 82.9(a)(12)—Other deviations in the Uniform Settlement Statement are allowed upon the receipt of written approval by HUD following a request stating the reasons why the deviation is necessary;

§ 82.9(b)—If any local additions are made to the form, HUD reserves the right to direct the order and manner in which they are added.

These are not the only subsections in the regulations dealing with modifications of the Uniform Settlement Statement.

50. Real Estate Settlement Procedures Act Amendments of 1975, § 3(4), Pub. L. No. 94-205, 89 Stat. 1157 (January 2, 1976).

51. 121 CONG. REC. S23065 (daily ed. Dec. 19, 1975).

52. *Id.*

tion the lender might only allow the borrower to inspect the statement just prior to closing the evening before settlement. A better interpretation is that the lender must make this information available to the borrower at all times during the preceding business day.

A major problem is created by the Amendments because they do not provide that the statement be inspected by or be available to the seller at any time prior to settlement, and at settlement only at the option of the lender. Under the present regulations the lender has the choice of delivering the statement to the seller on the date of settlement or as soon after as practicable.[53] However, the seller does not have any statutory right to inspect the statement the day prior to the settlement or to inspect it on the day of settlement if the lender opts not to deliver it to him until after the settlement. The seller's omission seems irrational because, one, some settlement costs are imposed on him, and two, there is no reason to draw a distinction between the borrowers and sellers here when none is drawn between them by the regulation which requires the statement to be delivered to both at settlement or as soon after as practicable. Lenders should allow sellers the same opportunity to inspect the statement as buyers have, even though it is not statutorily required.

The Amendments authorize three exceptions to the requirement that a uniform settlement statement be made available to the borrower at or before settlement.[54]

> *First,* if a "final settlement statement is not customarily provided at or before the date of settlement," the Secretary may exempt settlements in such localities. The meaning of this exception will have to be clarified by HUD in the new regulations. It seems to say that in localities where settlement statements have not been used in the past certain settlements may be exempted. It is unclear whether this exception gives the authority to grant exemp-

53. 24 C.F.R. § 82.8(c) (1976) *as set forth in* 41 Fed. Reg. 1674 (January 9, 1976).
54. Real Estate Settlement Procedures Act Amendments of 1975, § 3(4), Pub. L. No. 94-205, 89 Stat. 1157 (January 2, 1976).

tions to all settlements that take place in a limited geographical area, or to all settlements conducted by a particular lender, or whether an exemption must be obtained for each settlement. A problem arises because the fact alone that settlement forms are not used does not mean that expensive and hidden settlement costs are not imposed. A better interpretation of the statute is that in a locality where few settlement costs are imposed because many settlement services are not required as a condition of the extenion of credit, an exemption from the requirements of Section 4 will be available. This interpretation will benefit small lenders in rural areas where the extension of mortgage credit is based more on the lender's personal knowledge of trust in the mortgagor.

Second, the Secretary may exempt transactions where requiring a uniform statement is "impractical". Transactions which will qualify under this exception will have to be defined by HUD. Individual exemptions can probably be obtained under the exception on the basis of a settlement's unique circumstances. It is unlikely that group exemptions will be granted under this exception. If Congress had thought it was impractical to force a particular group to comply with RESPA it could have expressly said so.

Third, the borrower may waive his right to have the statement made available to him at or before settlement. There are no statutory restrictions on the right to waive. No provision is made for the seller under the waiver provision but since he has no right to see the statement at or before settlement Congress apparenly felt there was no need to provide for him. Why the seller is omitted from these provisions is not explained by Congress and this writer believes it was an oversight.

C. *Information Booklets*

1. Under RESPA

Section 5 of RESPA[55] authorizes the distribution by covered lenders of special information booklets prepared by

55. 12 U.S.C. § 2604 (Supp. IV, 1974).

HUD to prospective borrowers in order to help them understand the nature and costs of real estate settlement services. Under Regulation X a lender was required to deliver or mail an information booklet to a borrower upon a written application for a federally related mortgage loan or within three days after receiving the application.[56] The booklet had to be received by at least one of the individuals applying for the loan.[57]

This requirement received little criticism from those opposed to other sections of the Act. In fact the booklet benefited borrowers by explaining to them the nature of the transaction they were involved in while causing little harm to the real estate industry in terms of delay and extra paperwork. According to a HUD telephone survey over half of the people polled said they had received the booklet, read it, and understood it.[58]

2. Under the Amendments

The disclosures required by Section 5 remain the same but none of RESPA's implementing regulations survived the Amendments. However, the regulation that loan applications had to be in writing to trigger the requirement to provide the booklet is now in the statute.[59] HUD suspended Section 5 so it would have time to issue new regulations.[60] This means that until June 30, 1976, lenders are not required to supply information booklets to borrowers upon written loan applications. However, HUD encourages lenders to provide as much information as possible to borrowers regarding settlement procedures and costs.[61]

A major change in Section 5 is the requirement that the lender include with the booklet a good faith estimate of

