



United States  
General Accounting Office  
Washington, D.C. 20548

---

Office of the General Counsel

B-272303.1

June 28, 1996

The Honorable Alfonse M. D'Amato  
Chairman  
The Honorable Paul S. Sarbanes  
Ranking Minority Member  
Committee on Banking, Housing, and Urban Affairs  
United States Senate

The Honorable James A. Leach  
Chairman  
The Honorable Henry B. Gonzalez  
Ranking Minority Member  
Committee on Banking and Financial Services  
House of Representatives

Subject: Amendments to Regulation X, the Real Estate Settlement Procedures Act: Withdrawal of Employer/Employee and Computer Loan Origination Systems Exemptions (FR-3638); and Policy Statements 1996-1 (regarding computer loan origination systems); 1996-2 (regarding sham controlled business arrangements); and 1996-3 (rental of office space, lock-outs, and retaliation)

Pursuant to section 801(a)(2)(A) of title 5, United States Code, this is our report on a major rule promulgated by the Department of Housing and Urban Development (HUD) entitled "Amendments to Regulation X, the Real Estate Settlement Procedures Act: Withdrawal of Employer/Employee and Computer Loan Origination Systems Exemptions (FR-3638); and Policy Statements 1996-1 (regarding computer loan origination systems); 1996-2 (regarding sham controlled business arrangements); and 1996-3 (rental of office space, lock-outs, and retaliation)" (RIN: 2502-AG26). We received the rule on June 14, 1996. It was published in the Federal Register as a final rule on June 7, 1996. 61 Fed. Reg. 29238.

The final rule revises Regulation X, which implements the Real Estate Settlement Procedures Act of 1974 (RESPA). RESPA generally prohibits compensated referrals in connection with real estate settlements involving federally related mortgage loans. 12 U.S.C. § 2607(a). However, it also authorizes HUD to exempt payments

or classes of payments from this prohibition. 12 U.S.C. §§ 2607(c), 2617(a). A 1992 rule created exemptions for payments by employers to employees and for payments by borrowers to computer loan origination systems. See 57 Fed. Reg. 49600. The final rule withdraws both exemptions and introduces three limited exemptions for permissible payments by employers to bona fide employees. In addition, the rule revises certain controlled business disclosure requirements. Further, three statements of policy accompany the final rule, one analyzing payments for computer loan origination systems under the RESPA regulations and two others on issues raised by comments on the proposed rule.

Enclosed is our assessment of HUD's compliance with the procedural steps required by sections 801(a)(1)(B)(i) through (iv) of title 5 with respect to the rule. Our review indicates that HUD either has complied with or is in the process of complying with applicable requirements.

If you have any questions about this report, please contact Helen T. Desaulniers, Senior Attorney, at (202) 512-4740. The official responsible for GAO evaluation work relating to HUD is Judy England-Joseph, Director, Housing and Community Development Issues. Ms. England-Joseph can be reached at (202) 512-7631.

Robert P. Murphy  
General Counsel

Enclosure

cc: Nelson A. Diaz, Esq.  
General Counsel  
Department of Housing and Urban Development

ANALYSIS UNDER 5 U.S.C. §§ 801(a)(1)(B)(i)-(iv) OF A MAJOR RULE  
ISSUED BY  
THE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT (HUD)  
ENTITLED  
"AMENDMENTS TO REGULATION X, THE REAL ESTATE SETTLEMENT  
PROCEDURES ACT: WITHDRAWAL OF EMPLOYER/EMPLOYEE AND COMPUTER  
LOAN ORIGINATION SYSTEMS EXEMPTIONS (FR-3638); AND POLICY  
STATEMENTS 1996-1 (REGARDING COMPUTER LOAN ORIGINATION SYSTEMS);  
1996-2 (REGARDING SHAM CONTROLLED BUSINESS ARRANGEMENTS); AND  
1996-3 (RENTAL OF OFFICE SPACE, LOCK-OUTS, AND RETALIATION)"  
(RIN: 2502-AG26)

(i) Cost-benefit analysis

As discussed below, the Department of Housing and Urban Development (HUD) submitted the proposed Amendments to Regulation X to the Office of Management and Budget (OMB) for review as a "significant regulatory action" under Executive Order 12866. Since the rule was determined to be potentially "economically significant,"<sup>1</sup> HUD prepared an Economic Analysis, which was also reviewed by OMB. According to HUD staff, after the Economic Analysis was submitted to OMB, HUD made changes in the Analysis to maintain its consistency with the rule, to which minor changes had been made as described below. These changes were also submitted to OMB for approval.

