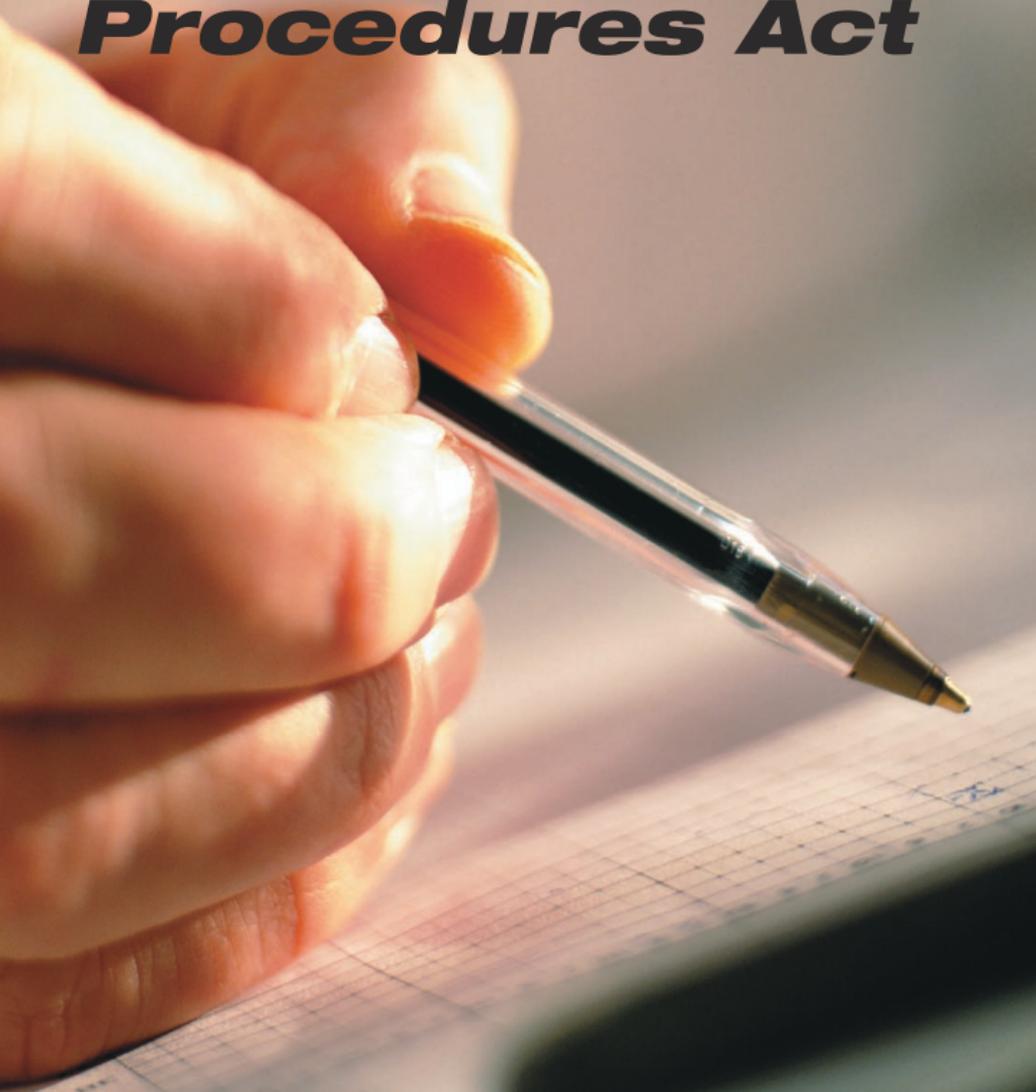


RESPA

A Guide to Complying with the Real Estate Settlement Procedures Act



NATIONAL ASSOCIATION
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RESPA

***A Guide to
Complying with
the Real Estate
Settlement
Procedures Act***



NATIONAL ASSOCIATION
OF REALTORS®

The Voice for Real Estate®

REGULATORY AND INDUSTRY RELATIONS

The NAR Regulatory and Industry Relations Department is the vehicle for representing REALTORS® and the real estate industry in today's changing regulatory business environment. The Department's focus includes: Housing, Financial, Business, Commercial and Environmental Affairs; Industry Relations; and Housing Opportunities. The group's mission is to enhance NAR's regulatory policy presence in Washington D.C., establish and coordinate formal relations with pertinent industry organizations and groups, and conduct long-term policy analysis, with special emphasis on how the real estate industry will be affected by federal regulations. This mission elevates the Association's regulatory and industry relations efforts to unprecedented levels.