56. 24 C.F.R. § 82.5(a) (1975); 24 C.F.R. § 82.2(g) (1975) *as amended in* 40 Fed. Reg. 47792-93 (October 10, 1975).
57. 24 C.F.R. § 82.5(a) (1975).
58. *Hearings on RESPA*, at 70-71.
59. Real Estate Settlement Procedures Act Amendments of 1975, § 4(3), Pub. L. No. 94-205, 89 Stat. 1157 (January 2, 1976).
60. 24 C.F.R. §§ 82.6 and 82.7 (1976) *as set forth in* 41 Fed. Reg. 1674 (January 9, 1976).
61. 24 C.F.R. § 82.7 (1976) *as set forth in* 41 Fed. Reg. 1674 (January 9, 1976).

the amount or range of charges for specific settlement services which the borrower is likely to incur.[62] The estimates of the settlement charges are to be those prevailing in the area and applicable with respect to the particular lender. The estimates can appear on preprinted forms geared to various sales prices or mortgage amounts at certain fixed intervals. If the lender arranges for a settlement service to be provided by a particular source, the lender should inform the borrower of this, and the estimate of the cost of the service should reflect the lender's knowledge.[63]

This estimate of settlement charges will replace any requirement for advance disclosure of exact charges.[64] Congress determined that although the exact costs are not disclosed in advance, the present procedure gives borrowers enough of the details of the settlement process to enable them to spot and avoid unreasonable charges.[65] This procedure might encourage a more sophisticated borrower to shop around for settlement services but it will not inform any borrower of the exact amount of money he will need at settlement.[66] It is questionable whether the advance disclosure statement informed the borrower of the exact amount needed either, since the use of good faith cost estimates was allowed. It appears that the two goals of advance disclosure—to encourage shopping for the services and to inform of the amount required at settlement—will be only partially fulfilled by the Amendments. However, if HUD requires periodic updating and revising of the cost estimates at fairly close time intervals, more of the benefits of advance disclosure will accrue to the homebuyer while still relieving the lender of the burden of obtaining specific information for each mortgage loan.

Neither Section 4, requiring the uniform settlement statement, nor Section 5, providing for the information booklet, provide civil penalties for violations under either RESPA

62. Real Estate Settlement Procedures Act Amendments of 1975, § 4(2), Pub. L. No. 94-205, 89 Stat. 1157 (January 2, 1976).
63. H.R. REP. No. 94-667, 94th Cong., 1st Sess. 5 (1975).
64. *Id.* at 4.
65. *Id.*
66. *Id.* at 19 (dissenting views of Representative Leonor K. Sullivan).

or the Amendments. Enforcement would be more effective if there were civil liability provisions, but the lender could then be held liable in class action suits for innocent and inadvertant errors.

D. *Advance Disclosure*

The Amendments repealed Section 6 of RESPA[67] requiring advance disclosure to the borrower and the seller of an itemized list of settlement charges. The section received many criticisms which eventually caused its repeal. Below, some of the more significant criticisms are briefly discussed.

The primary responsibility for advance disclosure was on the lender even though he was not the provider of many of the services. The lender could delegate the preparation of the advance disclosure statement to a settlement agent,[68] but the lender remained civilly liable for any violations to both the borrower and the seller.[69] As a result lenders generally handled the preparation of the statement themselves. This preparation was estimated as increasing the lender's work time on each mortgage loan by approximately one hour[70] and increasing the cost of making every loan by at least \$35.[71] Under Section 12 of RESPA the costs of preparing any statements required by the Act cannot be charged to its recipients. The result was an increase in the lender's operating expenses which was undoubtedly passed along to the consumer, probably in the form of an increase in the loan origination fee.

Under the regulations the lender was not subject to civil liability if there was an unintentional, bona fide error and if the lender had established procedures to insure disclosure.[72] Liability had to be determined in court, and even a lender who had established adequate procedures could be found guilty if the error was not bona fide based on a court's after-

67. 12 U.S.C. § 2605 (Supp. IV, 1974).
68. 24 C.F.R. § 82.7(a) (1975).
69. 24 C.F.R. § 82.7(n) (1975).
70. *Hearings on RESPA*, at 31.
71. *Id.* at 128.
72. 24 C.F.R. § 82.7(n)(2) (1975).

the-fact determination. If found guilty the lender was required to pay the opponent's attorney fees plus at least $500 damages. The problem was magnified by the possibility of class actions.

Advance disclosure introduced into the settlement process a new step which resulted in increasing the time between the loan application and the loan commitment. A written loan commitment triggered the advance disclosure requirement.[73] As a result prior to such commitment the lender was required to acquire from the providers of settlement services the costs they were going to charge for the particular transaction. The new step involved telephone calls or meetings, the completion of forms, and additional record keeping for every transaction.[74] However, if the exact amount of the cost was unknown the lender could make a good faith estimate provided it was so designated on the form.[75] This front end work was accused of increasing settlement costs and causing unreasonable delays for homebuyers and sellers in the settlement process.[76]

The regulations governing waiver of advance disclosure laid traps for any unwary lender. The result was that many refused to utilize the provision. This refusal resulted in delaying the settlement of any homebuyer wishing to immediately close a deal.[77] A waiver could reduce the time between the receipt of advance disclosure and the settlement to three days but only if the settlement was held not later than 21 days after the date of the loan application. The waiver had to be signed by each borrower and seller.[78] Apparently the borrower's and seller's waiver of advance disclosure was revokable because the October 9, 1975, amendments to the regulations provided that the waiver could be made irrevocable.[79] The October 9 amendments also provided that the

