

In The Title Corner

FOURTH QUARTER 2008 • VOLUME 11, ISSUE 4

- 1 2008 RESPA Reform Analysis
- 2 Eureka! Oil, Gas and Mineral Rights Exceptions Explained
- 3 Celebrating Commitment
- 6 To the Rescue???
- 7 Strength & Stability
- 8 Ask Your Underwriter



2008 RESPA Reform Analysis

On Wednesday, November 12th, HUD issued its long-awaited RESPA mortgage reform package to assist borrowers to shop for the lowest cost mortgage and related closing services. This includes a standard Good Faith Estimate ("GFE") that discloses key loan terms and closing costs. The rule in its entirety is posted on HUD's web site at www.hud.gov.

This is considered a significant victory for the settlement services industry, as the proposed "closing script" that could have potentially added 30 minutes or more to the closing is gone. In its place is an additional page on the HUD-1 Settlement Statement that allows consumers to compare loan terms and closing costs with those listed on the GFE.

BULLET POINT INDEX

- Modified GFE will contain non-itemized title charges in 1100 series
- Modified HUD-1 with new page 3 will compare actual costs to GFE and disclose tolerances
- Recording charges subject to 10% tolerance
- Average charge can be used for any settlement service subject to specific requirements
- Definition of "required use" changed and discounts can be offered through affiliated settlement service providers in some cases
- Effective date for new GFE and HUD-1 is January 1, 2010. Effective date for remainder of rule is January 16, 2009.

ANALYSIS

Although the most significant changes in the March 2008 proposed HUD regulation failed to make the final cut, there are still some important changes being made by HUD in its final RESPA rule. These changes will impact the title insurance industry in different ways, but not nearly as much as the original proposal would have.

What was left out: In the face of thousands of comments, HUD decided to remove some of the more controversial provisions of the proposed rule, all of which the title insurance industry had lobbied



Eureka! Oil, Gas and Mineral Rights Exceptions Explained

In the first quarter of 2008, we discussed deleting the standard exceptions in Schedule B of the title policy. Another exception which is commonly requested to be deleted in both owner's and lender's policies is the exception for oil, gas and mineral rights. The following is a discussion of the basis for the exception and the information needed in order to determine whether it can be modified or deleted from the final policy.

Oil, gas and mineral ("OGM") rights are basically the right to drill or mine beneath the surface of the land and to extract and develop any petroleum, gas or minerals located as a result of the drilling or mining. While it may seem logical that the owner of the property within which these commodities are located also owns the right to locate, extract and develop them, the fact is that the State of Florida recognizes a separate and distinct oil, gas and mineral "estate" which can be severed from the "surface" estate and have its own chain of ownership. The owner of the separate mineral estate has the right to enter onto the surface estate to locate and remove what is extracted. However, as will be discussed later, this right of entry is not unlimited.

A common way to sever the surface estate from the mineral estate is through a reservation of OGM rights by the grantor of a deed. Although many private landowners reserve OGM rights for themselves, the State of Florida also routinely reserves, and still does

reserve, at least a fractional interest in the OGM rights in property it conveys out. In fact, pursuant to 270.11(1) F.S., after October 1, 1986, all contracts and deeds made by the Trustees of the Internal Improvement Fund ("TIIF"), any other state agency or any local government or water management district as seller automatically contain a reservation of an



undivided three-fourths interest in minerals and an undivided one-half interest in all petroleum in, on or under the land, including the right to mine the same. The reservation exists regardless of whether it is stated in the deed or not, unless the agency chooses not to reserve or is otherwise prevented from doing so by law.

Many title agents mistakenly think that OGM rights can be eliminated by the Marketable

Record Title Act ("MRTA"). While MRTA eliminates "estates, interests, claims or charges" created prior to the root of title, because the mineral estate is an estate entirely separate from the surface estate, it is unclear whether ownership of the mineral estate is an interest in land that can be eliminated by MRTA. There is no Florida case law addressing this issue. Until the question is resolved, either judicially or by statute, ORT will not rely on MRTA to eliminate reserved OGM rights.