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INTRODUCTION

In 1974, Congress enacted the Real Estate Settlement Procedures Act (RESPA) as a consumer disclosure and anti-kickback statute. As a result, RESPA serves four primary purposes:

RESPA requires disclosures that list settlement costs to be given to homebuyers and sellers.

RESPA eliminates abusive practices, such as kickbacks and referral fees, which increase the costs paid by consumers.

RESPA reduces the amounts that homebuyers must place in escrow accounts.

RESPA reforms and modernizes local recordkeeping and land title information.

This guide is designed to provide an introduction to RESPA's requirements and prohibitions affecting real estate brokers and agents. Part 1 of this guide briefly explains the scope of the Act, the general prohibition on kickbacks and referral fees under Section 8 of RESPA, exceptions to Section 8, penalties available for RESPA violations, and significant enforcement actions settled by the U.S. Department of Housing and Urban Development (HUD or Department). Part 2 contains examples of activities permitted and not permitted under Section 8 of RESPA.

Please be aware that RESPA requires certain consumer disclosures, including a HUD-1 Settlement Statement, a Good Faith Estimate, Special Information Booklets, Transfer of Servicing notices, and Escrow Account statements. Since real estate brokers and

agents are not responsible for providing these disclosures, this guide does not review the disclosure requirements under RESPA.

Moreover, please be aware that many states have enacted laws with similar prohibitions and consumer protections as provided under RESPA. This guide discusses only the federal requirements of RESPA and does not take into consideration any additional regulations that may have been imposed on the state level. It is possible that state laws may prohibit activities that are permissible under RESPA, and we recommend that you consult with a RESPA attorney to ensure that you comply with all applicable laws. This guide is not intended to provide you with legal advice as to the matters discussed herein.

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PART 1

SCOPE OF RESPA

RESPA applies to **settlement services**.^{*} Settlement services are provided by settlement service providers. Settlement services are things associated with the purchase of a home that occur at or before settlement. If the service occurs *after* settlement, it is generally *not* considered a settlement service. Settlement services include the following:

- Real estate broker or agent services**
- Services related to the issuance of a title insurance policy**
- Origination of a mortgage loan**
- Services rendered by a mortgage broker**
- Services related to origination, processing, or funding of a mortgage loan**
- Services rendered by an attorney**
- Document preparation, including notarization, delivery, and recordation**
- Rendering credit reports and appraisals**
- Rendering inspections**
- Settlement or closing**
- Services involving hazard, flood, or other casualty insurance or homeowners' warranties**
- Services involving real property taxes or other assessments or charges on real property**
- Any other services that a settlement service provider requires a borrower to pay for before or at closing**

^{*}Terms appearing in italics are further defined in the Glossary to this guide.

RESPA, therefore, governs the activities of a person or entity that provides any of the services listed above, including real estate brokers and agents.

RESPA does not apply to:

- *Transactions that are primarily for business, commercial, or agricultural purposes*
- *Government or governmental agencies or instrumentalities*
- *Temporary financings*
- *Secondary market transactions*

ANTI-KICKBACK PROVISIONS

Section 8 of RESPA prohibits referral fees and kickbacks to settlement service providers because these fees raise the cost of services to consumers. Section 8 is divided into four parts:

- *Section 8(a) prohibits referral fees*
- *Section 8(b) prohibits the splitting of unearned fees*
- *Section 8(c) lists exceptions to the prohibitions in Sections 8(a) and (b)*
- *Section 8(d) governs the enforcement of RESPA*

Section 8(a) – Prohibition Against Referral Fees

Section 8(a) prohibits a person from giving or receiving any fee, kickback, or thing of value pursuant to any written or oral agreement or understanding that business involving a real estate settlement service and a federally related mortgage loan will be referred to any person.

Four elements are required for a Section 8(a) violation:

1. A settlement service involving a **federally related mortgage loan**. RESPA defines a federally related mortgage loan as a loan secured by a first or subordinate lien on a one-to-four family residential dwelling (including manufactured homes) that meets certain other criteria. A federally related mortgage loan means *any* loan that places a lien on a one-to-four family property and includes both government-insured and conventional mortgage loans.
2. A **referral** of business incident to or part of a settlement service pursuant to an **agreement** or **understanding**

Please be aware that the agreement or understanding does not have to be written or verbalized, but may be established by practice, pattern, or course of conduct.

