

October 28, 2002

Richard A. Hauser, Esquire  
General Counsel  
Office of the General Counsel  
Department of Housing and Urban Development  
451 Seventh Street, SW  
Washington, DC 20410-0500

Re: Department of Housing and Urban Development: Real Estate Settlement Procedures Act (RESPA); Simplifying and Improving the Process for Obtaining Mortgages to Reduce Settlement Costs to Consumers; Proposed Rule Docket Number: FR-4727-P-01

Dear Mr. Hauser:

As part of its statutory duty to monitor and report on an agency's compliance with the Regulatory Flexibility Act of 1980 ("RFA"), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA"),<sup>1</sup> the Office of Advocacy of the U.S. Small Business Administration ("Advocacy")<sup>2</sup> reviewed the Department of Housing and Urban Development's ("HUD") compliance with the RFA's requirements for the above-referenced Notice of Proposed Rulemaking ("NPRM").<sup>3</sup>

On July 29, 2002, the Department of Housing and Urban Development (HUD) published a proposed rule on the Real Estate Settlement Procedures Act (RESPA) in the *Federal Register*, Vol. 67, No.145, p. on page 49134. The purpose of the proposal is to simplify and improve the process of obtaining home mortgages and reduce settlement costs to consumers. The proposal addresses the issue of lender payments to mortgage brokers by changing the way that payments in brokered transactions are recorded and reported to

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<sup>1</sup> Pub. L. No. 96-354, 94 Stat. 1164 (1980) (codified at 5 U.S.C. § 601 et seq.) amended by Subtitle II of the Contract with America Advancement Act, Pub. L. No. 104-121, 110 Stat. 857 (1996). 5 U.S.C. § 612(a).

<sup>2</sup> Congress established the Office of Advocacy of under Pub. L. No. 94-305 to represent the views of small business before Federal agencies and Congress.

<sup>3</sup> 67 Fed. Reg. 49134 (July 29, 2002).

consumers. It requires a Good Faith Estimate (GFE) settlement disclosure and allows for packaging of settlement services and mortgages.

After reviewing the NPRM and discussing it with affected small businesses,<sup>4</sup> Advocacy would like to encourage HUD to issue a revised initial regulatory flexibility analysis (IRFA) that takes into consideration the comments of affected small entities and develops regulatory alternatives to achieve HUD's objectives while minimizing the impact on small businesses.

### **RFA Requirements for a NPRM**

The RFA requires agencies to consider the economic impact that a proposed rulemaking will have on small entities. Unless the head of the agency certifies that the proposed rule will not have a significant economic impact on a substantial number of small entities, the agency is required to prepare an IRFA. The IRFA must include: (1) a description of the impact of the proposed rule on small entities; (2) the reasons the action is being considered; (3) a succinct statement of the objectives of, and legal basis for the proposal; (4) the estimated number and types of small entities to which the proposed rule will apply; (5) the projected reporting, recordkeeping, and other compliance requirements, including an estimate of the small entities subject to the requirements and the professional skills necessary to comply; (6) all relevant Federal rules which may duplicate, overlap, or conflict with the proposed rule; and (7) all significant alternatives that accomplish the stated objectives of the applicable statutes and minimize any significant economic impact of the proposed rule on small entities.<sup>5</sup> In preparing its IRFA, an agency may provide either a quantifiable or numerical description of the effects of a proposed rule or alternatives to the proposed rule, or more general descriptive statements if quantification is not practicable or reliable.<sup>6</sup>

### **HUD's Compliance with the RFA**

Pursuant to the RFA, HUD prepared an IRFA in conjunction with its Economic Analysis prepared under Executive Order 12866.<sup>7</sup> Section 605 of the RFA expressly permits agencies to perform an IRFA in conjunction with other analyses provided the analysis meets the requirement of the RFA. For the reasons stated below, Advocacy is of the opinion that further economic analysis prepared by HUD, in a revised IRFA, would improve the Final Rule.

### **Defining Small Businesses Affected by the RESPA Proposal**

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<sup>4</sup> On October 9, 2002, the Office of Advocacy held a roundtable on this rule. Mortgage brokers, mortgage lenders, realtors, appraisers, and third party service providers participated in the roundtable. In addition, on October 25, 2002, Advocacy met with minority members of the real estate community in Baltimore, Maryland to discuss the impact of this rule on their businesses.

<sup>5</sup> 5 U.S.C § 603.