The numerous ways in which OGM rights can be created and the failure of MRTA to specifically eliminate them make the possibility that OGM rights are held by someone other than the owner of the surface estate very real. For this reason, unless ownership of the entire mineral estate is determined through the search to be held by the current owner of the surface estate, all ORT commitments should contain an exception for "oil, gas and mineral rights reservations, if any."

Ownership of the mineral estate can be very valuable and a fair number of claims have been generated due to the failure to include the OGM rights exception on a final policy. That being said, there are many times where it is

appropriate to delete the exception. However, doing so usually requires the agent to conduct a lengthier search than what is normal practice in the industry today. In fact, the agent often has to search all the way back to a deed out of T1IF in order to determine whether there were any OGM rights reservations. Such a search can be costly and time-consuming and ORT examiners will not undertake such a search without being specifically instructed to do so. Agents who employ outside abstractors should inquire as to the extra time and cost involved in extended searches for reserved OGM rights. In the event that a search does reveal reservation of OGM rights, an exception for the specific reservation is required. If the reservation is contained in an instrument that pre-dates the root of title, then the following language may be added at the end of the exception: "No determination has been made as to the current owner of the excepted interest."

Even if a search reveals a reservation of OGM rights or if the parties do not wish to have such an extended search conducted, it is still possible to provide the insured with coverage against the holder(s) of these rights entering onto the insured property to locate and extract the oil, gas or minerals. There are two possible statutory provisions that will bar the right of entry. The first is MRTA and the second is *Section 270.11(2)(b), F.S.*

Although it has not been judicially determined that MRTA will eliminate the ownership interest of the mineral estate, the right of entry is a burden on the surface estate and can, therefore, be eliminated by MRTA, but only as to private parties. Interests of the Federal government, the State of Florida or its agencies (this includes T1IF) reserved in a deed or patent are not eliminated by MRTA. In addition, MRTA cannot be

used to eliminate any rights currently being exercised or the rights of anyone in possession of the property. Evidence indicating current exercise of the right of entry includes the separate payment of taxes on the mineral estate. If it is determined that the right of entry is barred, a notation to that effect may be added at the end of the exception.

In cases where the OGM reservation is in favor of either T1IF or the State Board of Education, the agent should determine whether the right of entry has been eliminated by *270.11(2)(b), F.S.* That section provides that the right of entry, whether reserved prior or subsequent to the effective date of the statute, is released as to "any parcel of property that is, or ever has been, a contiguous tract of less than 20 acres in the aggregate under the same ownership." In cases where the statute applies, the following language may be added after the exception, "Note: The right of entry has been released by *270.11, F.S.*"

Determination as to the extinguishment of the right of entry is important not only for the policy, but also for any Form 9, 9.1 or 9.2 being issued with the policy. All three of these endorsements contain affirmative coverage against damage to existing (Form 9 and 9.2) or future (Form 9.1) improvements (but not lawns, shrubbery or trees) located on the land resulting from exercise of the right of entry in connection with any mineral reservations excepted in the policy. If it has not been determined that the right of entry is barred, it should be noted after the exception that Form 9 coverage is not available for that matter.

As always, if you have any questions about oil, gas and mineral rights or the exception for them, please contact Underwriting for assistance.



Celebrating Commitment!

■ By Robin Cardella, Vice President and Mid-FL Operations Manager

We are extremely proud to announce additional companies who have made a commitment to Old Republic National Title Insurance Company and its customers:

**Livingston, Patterson
Strickland & Siegel, P.A.**
Sarasota – 15 years

Comments and information

We invite your feedback and welcome your suggestions regarding "In The Title Corner" and the publication of future articles. Address correspondence to:

In The Title Corner
Old Republic National Title
Insurance Co.
100 S. Ashley Drive
Suite 700
Tampa, FL 33602
800-342-5957
Fax: 813-228-0301
www.ortil.com

2008 RESPA Reform Analysis continued from page 1—

against. For instance, the closing script was eliminated, which would have caused a great many problems for the title insurance industry. HUD also decided against calling owners' title insurance "optional." In addition, recording charges were originally subject to a no-tolerance standard and that has been changed. Finally, while HUD decided against specific language permitting volume discounting at this time, it will consider rule changes in the future allowing for negotiated and volume discounts which balance consumer protection while providing "adequate market flexibility and due consideration to small business concerns."