3. Payment or receipt of a fee or **thing of value**

HUD's regulations provide that a fee or thing of value is virtually anything one receives in consideration for referring a settlement service, including, but not limited to:

- Money or fees
- Discounts
- Duplicate payments of a charge
- Stock, dividends, distribution of profits
- Credits representing money that may be paid at a future date
- Opportunity to participate in a money-making program
- Retained or increased earnings
- Increased equity in a parent or subsidiary entity
- Special bank deposits or accounts, or special or unusual banking terms
- Services of all types at special or free rates

- Lease or rental payments based in whole or in part on the amount of business referred
- Trips and payment of another person's expenses
- Reduction in credit against an existing obligation

4. For the referral of settlement service business

Section 8(b) – Prohibition Against Splitting Unearned Fees

In addition to the prohibition on kickbacks and referral fees, RESPA prohibits a person from *giving and receiving* any portion, split, or percentage of any fee charged or received for a real estate settlement service in connection with a federally related mortgage loan, unless the portion of the fee is for services actually performed.

Three elements are required for a Section 8(b) violation:

- *A settlement service involving a federally related mortgage loan*
- *A split of an unearned fee between two or more parties or a mark-up of an unearned fee*
- *A payment for the referral of business, rather than for services actually performed*

Some federal circuit courts have interpreted Section 8(b) differently from HUD. The Seventh, Fourth, and Eighth Circuits have concluded that Section 8(b) requires an *actual split* of the unearned portion of a fee between two or more parties in order for a Section 8(b) violation to occur. For example, a lender orders a credit report, which costs \$15. The lender charges the consumer \$25 for the credit report, pays the credit bureau \$15 for the cost of the report and retains the \$10 excess. The lender then pays the real estate agent who referred the consumer \$5 from the \$10 excess. In this

example, the \$10 represents the unearned portion of a credit report fee, and the \$5 payment to the agent qualifies as an actual split in violation of RESPA.

HUD, however, does not require a split of a fee to find a Section 8(b) violation, and the Eleventh, Second, and Third Circuits have agreed with HUD. HUD issued a policy statement, which describes three scenarios where a Section 8(b) violation would occur:

- *Two or more persons split a fee and one person did not perform any services to receive a share of the fee*
- *One person marks up the cost of a third-party service and keeps the difference without providing any goods or services to justify the additional charge*
- *One person charges a fee for no, nominal or duplicative work, or a fee that exceeds the value of the goods or services provided*

Using the example above, HUD would take the position that the lender's mark up of a \$15 credit report fee to \$25, and retention of the \$10 extra, is all that is required to constitute a violation of Section 8(b).

Section 8(c) – Exceptions to the Anti-Kickback Prohibitions

Despite the prohibitions in Section 8 of RESPA, Congress understood that a number of business referrals that occur in the settlement service industry do not harm consumers. As a result, Congress permitted certain conduct to be exempt from RESPA and HUD's scrutiny. If a fee or thing of value is paid under one of these exceptions, the person or entity does not violate RESPA. These exceptions are listed on the next page.

1. Cooperative agreements between listing and selling real estate brokers

This exception refers only to fee divisions within real estate brokerage arrangements when all parties are acting in a real estate brokerage capacity. Please be aware that this exception has no applicability to fee arrangements between real estate brokers and mortgage brokers, or between mortgage brokers.

2. Payments to an attorney for services actually rendered

3. Payments by a title company to its duly appointed title agent for services performed in the issuance of a title policy

To qualify for this exception and receive compensation as a title agent, an entity must perform “core title services” and be liable to its insurer for any negligence in connection with the issuance of a defective title policy. Core title services include:

- Examination and evaluation of the title evidence to determine insurability
- Preparation and issuance of the title commitment
- Clearance of underwriting objections
- Preparation and issuance of the title policy
- Handling of closing or settlement where the closing is part of an all-inclusive title insurance rate

4. Payments by a lender to its duly appointed agent for services performed in the making of a loan

This exception is unclear and there is little explanation provided in the statute, regulations, or legislative history regarding the meaning of the exception.

