

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL ASSOCIATION OF)
MORTGAGE BROKERS, INC.,)
7900 Westpark Drive,)
Suite T-309,)
McLean, VA 22102,)
)
Plaintiff,)
)
v.)
)
HON. STEVE PRESTON, SECRETARY)
OF THE UNITED STATES)
DEPARTMENT OF HOUSING AND)
URBAN DEVELOPMENT)
451 7th Street, S.W.)
Washington, D.C. 20410,)
)
Defendant.)

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Summary of Complaint

1. This action challenges a final rule adopted by the United States Department of Housing and Urban Development ("HUD") entitled, "Real Estate Settlement Procedures Act (RESPA): Rule to Simplify and Improve the Process of Obtaining Mortgages and Reduce Consumer Settlement Costs." 73 Fed. Reg. 68,204-288 (Nov. 17, 2008) (to be codified at 24 C.F.R. pts. 203 and 2500) ("Final Rule"). The rule requires mortgage brokers, but not other loan originators, to make detailed disclosures regarding compensation. The asymmetrical disclosure requirement

will place mortgage brokers at a significant and permanent competitive disadvantage, impeding competition in the mortgage lending industry to the detriment of consumers.

2. HUD adopted the Final Rule in direct contravention of its own stated policy that all loan originators, mortgage brokers and lenders alike, should be required to make the types of disclosures the Final Rule requires only of mortgage brokers. HUD also adopted the challenged rule six years after abandoning a rulemaking proceeding in which HUD proposed a substantially identical rule. The opposition to the Rule was overwhelming, both from the mortgage lending industry and from consumer groups.

3. The Final Rule contravenes extensive research by leading authorities in the areas of consumer protection and the mortgage industry. For example, the Rule contravenes the findings of the Federal Trade Commission, the federal government's principal consumer protection agency, which conducted extensive studies over a number of years on the issue of mortgage disclosures and emphatically concluded that disparate disclosure requirements for mortgage brokers and other mortgage originators harmed consumers by creating confusion and leading to additional, unnecessary expenses.

4. The Rule adopted by HUD is arbitrary and capricious. It is contrary to the clear intent of Congress, HUD's own stated

policies and interpretations, and governing judicial precedents. It also is not reasonably supported by HUD's explanations and justifications and fails to offer a rational basis for rejecting alternative approaches.

5. Enforcement of the Final Rule will cause irreparable harm to plaintiff National Association of Mortgage Brokers, Inc. and its members and is contrary to the public interest. The Rule mandates disclosures that will confuse consumers and detract from their ability to comprehend mortgage loans and comparison shop. The Final Rule treats direct competitors differently such that mortgage brokers will be at a permanent disadvantage in the marketplace, consequently reducing healthy competition to the detriment of consumers. Experts have found that disparate disclosure requirements, such those in the Final Rule, increase costs to mortgage consumers, the exact opposite of HUD's stated goals in promulgating the Final Rule.

Jurisdiction and Venue

6. The Court has jurisdiction of this matter pursuant to 28 U.S.C. § 1331. This action arises under the Real Estate Settlement Procedures Act of 1974, as amended, 12 U.S.C. §§ 2601 et seq. ("RESPA"), the Administrative Procedure Act, 5 U.S.C. §§ 551 et seq., and the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202.

7. Plaintiff National Association of Mortgage Brokers, Inc. ("NAMB") is a not-for-profit corporation organized under the laws of Florida, with its principal place of business in McLean, Virginia. NAMB is suing in its individual capacity and as a representative on behalf of its members.

8. Defendant Steve Preston is the Secretary of HUD ("Secretary"). He is responsible for the operation of HUD and the promulgation of rules and regulations by the agency, in particular the rule at issue herein. He is sued in his official capacity only.

9. Venue in this Court is proper pursuant to 28 U.S.C. § 1391(b) and (e).

Standing

10. At least one of NAMB's members has standing to sue in its own right.

11. The interests NAMB seeks to protect are germane to its purpose.

12. Neither the claim nor the relief requested requires the participation of an individual NAMB member in the suit.

Background

13. NAMB is the only national trade association that represents the mortgage broker industry. NAMB represents the interests of more than 70,000 mortgage professionals located in all 50 states and the District of Columbia, and works with 49

state affiliate associations nationwide. NAMB also represents the interests of homebuyers and advocates for public policies that serve the mortgage consumer by promoting competition, facilitating homeownership and ensuring quality service.