Overview of the New Rule:

The final rule is a stripped-down version of the original proposal. It contains a new GFE and HUD-1, each of which must be used as of January 1, 2010. The regulations concerning those forms become effective the same day, including the concept of "tolerances" for the cost of items listed on the GFE. However, other changes will be effective January 16, 2009. These include the ability to use average cost pricing for certain settlement services and a new definition of "required use" in the affiliated business setting and a description of how "required use" relates to packaging and consumer discounts.

Description of Elements of the New Rule

New Forms: The new GFE and HUD-1 forms have been changed to make them more comparable than they have been in the past. It will be easier for consumers to find

particular categories of costs on each form and to see how the actual amount charged differs, if at all, from what was estimated in the GFE. In place of the closing script concept, the HUD-1 will have a new third page which includes a chart comparing GFE disclosures with HUD-1 charges. The chart is divided into three categories, with each category representing a different "tolerance" for pricing changes (from the GFE to the HUD-1) for the component costs found in each category. Charges that cannot increase include most of the lender charges for the loan itself and transfer taxes on deeds and mortgages/deeds of trust. Charges that, in total, cannot increase more than 10% include recording charges, (a welcome change from zero tolerance proposed in March), lender required settlement services where the lender selects the provider, and title services, title insurance and owner's title insurance where the borrower uses a settlement service provider identified by the lender. The amount charged for all other services may change at closing.

Page three of the HUD-1 also contains a table of loan terms. The lender is supposed to supply information for this form, so that the settlement agent can put it together, including loan amount and term, initial interest rate, initial monthly payment amount, whether the interest rate can go up and how much, whether the principal balance can rise, whether there is a balloon payment or prepayment penalty and the amount of the monthly escrow payments, if any.

The GFE is binding on the lender unless a new GFE is provided prior to settlement. This can be done if "changed

circumstances" result in increased costs for any settlement service, such that the charges would exceed the tolerance for those charges. However, if there is a violation of tolerance requirements, which would violate Section 5 of RESPA, the originating lender will have 30 days after closing to remedy the situation by reimbursing the borrower for the overages. A similar 30 day cure provision is permitted for settlement agents to revise the HUD-1 should an inadvertent or technical error occur in its preparation, whether the error involves an overcharge, undercharge or any misstatement of fact. Such an error would violate Section 4 of RESPA and would need to be corrected to avoid liability.

ALTA attempted to get HUD to alter the GFE so that the 1100 series of charges would be fully itemized in order to enhance the ability of borrowers to comparison shop. This category includes not only title insurance charges, but also attorneys' fees and costs of survey. ALTA believes that borrowers having a detailed listing of each service (including lender's title insurance, owners' title insurance and closing services) would be armed with the information they need to shop. HUD decided that too much detail would be confusing to consumers and left the form as it was. ALTA also lost its argument that the agent and underwriter portions of the title insurance premium should NOT be split out on lines 1107 and 1108, since the split does not affect the consumer. Although it seems inconsistent with its position of itemization in the 1100 series of charges, HUD decided the split should be shown on the HUD-1.

Continued on page 5—

The HUD-1 will also contain a designated line for the closing fee (Line 1102). In order to limit what it considers unnecessary itemization, however, HUD's rule calls for the settlement statement to combine administrative and processing services related to title insurance at line 1101 with the overall charge for title services. Because of this change, HUD finds it unnecessary to continue to define "primary title services" as a particular set of services. The definition of "title services" is "any service involved in the provision of title insurance (lender's or owner's policy), including but not limited to: title examination and evaluation; preparation and issuance of a title insurance policy or policies; and the processing and administrative services required to perform these functions." The term also includes the service of conducting a settlement. *24 CFR 3500.2.*

Effective Dates: As mentioned earlier, the new GFE and HUD-1 forms will be required as of January 1, 2010. The current forms will remain in effect until that time. If, however, a settlement provider issues a new GFE form prior to the effective date, it will be subject to all the requirements of the new GFE including compliance with tolerance provisions and use of the new HUD-1. Other components of the final rule, including the average charge and required use provisions and the technical amendments, will take effect immediately upon the effective date of the rule (January 16, 2009).