5. Payments by an employer to its employee

Under this exception, an employer may pay its own employees for any referral activities. The referred party, however, may not pay the employee or reimburse the employer for the employee's referral.

HUD has not articulated a position on who constitutes an "employee" under RESPA. Nevertheless, if a person satisfies all Internal Revenue Service requirements for employment, a reasonable basis exists to conclude that he or she will be considered an employee under RESPA. These employment requirements include, to name a few:

- Employee is subject to employer's supervision and control
- Employee maintains a physical presence at the employer's office
- Employee uses employer's office supplies and equipment
- Employee works a set number of hours for employer
- Employee receives paychecks and W-2 forms from employer

It is important to emphasize that real estate agents are typically considered independent contractors and not employees, and, therefore, are not eligible for this exception.

6. Payments for services actually rendered or goods actually provided

To qualify for this exception, a real estate broker or agent must satisfy a two-part test:

1. Actual, necessary, and distinct goods or services must be provided
2. The compensation must be reasonably related to the goods and services provided.

With regard to actual goods and services:

- A title agency must perform core title services.
- A mortgage broker must take a loan application *and* perform at least 5 of the following 13 additional items:
 - Analyze the borrower’s income and debt, and pre-qualify the borrower to determine the maximum allowable mortgage.
 - Educate the borrower in the home buying and financing process, advise him or her about different types of available loan products, and demonstrate how closing costs and monthly payments differ for different products.
 - Collect financial information (tax returns, bank statements) and other related documents.
 - Initiate and order Verifications of Employment and Deposit.
 - Initiate and order requests for mortgage and other loan verifications.
 - Initiate and order appraisals.
 - Initiate and order inspections or engineering reports.
 - Provide disclosures to the borrower.
 - Assist the borrower in understanding and clearing credit problems.
 - Maintain regular contact with the borrower, real estate agents, and lender between the time of application and closing, and gather any additional information as needed.
 - Order legal documents.

- Determine whether the property was located in a flood zone or order such service.
- Participate in the loan closing.

If a mortgage broker takes a loan application and performs counseling-type services, HUD will consider the following additional factors to ensure that meaningful counseling is performed and that a broker is not compensated for steering a customer to a particular lender:

- The entity furnishes the borrower an opportunity to consider products from at least 3 different lenders
 - The entity receives the same compensation regardless of which lender's products are ultimately selected
 - Any payment for the counseling services is reasonably related to the services performed and not based on the amount of loan business referred to a particular lender
- HUD does not define core services for other types of settlement services providers. Nevertheless, numerous other goods, such as rental of a desk in a real estate broker's office, services performed by a real estate broker or agent for other settlement service providers, or goods provided, such as software technical support, can qualify for the exception, as long as the services are actual, necessary, and distinct from services already being provided by the real estate broker or agent.

With regard to the compensation paid, it must be reasonably related to the value of the goods or services provided.

HUD has not offered meaningful guidance as to how to determine the reasonableness of a particular fee. The Department, however, has indicated that it may be appropriate to consider fees generally charged in the marketplace for the service provided or the internal cost of providing the service. Determining fair market value is a business decision that a real estate broker or agent must be able to defend should HUD or a court question its reasonableness.

Please be aware, however, that RESPA is not a rate-setting statute and does not prescribe how much a real estate broker or agent may charge. As noted above, RESPA requires that a fee be commensurate with the value of the services provided.

7. Payments among *affiliated business arrangements* (AfBAs)

In 1993, RESPA was amended to permit two settlement service providers to own other settlement service providers or enter into a joint venture operation, so long as the AfBA adheres strictly to RESPA requirements and guidelines. Thus, if a real estate broker refers customers to a title insurance agency in which the real estate broker owns a 50% interest, this arrangement qualifies as an AfBA. Generally, this exception permits the AfBA owners to receive a return on their ownership interest in the AfBA, and these payments are not considered to be referral fees.

To comply with RESPA, an AfBA must meet the following requirements of a safe harbor test:

- The AfBA owner who refers business to the AfBA must provide a written disclosure on a separate sheet of paper of the existence of the arrangement along with a written estimate of the charge or range or charges imposed by

the AfBA no later than the time of the referral.

- The customer being referred must not be *required to use* any particular provider of settlement services.
- No payments, other than a return on ownership interest or payments otherwise permitted under the statute may be received under the arrangement.