14. NAMB serves the public directly by sponsoring consumer education programs for current or aspiring homebuyers seeking mortgage loans and, to help ensure that the public is well-served by brokers and others in the lending industry, sponsors a fraud reporting program with information and links available on the NAMB website.

15. In addition, NAMB requires that its members adhere to a professional code of ethics and best lending practices that foster integrity, professionalism, and confidentiality when working with consumers. NAMB provides its members with access to professional education opportunities and offers rigorous certification programs to recognize members with the highest levels of professional knowledge and education.

16. Parties acting as mortgage brokers defy simple characterization, but in today's market, it can generally be said that a real estate financing professional or entity acts in a mortgage broker capacity when the professional or entity works with both borrowers and lenders, though representing neither, to obtain a mortgage loan. Mortgage brokers add value by providing

goods with quantifiable value, such as a customer base and goodwill, as well as facilities and services.

17. Mortgage brokers work with consumers to help them through the complex mortgage origination process. A broker's services may include taking the application; performing a financial and credit evaluation; collecting and completing documents; working with realtors; ordering title searches, appraisals, and pay-off letters; assisting in remedying faulty credit reports or title problems; and facilitating loan closings.

18. Mortgage brokers have helped tens of millions of consumers, including many low- to moderate-income borrowers, enjoy the benefits of homeownership and provide consumers with a highly efficient and cost-effective means of obtaining a mortgage that fits the consumer's financial goals and circumstances. Mortgage brokers also have been a key catalyst in invigorating competition in the mortgage lending industry, expanding product choice, reducing marginal prices and serving new customers.

19. One of the greatest barriers to homeownership is the upfront cost of obtaining a mortgage, a significant portion of which is closing costs and loan origination fees. For borrowers who cannot pay these fees out of pocket, or who seek an alternative means of dealing with closing costs, the yield

spread premium ("YSP") affords prospective homebuyers an option to address these costs in a practical manner that facilitates home buying. The YSP is a payment made to a mortgage broker by a lender for the purchase of a broker-originated mortgage loan. The YSP represents the premium a lender is willing to pay to purchase a loan with an interest rate that is above the lender's "par rate."

20. A YSP allows a borrower to pay some or all settlement costs over the life of a mortgage loan through a higher interest rate. HUD has expressly approved of YSPs as a way for borrowers assuming broker-originated mortgages to pay settlement costs, including compensation to their broker for loan origination services, because significant settlement costs would otherwise prove an insurmountable obstacle for many aspiring homebuyers.

21. Mortgage originators other than brokers may provide the same benefit to borrowers—that is, no or reduced upfront settlement costs in exchange for a higher interest rate on the borrower's mortgage loan—but do not use YSPs to finance the benefit. Rather, those originators recoup the cost of fronting settlement costs by selling mortgage loans on the secondary market for a price that represents the difference between the interest rate on the lender-originated loan and the purchaser's "par rate." HUD has explicitly recognized that the sale of lender-originated loans on the secondary market achieves the

same purpose as lender payments to mortgage brokers, or YSPs; the payments are functionally equivalent.

22. Mortgage markets have evolved rapidly in recent years, as have the roles of mortgage professionals and entities, who may work in multiple capacities. As noted by a December 2007 study by Richard Todd of the Federal Reserve Board of Minneapolis and Professor Morris Kleiner of the University of Minnesota, with the emergence of the "originate to distribute" model of mortgage financing, under which loans, regardless of originator, are often promptly repackaged, sold, and securitized, "[T]he actual roles of brokers, loan officers, lenders, and others are not as rigidly bound and often blur."

23. In today's loan origination marketplace, originators who in the past may have been distinguishable from mortgage brokers increasingly function as brokers. With the prevalence of the "originate to distribute" model of mortgage financing, lenders often know at the time of closing that they will quickly sell the loan and can calculate how much they will make from the sale of the loan. Lenders also often enter into multiple contracts with various banks and other lenders to offer an array of products, and they receive underwriting approval from another funding source prior to funding mortgage loans.

24. Mortgage consumers are indifferent to the specific attributes of the loan originators with which they are dealing.

Consumers focus, properly, on mortgage product and price. They should be given the means to readily compare those key criteria among all originators. The Final Rule would achieve the opposite result.

25. Consumers would benefit from receiving the same information about mortgage transactions regardless of the type of originator involved. The traditional distinction between brokers and lenders has become a distinction without a difference, and HUD's insistence on perpetuating this artificial distinction at the expense of the consumer is without any rational basis.