73. 24 C.F.R. § 82.2(h) (1975) *as amended in* 40 Fed. Reg. 47792-93 (October 10, 1975).
74. 24 C.F.R. § 82.7(m) (1975); *Hearings on RESPA*, at 30.
75. 24 C.F.R. § 82.7(f) (1975).
76. *See, e.g., Hearings on RESPA*, at 89 and 137.
77. *Id.* at 246-47.
78. 24 C.F.R. § 82.7(d) (1975).
79. 24 C.F.R. § 82.7(d) (1975) *as amended in* 40 Fed. Reg. 47792-93 (October 10, 1975).

time between advance disclosure and settlement could be waived to one day, that the 21 day requirement was eliminated, and that the waiver had to be signed by only one of the borrowers and one of the sellers, if more than one. These amendments came too late to save the section from repeal.

E. *Disclosure of the Previous Selling Price*

The Amendments repealed Section 7 of RESPA[80] which required that before a lender could make a loan commitment the seller had to disclose to the buyer: 1) the name and address of the present owner of the property; 2) the date the property was acquired by the present owner; and 3) the purchase price of the last arms length transfer of the property and a list of subsequent impovements and their cost if the seller had not owned the property for two years prior to the date of the loan application, and the seller had not used it as a residence. The ownership requirement and the requirement that the seller had not used the property as a residence were in the conjunctive so if either was not met the previous selling price did not need to be disclosed.[81] This disclosure was unrelated to the lender's function in the settlement process yet he was required to see that it was made. If the lender failed to comply there were criminal sanctions of one year imprisonment or a $10,000 fine, or both.

Disclosure to the borrower was required prior to the time of the lender's commitment but probably after the borrower had agreed to purchase the property. So even if the borrower discovered that the price of the home was inflated, he was locked into the agreement[82] unless he sued in court for rescission or forfeited his earnest money. Disclosure should have been given before any binding sales agreement was signed or any money was paid. The responsibility for such disclosure should have been placed on the seller rather than on the lender.[83]

The section was enacted to prohibit speculators from purchasing property at a low price, exchanging it several

80. 12 U.S.C. § 2606 (Supp. IV, 1974).
81. *Hearings on RESPA*, at 50.
82. *Id.* at 92.
83. *Id.* at 60.

times in collusive transactions to build up its cost basis, and finally selling it to a homebuyer at an inflated price.[84] An alternative solution to this problem was to require that an appraisal be delivered to the homebuyer at the time of the loan commitment. This solution was viable because most lenders require an appraisal as a condition precedent to the extension of credit. However, the appraisal would still have come after the borrower was locked into the transaction. The required disclosure of the current owner's name and address and his date of acquisition added little to prohibiting the fraud involved here.

There were reports that lenders required disclosure of the previous selling price even when it was not required under the statute because they feared the criminal sanctions.[85] This caused problems with bona fide homeowners who did not want to disclose the information, because if there was no disclosure the lender was forbidden from making a loan commitment.

Profit is not wrong in itself but only when it is coupled with fraud. This section tended to curb the profit of all real estate homeowners and investors, especially investors of inner city housing without regard to whether fraud was involved. This was statutory overkill.[86] As a result of the section, inner city housing investors might decide to pull their money out because of curtailed profits and high risks. Migration of capital out of the inner cities is harmful because there is no other money to replace it.[87]

F. *Prohibition Against Kickbacks*

Section 8 of RESPA[88] was left in tact by the Amendments, the only changes being additions to the original section.

84. *Id.* at 159-60.
85. *Id.* at 250-51.
86. H.R. REP. NO. 94-667, 94th Cong., 1st Sess. 5 (1975).
87. *Hearings on RESPA*, at 249-50.
88. 12 U.S.C. § 2607 (Supp. IV, 1974).

1. Under RESPA

Section 8 prohibits any person from giving or receiving anything of value under any agreement, oral or written, for the referral of any business in connection with real estate settlement services of a federally related mortgage loan. Criminal sanctions, a $10,000 fine or one year imprisonment or both, are imposed on violators. Such sanctions tend to discourage any type of conduct that can possibly be forbidden by the Act, even if it is beneficial to the public. Section 8 was enacted because of the legislative finding that referral fees greatly increased the cost of settlement to the borrower without any corresponding advantage.[89]

Certain payments are specifically allowed by the section:[90] 1) fees to attorneys for actual services rendered; 2) fees paid by a title insurance company to its agent for the issuance of a title insurance policy; 3) fees paid by a lender to its agent for services performed in making the loan; and 4) fees or other payments to any person for goods or facilities furnished or for services performed.