In addition to meeting the three-part safe harbor test, an AfBA must be a bona fide provider of settlement services, rather than a “sham” business used to disguise referral fees. HUD issued a Statement of Policy that lists several factors to be used to determine if an AfBA is a bona fide provider of settlement services. Please note that an AfBA does not have to meet all factors to be lawful, and no one particular factor will determine whether an AfBA is legitimate. These factors are summarized below:

- An AfBA must have sufficient initial capital, typical in the industry, to conduct the settlement service business for which it was created.
- The AfBA must have its own employees.
- The AfBA must either manage its own affairs or, if one of its owners provides management services, pay such owner the fair market value of its services.
- The AfBA must have its own office space so that the public can clearly identify the entity with which it is doing business. If an AfBA rents space from an owner, it must pay fair market rent to the owner for the space and facilities used.
- The AfBA must provide “substantial services,” or the essential functions and types of services generally performed by the type of entity at issue. For example, in the case of a joint venture title

insurance agency, these substantial services are termed “core title services.”

- The AfBA must perform all “substantial services” itself and may not subcontract out such functions. Non-substantial services may be subcontracted out, which include, for example, those related to management, accounting, and human resources.
- The AfBA must actively compete in the marketplace for business and attempt to market its services to others besides its joint venture partners.

An entity that meets both the safe harbor test and performs the functions of a bona fide business will satisfy the AfBA requirements. As a result, such an entity may refer business to and receive dividends from an affiliated settlement service provider without risk of violating Section 8.

Please refer to ***Affiliated Business Arrangements, A Guide to Complying with the Real Estate Settlement Procedures Act*** (item #126-120) for more information on RESPA’s requirements.

Section 8(d) – Enforcement of Section 8

Real estate brokers and agents should be aware that RESPA authorizes harsh penalties for those in violation of Section 8. Specifically, to enforce the prohibitions against kickbacks and the splitting of fees, Section 8(d) gives HUD the authority to impose the following penalties:

- *Civil and criminal penalties*
- *Imprisonment for up to one year*
- *A fine of up to \$10,000*

- *Both imprisonment and a fine*
- *Treble damages, which means a person who violates Section 8 of RESPA must pay three times the amount of the charge for the settlement service involved in the violation*

RESPA also authorizes the following entities or persons to sanction violators:

- *State attorney generals and state insurance commissioners*
- *HUD, in the case of FHA-insured or VA-guaranteed loans*
- *Consumers*

If a person or entity violates the anti-kickback provisions of RESPA, a consumer has one year to bring an action in court in connection with the violation. The government, however, may bring an action within three years of the violation. Business competitors have no standing to bring a law suit to enforce RESPA.

Over the past couple of years, HUD has increased its enforcement staff and stepped up its pursuit of RESPA violators. From these efforts, note that HUD often has focused its enforcement efforts on real estate brokers and affiliated business arrangements. For example, in a July 28, 2003 press release, HUD announced a settlement agreement with a savings bank, which allegedly paid up to \$100 to real estate agents for filling out and submitting on-line applications for prospective borrowers. Under the settlement, the bank agreed to discontinue the practice and paid a fine to the U.S. Treasury. The Department stated that “HUD has long considered that a real estate agent may not be compensated for merely filling out a loan application” and that such “compensation may even be considered a fee for the referral of business in violation of Section 8(a) of RESPA.” A few months later, HUD announced a similar settlement for alleged payments to real estate agents for allegedly



taking loan applications. This lender agreed to pay the government \$15,000 as a settlement.

HUD also has pursued real estate brokers and agents for accepting website “virtual tours” of broker properties paid for by various title companies. In two separate settlement agreements, real estate brokers agreed to pay \$5,200 and \$14,000 respectively to settle HUD’s allegations and to discontinue all such practices. In addition, HUD has pursued real estate brokers for accepting conference room rental fees in excess of fair market value. According to the Department, any portion of the rental fee received above fair market value constituted an alleged fee for the referral of business. Two real estate brokers agreed to pay HUD \$45,000 and \$15,000.