26. On March 14, 2008, the Secretary published in the Federal Register "Real Estate Settlement Procedures Act (RESPA): Proposed Rule to Simplify and Improve the Process of Obtaining Mortgages and Reduce Consumer Settlement Costs," a proposed rule that would, among other things, revise requirements for disclosure of compensation to mortgage brokers in the form of lender payments. 73 Fed. Reg. 14,030-124 (Mar. 14, 2008) (to be codified at 24 C.F.R. pts. 203 and 3500).

27. On November 17, 2008, the Secretary promulgated the final version of the regulation in the Federal Register. See Real Estate Settlement Procedures Act (RESPA): Rule to Simplify and Improve the Process of Obtaining Mortgages and Reduce

Consumer Settlement Costs, 73 Fed. Reg. 68,204-288 (Nov. 17, 2008) (to be codified at 24 C.F.R. pts. 203 and 2500).

28. The Final Rule will adversely and irreparably harm NAMB and its members, as well as mortgage consumers, in numerous ways, including but not limited to the following:

(a) The Rule will create a substantial bias against mortgage brokers, even when broker-originated loans cost the same as or less than lender-originated loans, placing brokers at a significant and permanent competitive disadvantage.

(b) The Rule will have significant impact on NAMB and its members, many of whom are small business owners who will struggle to remain viable in the face of the rule's bias toward mortgage lenders. The Rule presents a very real danger that a number of mortgage brokers will be forced to close their doors and, ultimately, that NAMB itself will cease to have reason to exist.

(c) The Rule will significantly reduce healthy competition in the mortgage lending industry. Reduced competition will decrease the options available to consumers and increase the cost of all mortgages to consumers.

(d) The asymmetrical disclosures required by the rule will result in consumer confusion regarding the

costs of loans and make it more difficult for consumers to comparison shop. Consequently, a significant proportion of borrowers will choose more expensive loans and incur substantial additional costs.

Legal Bases for Challenging HUD's Final Rule

29. The Final Rule contravenes RESPA's purpose of reforming the real estate settlement process to provide consumers with more effective disclosure of settlement costs and help protect consumers from unnecessarily high settlement charges. The Final Rule also is contrary to HUD's own stated policies and interpretations and governing precedents.

30. The Final Rule exceeds the scope of the Secretary's authority to interpret, and promulgate regulations under, section 19 of the RESPA. Because the Final Rule exceeds HUD's statutory jurisdiction, authority, and right, it is invalid pursuant to 5 U.S.C. § 706(2)(c).

31. The Final Rule is not reasonably supported by HUD's explanations and justifications, and HUD has failed to offer any rational reasons for its rejection of alternative approaches to achieving the asserted goals of the Final Rule. The Final Rule is arbitrary and capricious, an abuse of discretion, and otherwise not in accordance with law. As such, the Final Rule is invalid pursuant to 5 U.S.C. § 706(2)(a).

32. HUD has failed to give adequate notice of the Final Rule it adopted and failed to articulate a rational basis for its decision to adopt this Final Rule, which is inconsistent with past policy positions taken and interpretations made by HUD. For these and other reasons, the Final Rule is invalid pursuant to 5 U.S.C. §§ 553(c) and 706(2)(d).

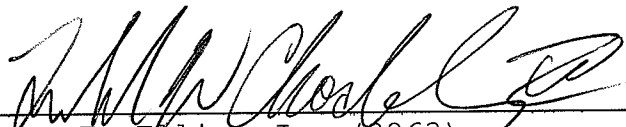
33. The Final Rule is void, invalid, and unenforceable because it has been promulgated in violation of the Regulatory Flexibility Act, 5 U.S.C. §§ 601 et seq.

34. NAMB and its members do not have an adequate remedy at law.

35. NAMB and its members will suffer irreparable harm if the Secretary is not enjoined from enforcing the Final Rule, which is scheduled to take effect on January 16, 2009, with the disclosure requirements becoming mandatory on January 10, 2010.

WHEREFORE, plaintiff NAMB prays that the Court issue a declaratory judgment that the Final Rule is contrary to law, arbitrary and capricious, unenforceable, and otherwise unlawful, and that the Court grant permanent injunctive relief enjoining the defendant Secretary of the United States Department of Housing and Urban Development from enforcing the Final Rule, with costs and attorneys fees against the defendant.

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