Section 8's use of broad prohibitory language causes a problem in determining what types of activities are proscribed. HUD issued no interpretations relative to the section. It seems to prohibit any provider of settlement services from rebating anything of value to any other person except for goods delivered or services performed. The Act does not prohibit payment for services actually performed but the payments have to be reasonable or the excess will be considered a kickback and therefore prohibited.[91] Senate Report 93-866 sets forth some specific transactions that are kickbacks and thus prohibited. It is illegal if: 1) an attorney receives 10 percent or more of the title insurance premium for doing nothing more than referring the business; 2) a discount or allowance for the prompt payment of the cost of a settlement service is given to a lender or realtor as a rebate for the placement of business; 3) a commission is

89. S. REP. NO. 93-866, 93d Cong., 2d Sess. 6 (1974).
90. 12 U.S.C. § 2607(c) (Supp. IV, 1974).
91. S. REP. NO. 93-866, 93d Cong., 2d Sess. 6 (1974).

paid by a title insurance company to a corporation which is wholly owned by one or more savings and loan associations and such corporation performed no substantial services for the title insurance company; and 4) an attorney gives a portion of his fee to the lender or realtor who referred the client to him.[92]

A prime question under Section 8 was whether it invalidated such practices as multiple listing services, referral arrangements, and other cooperative arrangements.[93] Under a multiple listing service one broker lists the property for sale, making it available to be sold by other brokers on the listing service. If any other broker sells the property the commission is split between the selling broker and the listing broker according to the listing agreement, not necessarily according to the actual work performed by each.[94] A broker referral arrangement is utilized when a buyer is moving and contacts a local broker who refers the buyer to a broker in the new location. If the broker in the new location sells the buyer a home he splits the commission with the referring broker on a predetermined basis, again not necessarily based on the work each performed.

2. Under the Amendments

The Amendments make it clear that payments received pursuant to cooperative brokerage and referral agreements between real estate agents and brokers are allowable.[95] Also the Secretary now has the authority to designate other payments or classes of payments or other transfers as not prohibited by this section.[96] This open ended provision gives the Secretary flexibility to deal with future unforeseen situations as they arise.

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92. *Id.*
93. *Hearings on RESPA*, at 252-59.
94. These arrangements are beneficial to the seller because the property is more broadly exposed and will probably move faster than if only one broker can sell it. Also the buyer is able to find out all the property for sale in the area without having to contact each brokerage firm. Cooperative arrangements sometimes cover large geographical areas tremendously increasing the information available to buyers and sellers.
95. Real Estate Settlement Procedures Act Amendments of 1975, § 7, Pub. L. No. 94-205, 89 Stat. 1157 (January 2, 1976).
96. Real Estate Settlement Procedures Act Amendments of 1975, § 7, Pub. L. No. 94-205, 89 Stat. 1157 (January 2, 1976).

One type of abuse that RESPA does not deal with is an attorney, lender, or real estate broker who purchases stock in a title insurance company. Such persons are encouraged to refer business to the title company since any benefits to the company will eventually flow to them as dividends and economic growth of the stock. This type of conflict of interest or any other conflict should be disclosed to the borrower.

G. *Title Companies*

Under Section 9 of RESPA[97] the seller of property purchased with a federally related mortgage loan cannot require a purchaser to buy title insurance from any particular company on penalty of being sued for damages in the amount of three times the cost of the insurance. While not the subject of much criticism the section has been the subject of some comment.[98] It does not have a reciprocal provision protecting the seller from the buyer. Title insurance is subject to negotiation and if it is negotiated and contracted that the seller purchase the insurance, the buyer should not be able to require the seller to purchase it from a certain source. This problem is not of great magnitude in states where it is customary for the borrower to pay for the title insurance, but it becomes more serious in states like Illinois where the seller customarily purchases the owner's title insurance policy.[99]

H. *Escrow Accounts*

1. Under RESPA

Section 10 of RESPA[100] limits the amount of money that lenders can require borrowers to pay into noninterest bearing escrow accounts established to pay the real property taxes and casualty insurance premiums on the mortgaged property. It was estimated that $9½ billion was being placed in mandatory escrow accounts during the course of a year on one to

97. 12 U.S.C. § 2608 (Supp. IV, 1974).
98. *Hearings on RESPA*, at 167-70.
99. *Id.* at 168.
100. 12 U.S.C. § 2609 (Supp. IV, 1974).

four family dwelling units and that very few of the accounts were interest bearing.[101] Large financial institutions with many outstanding mortgages derive substantial revenue from these accounts.[102] Section 10 was enacted to eliminate unreasonable deposit requirements and accumulations in escrow accounts. Other proposed solutions were having interest bearing escrow accounts or giving the homebuyer the option of paying his own taxes and premiums directly, thus bypassing escrow accounts.

2. Under the Amendments

The Amendments completely revise Section 10. A minor change is that the lender can require amounts to be deposited in escrow to cover "other charges with respect to the property"[103] in addition to charges for taxes and insurance. The future use by lenders of this addition will determine its importance.

The Amendments limit the amount of money a lender can require a borrower to initially deposit in an escrow account,[104] which will usually be on the date of settlement. The lender can always require the borrower to pay one-sixth of the total estimated charges to be paid within the ensuing twelve months. The one-sixth is a cushion for the lender in case the other amounts that can be required to be deposited do not cover the charges immediately payable.