Moreover, as real estate brokers and agents often maintain ownership interests in joint ventures, HUD’s recent enforcement efforts involving affiliated business arrangements are of particular concern. For example, on March 21, 2005, HUD announced a settlement with several entities that owned a joint venture settlement company. One such entity was comprised of real estate agents and distributed its profits from the joint venture based on the agents’ volume of referrals. HUD alleged that these payments constituted referral fees, rather than returns on an ownership interest, and the parties agreed to pay \$325,000 and to modify certain business practices. Most recently, HUD entered into a settlement agreement with an Atlanta-based real estate broker for alleged payments to real estate agents. Specifically, HUD alleged that the broker provided agents with relocation services, paid commissions immediately at closing, offered incentives, such as trips and baseball tickets, and paid higher commissions in exchange for referrals to the broker’s affiliated business. The real estate broker agreed to pay a \$250,000 fine.



Based on these actions, if you encounter an issue in your day-to-day operations that raises a question under RESPA, it is important that you seek additional resources and legal advice, if necessary. As you have read, RESPA violations can carry serious consequences, and it is imperative that you be aware of possible RESPA issues at all times.

Please contact NAR, or visit our website at **www.REALTOR.org/RESPA** for more informational materials on RESPA compliance.

PART 2

RESPA QUESTIONS AND ANSWERS

1. **QUESTION:** A real estate agent is sponsoring an open house for other agents. A local title agency reimburses the real estate agent for the cost of a luncheon and the title agency does not market its title services at the open house. Is this a violation of Section 8 of RESPA?

ANSWER: Yes, this is a violation of RESPA. By reimbursing the real estate agent for the cost of the luncheon, the title agency has given the real estate agent a thing of value in consideration for the referral of business. Both the title agency and the real estate agent could be held responsible for the RESPA violation. If, however, the real estate agent attends the open house to make a presentation or to otherwise market its services, such payments may be lawful under RESPA.

2. **QUESTION:** A real estate broker and a mortgage lender agree to jointly place a full-page advertisement in a local newspaper. Each company gets exactly one-half of the page to advertise its services. Each company pays one-half of the cost of the advertisement. Is this a violation of Section 8 of RESPA?

ANSWER: No, this appears to comply with RESPA. As long as the advertising costs paid by each party are reasonably related to the value of the goods or services received in return (i.e., the amount of advertising), no violation exists. HUD has

recognized that “[n]othing in RESPA prevents joint advertising[,]” but the Department takes the position that “if one party is paying less than a pro rata share for the brochure or advertisement, there could be a RESPA violation.” *

- 3. QUESTION:** The owner of a title agency meets the owner of a real estate brokerage firm for dinner at a local restaurant. The purpose of the dinner is for the two individuals to discuss future marketing opportunities. After the discussion has ended, the owner of the title agency pays for the real estate broker’s dinner. Is this a violation of Section 8 of RESPA?

ANSWER: No, this appears to comply with RESPA. The owner of the title agency can pay for dinner and not violate RESPA because the purpose of the dinner was business related and was not a payment for the referral of business.

- 4. QUESTION:** A buyer’s real estate agent couriers a purchase agreement to a seller’s real estate agent and pays a \$15 courier fee. The real estate broker charges the buyer \$25 for the courier service and keeps the remaining \$10 for its own use. Is this a violation of Section 8 of RESPA?

ANSWER: Yes, this could be a violation of RESPA. According to HUD, marking up the \$15 fee and keeping the extra \$10 is a violation of RESPA if the real estate broker did not perform additional services to justify the \$10 mark up.

* HUD Website, Frequently Asked Questions About RESPA For Industry, <http://www.hud.gov/offices/hsg/sfh/res/resindus.cfm>.

5. QUESTION: A mortgage lender devises a contest among local real estate agents where the real estate agent that refers the most customers to the lender will receive a vacation cruise to Alaska. Is this a violation of Section 8 of RESPA?

ANSWER: Yes, this is a violation of RESPA. The vacation cruise is a thing of value in exchange for the referral of business and violates Section 8's anti-kickback provisions. Both the mortgage lender and the real estate agents can be held responsible for the violation under RESPA.

6. QUESTION: "A" is a real estate broker who refers business to its affiliate title company "B." "A" provides its customers with an affiliated business disclosure that lists the range of charges that "B" will charge for title services, states that "A" has a financial interest in "B," and notifies the customer that he or she is not required to use "B" for title services. Does this violate Section 8 of RESPA?

ANSWER: No, this complies with RESPA. The referrer of business to an affiliated entity is required to provide a written disclosure to each consumer that identifies the affiliated relationship, provides the charges or range of charges that the joint venture generally charges, and notifies the consumer that he or she is not required to use the affiliated business.