<sup>6</sup> 5 U.S.C. § 607.

<sup>7</sup> Advocacy reviewed the summary of HUD's analysis published as an appendix to the proposed rule and the complete Economic Analysis and Initial Regulatory Flexibility Analysis for RESPA Proposed Rule to Simplify and Improve the Process of Obtaining Mortgages to Reduce Settlement Costs to Consumers, prepared by HUD's Office of Policy Development and Research and accessible on HUD's Website.

Section 601 of the RFA requires an agency to use the definition of small business contained in the U.S. Small Business Administration’s (“SBA”) small business size standards regulations,<sup>8</sup> promulgated by the SBA under the Small Business Act.<sup>9</sup> Below is a table of the SBA’s definition of small business for the industries in which small businesses have contacted the Office of Advocacy to raise concerns regarding the impacts of this rule.<sup>10</sup>

<b>NAICS Code</b>	<b>Industry Description</b>	<b>SBA Size Standard (revenues &lt;=) in \$ millions</b>
531210	Mortgage Brokers (Real Estate Agents and Brokers)	6
522292	Real Estate Credit	6
541191	Title Abstract and Settlement Offices	6
531320	Offices of Real Estate Appraisers	1.5
561710	Pest Inspectors – Exterminators	6

The proposed rule will affect mortgage brokers, mortgage lenders, realtors, appraisers, pest inspectors, and settlement service providers. Although HUD acknowledged that the majority of the businesses in the industries affected by the rule are small businesses, its economic analysis would improve by a revised IRFA that clearly defines the impact on those small entities.

HUD’s analysis included the overall cost of compliance for the proposal in its analysis. A revised IRFA would allow for HUD to compute the compliance cost per small entity. This would enable HUD to identify and analyze significant regulatory alternatives to minimize the potential burdens on small businesses subject to the rule. In addition, this information would assist small entities in understanding the nature of the impact of the rule on their businesses.

### **Alternatives to Reduce the Impact on Small Entities**

In addition to providing information about the economic impact of the action on small businesses, the RFA also requires an agency to consider less burdensome alternatives to the proposed action. In this particular rulemaking, there may be viable alternatives that HUD has not considered.

<sup>8</sup> 13 C.F.R. § 121.

<sup>9</sup> 15 U.S.C. § 632. Section 601 also provides that an agency can use an alternate definition if the agency obtains prior approval from Advocacy to use another standard (and publishes the standard for public comment) or the statute on which a rule is based provides a different definition of small business, then an agency may use that definition without consulting with the Office of Advocacy. 5 U.S.C. § 601 (3).

<sup>10</sup> This information was obtained from <http://www.sba.gov/size/sizetable2002.html>.

### Good Faith Estimate (GFE) Provisions

Advocacy supports the notion of protecting consumers from predatory lending practices and providing the consumer with full disclosure about the mortgage lending process. Advocacy urges HUD to give full consideration to suggestions that reduce consumer confusion and are cost effective for mortgage brokers and community-based lenders.

### Packaging

The purpose of packaging is to increase competition among settlement service providers and lower the cost of settlement services for the consumer. As with the GFE, Advocacy urges HUD to give full consideration to suggestions from the small business community concerning the packaging aspect of the proposal.

### **Conclusion**

The RFA requires agencies to consider the economic impact on small entities prior to proposing a rule and to provide the information on those impacts to the public for comment. As noted above, Advocacy recommends that HUD publish a supplemental IRFA to provide small businesses with sufficient information to determine what impact, if any, the particular proposal will have on its operations. In addition to providing the public with specific information about the economic impact on the proposal, the supplemental IRFA should provide a meaningful discussion of alternatives that may minimize that impact.

Secretary Martinez, Commissioner Weicher, and members of your staff in the Office of General Counsel, deserve credit for reaching out to small businesses and consulting with my office in the development of this rule. I am confident that we will continue to work together to ensure that these improvements to the mortgage financing process stimulate small-business growth and increased opportunities for homeownership. Thank you for the opportunity to comment on this important proposal. If you have any questions, please feel free to contact the Office of Advocacy at (202) 205-6533.

Sincerely,

Thomas M. Sullivan  
Chief Counsel for Advocacy

Jennifer A. Smith  
Assistant Chief Counsel  
for Economic Regulation

Cc: Dr. John D. Graham, Administrator, Office of Information and Regulatory Affairs