The Economic Analysis indicates that it is difficult to quantify the costs and benefits of the exemptions for certain employer/employee payments. The Analysis also states that HUD lacks "essential information" to estimate the economic consequences of its action with respect to computer loan origination systems (CLOs). However, in both areas, the Analysis includes a discussion of cost- and benefit-related issues and the possible effects of the changes to Regulation X.

With respect to HUD's Statement of Policy on CLOs, the Analysis states that the guidance provided should enable CLOs to develop with much greater certainty about RESPA consequences and with few restrictions on reasonable pricing and compensation. It also states that these actions should lead to faster development of

---

<sup>1</sup>In response to our inquiry, OMB staff advised that the rule could be "economically significant," and "major," because it could adversely affect competition. OMB also informed us that generally Regulation X matters had been designated "major rules" under Executive Order 12291.

CLOs, which should ultimately lead to greater consumer and producer surplus. The Analysis summarizes the two other Statements of Policy issued with the final rule.

In its submission, HUD states that its Analysis "reflects [its] assessment that (1) changes in the rule's treatment of employer/employee payments are desirable to prevent any abuse of the relationship of trust between consumers and providers of settlement services; and (2) the elimination of the exemption for payments by borrowers to CLOs enhance[s] the ability of firms to develop CLOs."

(ii) Actions relevant to the Regulatory Flexibility Act, 5 U.S.C. §§ 603-605, 607 and 609

In the preambles to the proposed and final rules, HUD states without elaboration<sup>2</sup> that "by approving [the rule the Secretary] certifies that [it] does not have a significant economic impact on a substantial number of small entities, other than those impacts specifically required to be applied universally by the RESPA statute."<sup>3</sup> 59 Fed. Reg. 37373; 61 Fed. Reg. at 29251. Accordingly, under 5 U.S.C. § 605(b), HUD did not prepare initial or final regulatory flexibility analyses. Sections 607 and 609 of title 5 were also inapplicable.

In the discussion of the Regulatory Flexibility Act, the preamble to the final rule states that HUD's Economic Analysis considers the impact of the rule on small entities. *Id.* In connection with the employer/employee payments exemption, the Analysis indicates only that large firms are likely to find the practice of dedicating an individual to marketing affiliates' products more attractive than small firms. In connection with CLOs, the Analysis identifies potential concerns of small real estate firms and lenders, but also sets forth potential advantages of CLOs to those entities.

Section 605(b) states that the certification and explanatory statement shall be provided to the Chief Counsel for Advocacy of the Small Business Administration (SBA). In response to our inquiry, HUD staff explained that its procedures do not include providing a separate copy of the certification to SBA and that it did not do so in this instance. An SBA official has confirmed that some agencies follow this practice, and that SBA has not objected to it.

---

<sup>2</sup>Section 605(b) provides that if the head of an agency makes a certification under that section, the agency shall publish such certification in the Federal Register along with a succinct statement explaining the reasons for such certification.

<sup>3</sup>HUD staff explained that the exemptions at issue here would not have a significant economic impact on a substantial number of small entities, to the extent that such an impact could be determined.

(iii) Agency actions relevant to sections 202-205 of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. §§ 1532-1535

In its submission, HUD explains that the final rule is not likely to result in annual expenditures of \$100 million or more by State, local, or tribal governments in the aggregate, or by the private sector. Therefore, sections 202 and 205 of the Unfunded Mandates Reform Act of 1994 are inapplicable.

In addition, the final rule does not affect small governments or contain a significant intergovernmental mandate. Accordingly, sections 203 and 204 of the act, which require agencies to consult with small governments and solicit input from State, local, and tribal governments, are also inapplicable.

(iv) Other relevant information or requirements under Acts and Executive orders

Administrative Procedure Act, 5 U.S.C. §§ 551 et seq.

HUD promulgated the Amendments to Regulation X under the notice and comment procedures of 5 U.S.C. § 553.

In 1993, HUD determined that a review of certain policies embodied in the controversial 1992 rule would be useful prior to promulgation of a proposed rule. 61 Fed. Reg. at 29239. Therefore, on July 6, 1993, HUD published a "notice of written comment period and informal public hearing." 58 Fed. Reg. 36176. On August 6, 1993, HUD conducted a public hearing, which produced testimony and documents from 36 interested parties; in addition, HUD received 1,526 comments on the matters at issue. 61 Fed. Reg. at 29240.