Additionally, the lender can require an initial deposit into escrow of an amount that will be sufficient to pay all of the charges attributable to a certain period. The parameters of this period vary with the particular charge involved. The beginning of the period is the last date prior to the date when the initial deposit is made on which that particular charge "would have been paid under normal lending practice" and "local custom". This statutory language creates

101. H.R. REP. No. 94-667, 94th Cong., 1st Sess. 20 (1975) (dissenting views of Representative Leonor K. Sullivan).
102. *Id.*
103. Real Estate Settlement Procedures Act Amendments of 1975, § 8, Pub. L. No. 94-205, 89 Stat. 1157 (January 2, 1976).
104. Real Estate Settlement Procedures Act Amendments of 1975, § 8, Pub. L. No. 94-205, 89 Stat. 1157 (January 2, 1976).

a problem of interpretation. It seems the beginning of the period covered is either when the last charge was in fact paid, if payment at that time is acceptable under normal lending practice, or at another time, either prior to or later than the actual payment, when that particular lender now requiring the escrow would have paid the charge had it been his responsibility. Apparently the lender can pick whichever date he wishes and the homebuyer is forced to abide by that decision if it is reasonable. The end of the time period is the due date of the first full installment mortgage payment (which is the same for every charge).

An example may better illustrate the mechanics of the second amount that can be required to be initially deposited. *B* is borrowing money from *L* to finance the purchase of a new home. As a condition of the extension of credit, *B* must open an escrow account with *L* to insure the payment of the real property taxes and the insurance premiums on the new home. *L* requires the first deposit into the account on June 30, 1976, which is the settlement date. The first full installment payment under the mortgage is due on July 30, 1976. The insurance premiums must be paid on or before January 31 of every year. The seller's last payment was made on January 31, 1976. *L* can require *B* to deposit in escrow a sum sufficient to pay for the insurance from January 31, 1976. The real property taxes must be paid quarterly, by May 15 for the first quarter, August 15 for the second quarter, November 15 for the third quarter, and February 15 for the fourth quarter. Since the taxes were paid on May 15, 1976, *L* can require to be deposited a sum sufficient to pay for the taxes from May 15, 1976, through July 30, 1976. The interpretation problem manifests itself if *L* picks dates different from January 31, 1976, and May 15, 1976 (the last dates on which payments were in fact made) as the beginning of the respective periods. The first quarter's taxes accrue as of March 31, 1976. If *L* decides that he would have paid the accrued taxes on April 15, 1976, and such a decision constituted a prudent lending practice, then *L* can require *B* to deposit an amount sufficient to cover the property taxes from April 15, 1976, through July 30, 1976. This course of action will lead to a larger initial deposit in the account.

The Amendments limit the amount which a lender can require a borrower to pay into escrow for any month beginning with the first installment mortgage payment,[105] in our example July 30, 1976. A lender can require the payment of one-twelfth of the total estimated charges which will be paid during the ensuing twelve month period.

Additionally, the lender can require that the borrower pay in any month an "amount as is necessary to maintain an additional balance in such escrow account not to exceed one-sixth" of the total estimated charges to be paid in the ensuing twelve months. This statutory language creates a problem of interpretation as to how much the lender can require the borrower to deposit in any one month. Congress felt this provision meant that the lender could only require a total of one-sixth of the yearly estimated charges to be paid in any month.[106] However, under a close reading of the statute it is possible that one-fourth (one-twelfth plus one-sixth) of the total charges can be collected in any month. This interpretation is possible because the first statutory phrase states that one-twelfth can be required to be deposited and the second phrase, which states one-sixth can be required to be deposited, speaks in terms of an "additional balance" in the account. If the balance is additional it is in addition to the original balance. A third interpretation, and the one most favorable to the borrower, is possible from the statutory language. Under this interpretation the one-sixth that can be required to be deposited is in the nature of an additional fund. After the fund is originally created by the borrower's deposit of one-sixth of the total charges due in the ensuing 12 month period, the lender cannot require more monthly deposits until the fund is diminished or until the estimated charges due increase so as to increase the dollar amount of the one-sixth limitation. The third interpretation appears

105. Real Estate Settlement Procedures Act Amendments of 1975, § 8, Pub. L. No. 94-205, 89 Stat. 1157 (January 2, 1976).

106. H.R. REP. No. 94-667, 94th Cong., 1st Sess. 7 (1975).

to adequately protect lenders from having to pay these charges out of their own resources when they come due.

The lender can also require the borrower to deposit into escrow additional monthly amounts if the lender determines that there will be, or if there is, a deficiency in the account.[107]

The Amendments limit the deposits that can be required to be placed in an escrow account. However, the statute does not provide for a rebate or any type of adjustment to an account if it is determined that there is more money in it than is statutorily allowed to be deposited. If a lender either innocently or intentionally collects more money in an account than is allowed, it appears that he can keep it with no adverse legal consequences.

I. *Fee for Preparation of Statements*

Under Section 12 of RESPA[108] no fee is to be charged any person by a lender for preparing any of the statements required under the Act. The Amendments do not affect this prohibition.