Average Charge: An average charge can be used for any settlement service, "provided that the total amounts received from borrowers for that service for a particular class of transactions do not exceed the total amounts paid to the providers of that service for that class of transactions." While the average charge concept will

be very useful for industry, the preceding quote is important to remember. Care will have to be taken so that the total average charge billed does not exceed the total paid for a given service. HUD states that one of the benefits of the average charge is that it will save administrative fees for settlement service providers and HUD expects that those savings will be passed on to consumers due to the pressures of competition.

In calculating an average charge, a provider may define a class of transactions based on time, loan type or geographic area.

The average charge must be recalculated at least every 6 months. If a settlement service provider uses an average charge for a class of transactions, the provider must use the same average charge for every transaction within that class. An average charge may NOT be used for services where the charge is based on the loan amount or property value, because it would cause smaller borrowers to subsidize larger borrowers. For instance, an average charge may NOT be used for title or mortgage insurance. A provider "must maintain all documents that were used to calculate the average charge for at least three years after any settlement in which the average charge was used." This last provision concerning record-keeping will be very important to keep in mind, as well. See *24 CFR 3500.8 (b)(2)*.

It is important to note that the average charge concept is the exception to HUD's rule. HUD states in its proposal that "(t)he amount stated on the HUD-1 for any itemized service cannot exceed the amount actually

received by the settlement service provider for that itemized service, unless the charge is an average charge in accordance with paragraph (b)(2) of this section." *24 CFR Section 3500.08 (b)(1)*. In other words, RESPA does not allow mark-ups. Should we provide distinct and necessary additional services, however, it is appropriate to charge a fee equal to the value of the additional services rendered.

Required Use and Packaging:

The concept of "required use" and how it relates to offers for consumers to use

affiliated businesses was examined by HUD.

Basically, "economic disincentives that are used to improperly influence a consumer's choices are as problematic under RESPA as are incentives that are not true discounts." Preamble pg. 133.

Legitimate consumer discounts can still be offered, but the rule limits the tying of such a discount to the use of an affiliated service provider.

The definition of

"required use" has been changed to explain when discounts can be offered so that they qualify for the affiliated business exemption under *24 CFR 3500.15*. "(A) settlement service provider may offer a combination of bona fide settlement services at a total price (net of the value of the associated discount, rebate or other economic incentive) lower than the sum of the market prices of the individual settlement services and will not be found to have required the use of the settlement service providers as long as: (1) the use of any such combination is optional to the purchaser; and (2) the lower price for the combination is not made up by higher costs elsewhere in the settlement process." *24 CFR 3500.2.*

**Basically,
"economic
disincentives that
are used to
improperly
influence a
consumer's choices
are as problematic
under RESPA..."**

To The Rescue????

■ by Jeanne F. Murphy, Florida State Counsel

"Foreclosure rescue," the very term conjures up an image of someone riding in on a white horse, sword raised, ready to take on the evil lender who is foreclosing on a homeowner in distress. Unfortunately, sometimes the "white knight" is really a devious villain in disguise, with the intent of defrauding the distressed homeowner. To protect homeowners from unscrupulous foreclosure rescue consultants and equity purchasers, the legislature recently passed a "foreclosure fraud" bill. The new legislation created section 501.1377, F.S., and went into effect October 1, 2008. The stated intent of the legislation is to provide homeowners who are at risk of losing their homes due to foreclosure or nonpayment of taxes, with the information necessary to make informed decisions regarding the sale or transfer of his or her home to an equity purchaser. Although it is important legislation and includes broad safeguards to protect homeowners against deceit and financial hardship, its impact on title insurance and closing agents is very limited. Accordingly, this article will only address the very narrow portion that concerns you.

The first thing to remember is that the statute only applies to "foreclosure-rescue transactions," which is specifically defined as transactions in which (i) residential real property in foreclosure is conveyed to an equity purchaser ("equity purchaser" is defined in the statute as any person who acquires a legal, equitable, or beneficial ownership interest in any residential real property as a result of a foreclosure-rescue transaction, but specifically excludes interests obtained through foreclosure, court order and various intra-family conveyances), (ii) the homeowner

maintains a legal or equitable interest in the residential real property conveyed (i.e. an option, lease option, beneficiary or trustee) and (iii) it is designed or intended by the parties to stop, avoid, or delay foreclosure proceedings against a homeowner's residential real property.