HUD published a proposed rule on July 21, 1994. 59 Fed. Reg. at 37360. In the preamble to the proposed rule, HUD discussed the comments received in response to its July 6, 1993 solicitation and invited further comments. See 59 Fed. Reg. at 37360, 37362-73. In addition, following promulgation of the proposed rule, HUD conducted an open house for operators of CLOs. The open house was designed to allow operators to demonstrate their systems to HUD and to the public. 61 Fed. Reg. at 29240. Further, in August and September 1995, HUD convened two working group meetings of interested industry, government, and public officials to obtain their input and to further explore the status of CLOs. Id.

According to the preamble to the final rule, HUD received 354 comments on the proposed rule. Id. at 29241. Throughout the preamble to the final rule, HUD discusses and responds to issues raised during the comment period, as well as the information gathered during the open house and subsequent working group sessions. See 61 Fed. Reg. at 29241-51.

## Paperwork Reduction Act, 44 U.S.C. §§ 3501-3520

The final rule continues a requirement that, in controlled business situations, people making referrals of settlement services make certain disclosures to those being referred. Under the Paperwork Reduction Act, these disclosure requirements are to be submitted by HUD to OMB for approval. HUD had believed that the controlled business disclosure requirements were included in a RESPA information collection submission last approved by OMB on May 6, 1994 (2502-0265). The final rule did not substantially modify the requirements for the controlled business disclosure and, therefore, HUD did not submit the disclosure requirements to OMB in connection with this rulemaking.

HUD has discovered that the controlled business disclosures, which are mandated in section 8(c)(4)(A) of RESPA, 12 U.S.C. § 2607(c)(4)(A), were omitted from the RESPA submission approved by OMB in 1994. HUD has begun to take the steps necessary to rectify this problem, including preparation and publication of a correction to the final rule and proper submission of the controlled business disclosure requirements for OMB review and public comment.

## Statutory authorization for the rule

HUD promulgated these amendments to Regulation X and accompanying Statements of Policy under the authority in section 19 of RESPA, 12 U.S.C. § 2617. Section 8(c)(5) of RESPA, 12 U.S.C. § 2607(c)(5), permits HUD to exempt "other payments or classes of payments" from RESPA's prohibition on compensated referrals, after consulting with specified Federal agencies. Section 19(a), 12 U.S.C. § 2617(a), authorizes HUD to grant "reasonable exemptions for classes of transactions, as may be necessary to achieve the purposes of [RESPA]." The preamble to the final rule states that HUD consulted with other Federal agencies, as required by section 8(c)(5). 61 Fed. Reg. at 29245.

## National Environmental Policy Act of 1969

The preambles to both the proposed and final rules reflect HUD's finding that the rule will not have a significant impact on the environment. 59 Fed. Reg. at 37373; 61 Fed. Reg. at 29251. Accordingly, HUD did not prepare an environmental impact statement in connection with this rule.

## Executive Order 12866

OMB reviewed the Amendments to Regulation X and accompanying Statements of Policy under Executive Order 12866 as a "significant regulatory action." HUD staff advised that, after submission to OMB, HUD made technical, editorial, and clarifying changes to the rule, which OMB also approved.

## Other Executive Orders

In response to our inquiry, HUD staff advised that HUD reviewed the rule under Executive Order 12988 (Civil Justice Reform). We note that the final rule does clearly specify its affects on existing regulations. In addition, the preambles to the proposed and final rules address Executive Orders 12612 (Federalism) and 12606 (the Family). With respect to the Federalism Order, they state that HUD has determined that the policies contained in the rule will not have substantial direct effects on States or their political subdivisions, or the relationship between the Federal government and the States, or on the distribution of power and responsibilities among the various levels of government. As a result, the rule is not subject to review under that Order. With respect to the Family Order, the preambles similarly state HUD's determination that the rule does not have the potential for a significant impact on family formation, maintenance, and general well-being, and, thus, is not subject to review under the Order. 59 Fed. Reg. at 37373-4; 61 Fed. Reg. at 29251. Further, the Executive Orders on property rights (12630), intergovernmental partnership (12875), and environmental justice (12948) are similarly inapplicable.

In its submission, HUD did not identify any other statute or executive order imposing procedural requirements relevant to the rule.