J. *Establishment of a Demonstration Land Parcel Recordation System*

Under Section 13 of RESPA[109] the Secretary is authorized to put into operation model land recordation systems which will simplify and facilitate land transfers and mortgage transactions at a reduced cost. The information gained from such demonstration models will be used either to develop a nationally uniform system of land title recordation or to improve the present systems.[110]

One study concluded the root problem involved in reducing settlement costs was reform and reorganization of public

107. Real Estate Settlement Procedures Act Amendments of 1975, § 8, Pub. L. No. 94-205, 89 Stat. 1157 (January 2, 1976).
108. 12 U.S.C. § 2610 (Supp. IV, 1974).
109. 12 U.S.C. § 2611 (Supp. IV, 1974).
110. S. REP. No. 93-866, 93d Cong., 2d Sess. 8 (1974).

land records.[111] If the core problem of high settlement costs is the complex land recordation system and the only provision made to overcome this problem in RESPA is to have the Secretary set up a model system at some indefinite future time, while less basic problems are the main concern of the Act, the validity of RESPA seems questionable.

K. *Report to Congress*

The Secretary is to report to Congress on the effectiveness of RESPA in eliminating abuses in the settlement process by 1980 at the latest.[112] The Secretary will inform Congress if RESPA is doing the job, and if it is not, the Secretary is to analyze whether lender pay or rate regulation alternatives will be more effective tools. The uniform settlement statement will assist the Secretary in his analysis by making available standardized, statistical information from all parts of the nation.

L. *The Secretary's Authority*

1. Under RESPA

RESPA's provisions dealing with advance disclosure, the uniform settlement statement, and the information booklet were the only ones which specifically authorized HUD to regulate. HUD was reluctant to interpret the other sections of RESPA.[113] If the problems of interpretation arose under the other sections they probably had to be resolved through litigation. Under Section 18(b) of RESPA[114] any rule, regulation, or interpretation of HUD could have been relied upon to avoid liability but there was a question as to whether or not HUD could interpret the sections if it was not specifically given such authority.

2. Under the Amendments

The Amendments repealed Section 18(b) and added a

111. *Hearings on H.R. 13337 Before the Subcomm. on Housing of the House Comm. on Banking and Currency*, 92d Cong., 2d Sess., pt. 2, at 878 (1972).
112. 12 U.S.C. § 2612(a) (Supp. IV, 1974).
113. *Hearings on RESPA*, at 335-36.
114. 12 U.S.C. § 2616(b) (Supp. IV, 1974).

new Section 19[115] which authorizes the Secretary to prescribe rules and regulations and to interpret all of the provisions of RESPA. The Secretary may also grant exemptions from compliance with the Act for any classes of transactions.[116] This provision was needed to give RESPA flexibility, and to enable HUD to issue the specific guidelines that are needed. Once a rule or interpretation is issued by HUD it can be relied upon as an affirmative defense even if the interpretation or regulation is later invalidated.[117] However, the regulations limit a qualifying "rule, regulation, or interpretation" to the HUD Form I and accompanying HUD instructions, and to the provisions contained in the regulations, but not including documents referred to in the regulations.[118] No other letter, statement, report, or any other written or oral communication may be relied upon as an affirmative defense to a violation under the Act.[119]

RELATED LEGISLATION

A. *Truth-in-Lending*

Under the Truth-in-Lending portion of the Consumer Credit Protection Act[120] (CCPA), every creditor is required to disclose certain information to each person to whom consumer credit is extended.[121] Included in the information required to be disclosed is a finance charge expressed as a simple annual percentage rate (APR).[122] The total dollar amount of the finance charge is generally required to be disclosed as well, but in the case of a sale of a dwelling such disclosure is not required.[123] This distinction is unrelated to any need of the borrower to know the total finance

115. Real Estate Settlement Procedures Act Amendments of 1975, § 10, Pub. L. No. 94-205, 89 Stat. 1157 (January 2, 1976).
116. Real Estate Settlement Procedures Act Amendments of 1975, § 10, Pub. L. No. 94-205, 89 Stat. 1157 (January 2, 1976).
117. Real Estate Settlement Procedures Act Amendments of 1975, § 10, Pub. L. No. 94-205, 89 Stat. 1157 (January 2, 1976).
118. 24 C.F.R. § 82.4(b) (1976) *as set forth in* 41 Fed. Reg. 1673 (January 9, 1976).
119. 24 C.F.R. § 82.4(c) (1976) *as set forth in* 41 Fed. Reg. 1673 (January 9, 1976).
120. 15 U.S.C. §§ 1601 to 1681t (1970).
121. 15 U.S.C. § 1631(a) (Supp. IV, 1974).
122. 15 U.S.C. § 1639(a)(5) (1970).
123. 12 C.F.R. § 226.8(c)(8) (1976).

charge. The real estate borrower has a greater need to know the dollar amount since it will be more than in most other consumer transactions.

The finance charge is the sum of all the charges payable directly or indirectly by the person to whom credit is extended and imposed directly or indirectly by the creditor as an incident of extending credit.[124] It appears that real estate settlement charges are included in the computation of the finance charge, thus informing the borrower of the total cost of his real estate loan. However, under an express statutory exception, real estate settlement charges for title insurance premiums, title examinations and abstracts, appraisal fees, credit reports, property surveys, document preparation, and required escrows are excluded from the finance charge.[125] Not only are these charges expressly excluded from the finance charge, they are also not required to be itemized or in any other way disclosed to the borrower. Yet any one or a number of them may be imposed by the lender as a condition precedent to the extension of credit. Many lenders do disclose such charges, which is a better practice even if it is not required.