7. QUESTION: Real estate broker "A" and title insurance company "B" create an affiliated title agency "C." "C" pays annual dividends to "A" and "B" in proportion to the amount of business that each refers to "C" during the year. Is this a violation of Section 8 of RESPA?

ANSWER: Yes, this is a violation of RESPA. An affiliated business may only pay its partners in annual dividends that are based on the amount of stock held by the partners. RESPA prohibits the payment of dividends based on the amount of business referred or expected to be referred to an affiliated business.

8. **QUESTION:** A title company places a fax machine in the office of a real estate broker to expedite the process of placing title orders with the title company. The title company expects that the real estate broker will refer business to the title company if the broker can quickly send information to the title company. The fax machine is used only for communication between the real estate broker and the title company. The real estate broker has a separate fax machine for general business. Is this a violation of Section 8 of RESPA?

ANSWER: No, this appears to comply with RESPA. The title company provides the fax machine in exchange for actual services from the real estate broker and the fax machine is dedicated to business conducted only with the real estate broker. If, however, the real estate broker uses the fax machine both for business with the title company and its general real estate business, this may constitute a violation of RESPA.

9. **QUESTION:** A settlement agent conducts real estate closings in the conference room of the real estate broker with the expectation that the real estate broker will refer closing business to the settlement agent. The settlement agent

pays fair market value to rent the conference room for each closing. Is this a violation of Section 8 of RESPA?

ANSWER: No, this appears to comply with RESPA. HUD has determined that a settlement service provider may rent a conference room or other office space from another settlement service provider, as long as it pays fair market value to rent the space. HUD also has stated that fair market value should be based on what a non-settlement service provider would pay for the same amount of space and services in the same or a comparable building.

10. QUESTION: A real estate broker pays its real estate agents \$20 for each referral the agents make to the real estate broker's affiliated mortgage company. Is this a violation of Section 8 of RESPA?

ANSWER: Yes, this is a violation of RESPA. Although RESPA provides an exception for payments made from an employer to its employees, payments between a real estate broker and its real estate agents do not qualify for this exception. Real estate agents are considered independent contractors, rather than employees of the real estate broker. As a result, the \$20 payments described above constitute payments in return for the referral of business in violation of RESPA.

11. QUESTION: A homeowner's insurance company gives a real estate broker marketing materials, such as desk calendars, pens, and notepads, all of which promote the homeowner's insurance company's name. Is this a violation of Section 8 of RESPA?

ANSWER: No, this appears to comply with RESPA. HUD's RESPA regulations provide an exception to Section 8 for normal promotional and educational activities that are not conditioned on the referral of business and that do not defray expenses that otherwise would be incurred by persons in a position to refer settlement service business.

12. QUESTION: A mortgage lender occupies an office in a real estate broker's business in order to pre-qualify customers for mortgage financing. Occasionally, real estate agents take loan applications from their customers and receive \$40 in return for each application. Is this a violation of Section 8 of RESPA?

ANSWER: Yes, this may be a violation of RESPA, according to HUD. HUD has taken the position that to be compensated as a mortgage broker, a person must take a loan application and perform at least five additional services in order to receive payment. Thus, if a real estate agent takes the loan application, but does not perform any other functions, he or she cannot receive payment under RESPA.

GLOSSARY

Affiliated Business Arrangement

An arrangement in which:

- *A person who is in a position to refer business incident to or a part of a real estate settlement service involving a federally related mortgage loan, or an associate of such person, has either an affiliate relationship with or a direct or beneficial ownership interest of more than one percent in a provider of settlement services*
- *Either of such persons directly or indirectly refers such business to that provider or affirmatively influences the selection of that provider.*

12 U.S.C. § 2602(7).

Affiliate Relationship

The relationship among business entities where one entity has effective control over the other by virtue of a partnership or other agreement or is under common control with the other by a third entity or where an entity is a corporation related to another corporation as parent to subsidiary by an identity of stock ownership.

24 C.F.R. § 3500.15(c)(2).

Agreement or Understanding

An agreement or understanding for the referral of business incident to or part of a settlement service need not be written or verbalized but may be established by practice, pattern, or course of conduct. When a thing of value is received repeatedly and is connected in any way with the volume or value of the business referred, the receipt of the thing of value is evidence that it is made pursuant to an agreement or understanding for the referral of business. 24 C.F.R. § 3500.14(e).