The statute includes numerous safeguards to protect homeowners who are involved in such transactions. The only one that really impacts you is the provision that creates a rebuttable presumption that the foreclosure-rescue transaction is

really a **loan** transaction. While the definition of a "foreclosure-rescue transaction" is quite broad, this presumption only applies to those foreclosure rescue transactions that specifically include an agreement allowing the homeowner to repurchase the property, such as a lease option. In such situation, the statute provides that the deed from the homeowner to the equity purchaser is deemed a mortgage rather than a conveyance. It is important to note that the above presumption does not apply as against creditors or subsequent purchasers for valuable consideration, without notice, unless the repurchase agreement (or a memorandum thereof) is recorded.

Although many equity purchasers include "foreclosure rescue" in their name, it is not

always going to be obvious when the statute applies. Accordingly, if you encounter a chain of title where there was an LP filed against the homeowner (or you are otherwise aware that a foreclosure action was filed) and then a subsequent conveyance of the

property which includes a right of repurchase by the homeowner either in the deed or in a separate writing (or if you are aware of any such agreement between the parties), you must assume that the deed into the equity purchaser will be treated like a mortgage.

To insure a conveyance from the equity purchaser you will need to obtain and record a deed from the original homeowner as well as a deed and satisfaction of mortgage from the equity purchaser. If you are asked to insure a mortgage from the equity purchaser, you will need to require a deed from the original homeowner which specifically releases its option to purchase and a satisfaction of mortgage from the equity purchaser.

The penalties for violation of the act are severe. The section provides that any person who violates any provision commits an unfair and deceptive trade practice and is subject to the penalties and remedies provided in part II of Chapter 501, including a monetary penalty of up to \$15,000 per penalty.





Strength & Stability

During these very difficult months of financial uncertainty, it is well worth a look at who's insuring your real property transactions. As potential indemnitors to real property owners and lenders, title insurers need a little scrutiny.

In 2008 and for the 16th straight year, the Old Republic Title Insurance Group received the highest financial strength ratings from all the major rating agencies. No other title group can make that claim. Our superior financial strength can be attributed to and measured by the following:

- Old Republic Title's claims reserves are 6.0 times the 5 year average annual claims payments, which is higher than our competitors. (Go ahead. Ask them what their ratios are!)
- Old Republic Title's parent Company, Old Republic International, is a multi-billion dollar diversified public company with a total debt to equity ratio of less than 5%.
- Founded in 1907, Old Republic Title is here to stay!
- Old Republic Title's self imposed single-site reinsurance retention limit is \$500 million*. We proudly continue to insure real property transactions in every state in the Union.

*Where permitted by state law and subject to underwriting approval.



Since 1992, the Old Republic Title Insurance Group has held the distinction of being the highest rated title insurance group in the nation.

Old Republic National Title Insurance Company | Old Republic General Title Insurance Corporation | Mississippi Valley Title Insurance Company | American Guaranty Title Insurance Company

100 South Ashley Drive, Suite 700
Tampa, FL 33602-5358
800.342.5957
oldrepublictitle.com/flnational

Ask Your Underwriter

■ Carolyn W. Broadwater, Florida State Counsel

Question: We're seeing more deeds in lieu of foreclosure and we need to know how much to collect for documentary stamps.

Answer: Pursuant to the Florida Administrative Code, documentary stamp tax must be paid on the unpaid principal balance of the mortgage. *F.A.C. Title 12 2B-4.013* states:

"(2) Defaulting Mortgagor: Where a mortgagor, in full or partial satisfaction of the mortgage indebtedness or in lieu of foreclosure of a mortgage, conveys the mortgaged premises to the mortgagee, documentary stamp taxes are due on the transaction. The tax will be due on the unpaid portion of any mortgages or other encumbrances the property is subject to, plus any other consideration as defined in *Section 201.02(1), F.S.*, including accrued interest."



Old Republic National
Title Insurance Co.
100 S. Ashley Drive, Suite 700
Tampa, Florida 33602

PRSTD STD
U.S. Postage
PAID
Tampa, FL
Permit #3162