In 1974, Section 121(c) was added to the Consumer Credit Protection Act.[126] This section required that a full statement of the closing costs incurred by a borrower in a real estate transaction be disclosed to him at the time of the creditor's loan commitment. The term "closing costs" was not defined in the statute or regulations so it was questionable if the term required disclosure of all or any of the above mentioned items excluded from the finance charge. The coverage of Section 121(c) was broader than RESPA and required disclosure of closing costs in any consumer credit transaction involving real property, including assumptions of existing loans, refinancings, home improvement loans, and second lien mortgage loans on residential real property. The section covered transactions to which RESPA

124. 15 U.S.C. § 1605(a) (1970).
125. 15 US.C. § 1605(e) (1970).
126. 15 U.S.C. § 1631(c) (Supp. IV, 1974).

was inapplicable; the main ones were home improvement loans and assumptions of existing loans.

Section 121(c) came under attack by the Federal Reserve Board (FRB), the administrators of the Consumer Credit Protection Act. According to one spokesman the section was unnecessary because of the enactment of RESPA. As for the transactions that RESPA did not cover, advance disclosure of the closing costs was said to be of doubtful value because: 1) closing costs generally are not material in relation to total consumer costs in such transactions; 2) these transactions are generally subject to the three day right of rescission[127] if the consumer does not like the credit deal; and 3) the time framework within which such transactions take place is generally short and disclosure delays may be detrimental to the consumers' interests.[128] As a result Section 121(c) was repealed by the RESPA Amendments.[129]

Future legislation requiring advance disclosure of Truth-in-Lending information is a possibility. Congress has indicated that "some form of advance Truth-in-Lending disclosure in consumer real estate transactions has merit."[130] Committees may consider this type of legislation in early 1976.[131] Advance disclosure of Truth-in-Lending information will benefit the borrower because it will inform him of the total cost of the loan prior to the loan's consummation, which will generally be on the date of settlement. Under present law, Truth-in-Lending disclosures must be made before the transaction is consummated.[132] Assuming the objective to be attained is disseminating to homebuyers and sellers all possible information relevant to the transaction, many RESPA items should be included in the Truth-in-Lending finance charge. Additionally, all the RESPA charges should be itemized separately or both a Truth-in-Lending

127. 15 U.S.C. § 1635(a) (Supp. IV, 1974).
128. *Hearings on RESPA*, at 95.
129. Real Estate Settlement Procedures Act Amendments of 1975, § 11, Pub. L. No. 94-205, 89 Stat. 1157 (January 2, 1976).
130. 121 CONG. REC. S23065 (daily ed. Dec. 19, 1975).
131. *Id.*
132. 12 C.F.R. § 226.8(a) (1976).

advance disclosure sheet and on a settlement statement. Such a solution is similar to RESPA's advance disclosure provision and is subject to the same problems. The costs of implementing such a plan are high. Real estate industry costs have previously been identified. Consumer costs include delay in settling which may mean that a seller has to pay interest, taxes, insurance premiums, and utilities on an empty house for the period of delay while the buyer pays rent for accomodations. Also, consumers will ultimately bear the lender's increased operating expenses.[133]

B. *Wyoming Law*

Wyoming has enacted the Uniform Consumer Credit Code[134] (UCCC) which has disclosure requirements similar to Truth-in-Lending. Because of the substantially similar disclosure requirements of the UCCC, Wyoming was exempted from complying with Truth-in-Lending.[135] The Wyoming Administrator of the UCCC adopted Truth-in-Lending's Regulation Z as the implementing regulation of the state statute.[136] A question arises as to which one governs in Wyoming when the state act and Regulation Z differ. It seems that the state statute should govern if there is a discrepancy since Wyoming was exempted from complying with Truth-in-Lending. Prudent Wyoming lenders and creditors should probably comply with the UCCC to be safe since its requirements are more stringent than those of Regulation Z. However, at the present time lenders and creditors generally comply with Regulation Z. There is another unresolved question as to whether the Wyoming Administrator has the authority to adopt a regulation that is inconsistent with state law. The questions raised by this discussion will have to be resolved by the Wyoming Supreme Court if the Federal Reserve Board does not revoke Wyoming's exemption under Truth-in-Lending.

The question of whether the UCCC or Regulation Z

133. *Hearings on RESPA*, at 45.
134. WYO. STAT. §§ 40-1-101 to 40-9-103 (Supp. 1975).
135. 12 C.F.R. § 226.12(f) (1976).
136. 4 CCH CONSUMER CREDIT GUIDE, Wyo., ¶ 6501 to 6815 (1973).

governs Wyoming law is relevant in the area of real estate settlement costs for two reasons. First, the Wyoming State Legislature adopted an amendment to the UCCC which was identical to Section 121(c) of the CCPA.[137] Second, the UCCC requires that all charges imposed on the debtor by the creditor as an incident of the extension of credit be included in the finance charge with no exceptions for charges imposed relative to residential real estate transactions.[138] Charges for appraisal fees, credit reports, lender's title insurance, title examinations, property surveys, and document preparation are probably included in the finance charge under the UCCC. Whether amounts to be paid into escrow accounts are included in the finance charge is doubtful. Notary fees and charges for owner's title insurance are categorized as additional charges which are excluded from the finance charge.[139] If the state statute controls in Wyoming the real estate borrower is better protected and more thoroughly informed than he is on a national level. In addition to these items being included in the finance charge, under the state law counterpart of Section 121(c), the creditor must give to the borrower a full statement of the closing costs at the time of the creditor's commitment. Any attempt to enforce these provisions of the UCCC will undoubtedly be met with opposition by any lender and creditor with the responsibility of making such disclosures. Lender opposition to advance disclosure, and their lobbying power can be seen in the history of RESPA.[140]