Associate

One who has one or more of the following relationships with a person in a position to refer settlement business:

- *A spouse, parent, or child of such person*
- *A corporation or business entity that controls, is controlled by, or is under common control with such person*
- *An employer, officer, director, partner, franchisor, or franchisee of such person*
- *Anyone who has an agreement, arrangement, or understanding, with such person, the purpose or substantial effect of which is to enable the person in a position to refer settlement business to benefit financially from the referrals of such business.*

12 U.S.C. § 2602(8).

Federally Related Mortgage Loan

Any loan (other than temporary financing such as a construction loan) which:

- (A) Is secured by a first or subordinate lien on residential real property (including individual units of condominiums and cooperatives) designed principally for the occupancy of from one to four families, including any such secured loan, the proceeds of which are used to prepay or pay off an existing loan secured by the same property
- (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
 - (ii) Is made in whole or in part, or insured, guaranteed, supplemented, or assisted in any way, by the Secretary [of HUD] 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 [of HUD] or a housing or related program administered by any other such officer or agency

(iii) Is intended to be sold by the originating lender to the Federal National Mortgage Association, the Government National Mortgage Association, the Federal Home Loan Mortgage Corporation, or a financial institution from which it is to be purchased by the Federal Home Loan Mortgage Corporation

(iv) Is made in whole or in part by any “creditor,” as defined in section 1602(f) of title 15 [Truth in Lending 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 chapter, the term “creditor” does not include any agency or instrumentality of any State.

12 U.S.C. § 2602(1).

Referral

A referral includes any oral or written action directed to a person which has the effect of affirmatively influencing the selection by any person of a provider of a settlement service or business incident to or part of a settlement service when such person will pay for such settlement service or business incident thereto or pay a charge attributable in whole or in part to such settlement service or business. A referral also occurs whenever a person paying for a settlement service or business incident thereto is required to use a particular provider of a settlement service or business incident thereto. 24 C.F.R. § 3500.14(f).

Required Use

A situation in which a person must use a particular provider of a settlement service in order to have access to some distinct service or property, and the person will pay for the

settlement service of the particular provider or will pay a charge attributable, in whole or in part, to the settlement service. However, the offering of a package (or combination of settlement services) or the offering of discounts or rebates to consumers for the purchase of multiple settlement services does not constitute a required use. Any package or discount must be optional to the purchaser. The discount must be a true discount below the prices that are otherwise generally available, and must not be made up by higher costs elsewhere in the settlement process. 24 C.F.R. § 3500.2(b).

Settlement Services

Any service provided in connection with a real estate settlement including, but not limited to, the following: title searches title examinations, the provision of title certificates, title insurance, services rendered by an attorney, the preparation of documents, property surveys, the rendering of credit reports or appraisals, pest and fungus inspections, services rendered by a real estate agent or broker, the origination of a federally related mortgage loan (including, but not limited to, the taking of loan applications, loan processing, and the underwriting and funding of loans), and the handling of the processing, and closing or settlement. 12 U.S.C. § 2602(3).

Thing of Value

Any payment, advance, funds, loan, service, or other consideration. 12 U.S.C. § 2602(2).

It includes, without limitation, monies, things, discounts, salaries, commissions, fees, duplicate payments of a charge, stock, dividends, distributions of partnership profits, franchise royalties, credits representing monies that may be paid at a future date, the opportunity to participate in a money-making program, retained or increased earnings, increased equity in a parent or subsidiary entity, special bank deposits or accounts, special or

unusual banking terms, services of all types at special or free rates, sales or rentals at special prices or rates, lease or rental payments based in whole or in part on the amount of business referred, trips and payment of another person's expenses, or reduction in credit against an existing obligation. 24 C.F.R. § 3500.14(d).

FEDERAL INFORMATION RESOURCES

For more information on RESPA and HUD's regulation of real estate brokers and agents, please visit:

http://www.hud.gov/offices/hsg/sfh/res/respa_hm.cfm

or contact HUD's RESPA Enforcement Office at:

U.S. Department of
Housing and Urban Development
Office of Consumer and Regulatory Affairs
Interstate Land Sales/RESPA Division
Room 9146
451 Seventh Street, SW
Washington, DC 20410

Tel: (202) 708-4560

Fax: (202) 708-4559

Email: hsg-respa@hud.gov

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