EVALUATION AND CONCLUSION

Was RESPA really needed? How effective was it? Are the Amendments a better solution? These are crucial questions that must be answered in order to determine if RESPA is beneficial or is just another law that engenders more rules and paperwork with no real benefit to anyone. RESPA's ultimate goal is to decrease settlement costs for homebuyers and sellers by: 1) giving them information on the services

137. WYO. STAT. § 40-2-301(5) (Supp. 1975).
138. WYO. STAT. § 40-3-109(1) (Supp. 1975).
139. WYO. STAT. § 40-3-202(a) and (d) (Supp. 1975).
140. *See Hearings on RESPA.*

and their costs to enable them to shop for cheaper prices; 2) outlawing particular types of fraudulent behavior; and 3) trying to set up some kind of model land recordation system.

It is questionable whether settlement charges can be reduced by a significant amount. The HUD-VA Report showed that the average total settlement cost in their study was $1937.[141] Of this amount $1019 was a sales commission.[142] If the most expensive settlement cost item is the real estate broker's commission, then it is the important cost to reduce. Brokers' commissions are not regulated but are set by competitive market demand. If they are high that is a reflection of the value of the service. If commissions are set by any type of agreement between brokers that is a problem for the anti-trust laws.[143] Even if an anti-trust suit is brought and won, brokers' commissions outside of the immediate area will not decrease. To establish a national policy that a set percentage commission violates the anti-trust laws, many and widespread court decisions to that effect will be necessary.

Our land recordation system was accused of being an important contributor to high settlement costs. Yet, how realistic is the idea that even if a new system is developed all the states will adopt it? Our real estate law and institutions have grown up conforming to our land recordation system. Title insurance companies and other real estate businesses are organized to deal with the present system. Any attempt to substantially change it will be met with opposition. According to the HUD-VA Report the average cost for title insurance was $127[144] and the average cost for a title examination was $118.[145] Except in the eastern portion of the U.S. these charges are generally not incurred together.[146] These amounts for land recordation related costs do not even compare to the $1019 cost of a broker's commission.

141. HUD-VA REPORT, at 36.
142. *Id.*
143. Goldfarb v. Virginia State Bar, __U.S.__, 95 S.Ct. 2004 (1975).
144. HUD-VA REPORT, at 36.
145. *Id.*
146. *Id.* at 45.

Points that must be paid to obtain a mortgage loan, whether styled a loan origination fee or a loan discount payment, are a major component of the total settlement cost bill.[147] Points are determined by the money market and are generally outside the control of the providers of settlement services. Points, the broker's commission, and the title related costs comprise much of the total settlement cost bill, and yet neither RESPA nor the Amendments can influence them to any great extent.

Congress tried to get information to homebuyers and sellers to enable them to shop for lower prices of settlement services. Some borrowers might have been encouraged to shop for these services under RESPA's advance disclosure provisions. But the disclosure only had to be made after a written loan commitment. At this time the borrower is already locked in if he has made a binding agreement with the seller to purchase the property. It seems that if shopping is the goal, the information should be provided at a meaningful time while the borrower is still inquiring about credit rather than after a lender's commitment. If HUD devises a system for updating specific cost components for the cost estimate sheet required under the Amendments, the goal of disseminating information at a more meaningful time will be accomplished. Many people will not shop for these services no matter what type of law is enacted, but if enough marginal borrowers shop it will drive down the cost of the services. However, the dollar amount of the reduction to each borrower and seller will probably be so small as to be unnoticeable in the overall cost bill.

RESPA's provisions outawing illegal payments and other kickbacks in real estate transactions are beneficial, but it is questionable if they will lower settlement charges to any significant degree. Even if kickbacks are not paid, the providers of the services will not necessarily lower their prices and there is nothing in the Act requiring them to do so. Loopholes can be found in the present law which result in a different form of the abuse but not its elimination.

147. *Id.* at 36.

RESPA's uniform settlement statement is a valuable tool which can be used in the study of residential real estate settlement costs. Perhaps such a study will enable Congress to formulate a more comprehensive and thought-out solution to high settlement costs, if indeed they are a real problem.

RESPA's costs in increased paperwork and confining rules and regulations outweigh its benefits. More study and analysis of the problem to be dealt with should have been undertaken by Congress prior to adopting RESPA. At the time of the law's enactment no comprehensive study had determined how widespread the abuses were. Yet Congress saddled lenders with a pile of paperwork, perhaps to kill a paper tiger. The Amendments were adopted without much analysis and primarily as a reaction against the advance disclosure requirement and the requirement that the previous selling price be disclosed. They eased the burden on lenders to a great extent, but they did not magically give validity to a questionable Act.

LACHLAN K. MURPHY