

## **HUD RESPONSES TO RESPA QUESTIONS: REAL ESTATE AGENT AND OTHER SETTLEMENT SERVICES**

### **Q. Can real estate agents be compensated as loan officers if they perform services identified in Statement of Policy 1999-1 (64 Fed. Reg. 10080, March 1, 1999)?**

A. When a person who is in a position to refer settlement service business, such as a real estate agent, receives compensation for providing additional services as part of a real estate transaction, such compensation must be bona fide and for services that are actual, necessary, and distinct from the primary services provided by such person. 24 C.F.R. 3500.14(g)(1)(iv) and (3). The referral of settlement service business is not a compensable service (see 24 C.F.R. 3500.14(b)). Therefore, payment (and receipt of payment) of an amount in excess of the amount that would be reasonably related to the market value for the origination services provided by a real estate agent may be used as evidence of payment for a referral or of an unearned fee, in violation of Section 8 of RESPA. See 24 C.F.R. 3500.14(g)(2). Similarly, the real estate agents cannot be compensated for loan origination if they do not provide any loan origination services or if they provide only nominal loan origination services, and they cannot be compensated for performing loan origination services for which a duplicative fee is charged. See 24 C.F.R. 3500.14(c). If a real estate agent normally would provide such services on behalf of his or her customers anyway, additional compensation for "loan origination" services would violate RESPA and HUD's implementing regulations..

In deciding on reasonable compensation for bona fide loan origination services provided by a real estate agent, the loan originator in the transaction and the real estate agent may find guidance in Statement of Policy 1999-1. In that Statement of Policy, HUD quoted from a letter it had previously issued identifying 14 services normally performed in the origination of a loan. Both the letter, which addressed lenders that were brokering loans, and the 1999 policy statement, which applied to mortgage brokers, indicated that the mere taking of an application is not sufficient "loan origination" work to justify compensation under RESPA. Both also provided guidance on when HUD would take enforcement action under RESPA against lenders and mortgage brokers that received compensation for origination work. HUD generally would not take any action against lenders and mortgage brokers compensated for loan origination work if: (1) they took the loan application information; (2) they performed at least 5 additional services on, or akin to those on, the list of 14 services performed in origination; and (3) the compensation was reasonably related to the market value of the services that were performed. If a lender or mortgage broker is relying on taking the application and performing only "counseling type" activities to justify the compensation, HUD would also look to see that meaningful counseling, not steering, is provided. As reiterated subsequently, in Statement of Policy 2001-1 (66 Fed. Reg. 53052, Oct. 18, 2001), HUD does not consider either referrals or delivering a loan with a higher interest rate to be compensable services.

Before receiving compensation for loan origination work in a transaction, real estate agents should be familiar with the guidance to mortgage brokers on bona fide origination

services that is included in the 1999 and 2001 policy statements, as well as the HUD regulations set forth in the first paragraph of this response.

**Q. If the real estate agent is an employee of the mortgage lender, is there any limitation on what the mortgage lender may pay the real estate agent?**

A. As set forth in 24 C.F.R. 3500.14(g)(1)(iv), Section 8 of RESPA permits a payment to any person of a *bona fide* salary or compensation or other payment for goods or facilities actually furnished or for services actually performed. Therefore, the lender may pay an employee (including an employee who is a real estate agent) bona fide compensation for goods, facilities, and services actually provided.

In addition, 24 C.F.R. 3500.14(g)(1)(vii) provides that an employer's payment to its own employees for any referral activities is permitted under Section 8 of RESPA. Therefore, the lender may also compensate a bona fide employee (including an employee who is a real estate agent) for referral activities.

Clearly, identifying who is a bona fide employee is very important in determining what is and is not permitted under the RESPA regulations in this regard.

**Q. In deciding whether someone is an employee, what would be the most critical factors?**

A. As set forth in 24 C.F.R. 3500.14(g)(1)(iv), Section 8 of RESPA permits a payment to any person of a bona fide salary or compensation or other payment for goods or facilities actually furnished or for services actually performed. Therefore, in determining whether a particular payment qualifies as bona fide salary or compensation to an employee, HUD would first look to see whether actual work was performed. In addition, as discussed above, if the person being compensated is in a position to refer settlement service business, HUD would review whether the work for which the person is being compensated as an employee is actual, necessary, and distinct from the services for which the person receives compensation in another capacity, or whether the "employment arrangement" is merely a vehicle for paying kickbacks. Other factors often referenced as evidencing an employment relationship, such as the method of payment, provision of training and benefits, type of supervision, work schedule, and factors issued by the IRS, may be useful guidance in deciding whether someone is an employee, but are not necessarily determinative for purposes of RESPA.

**Q. A real estate agent becomes affiliated with a mortgage lender that is not in any way related to the real estate brokerage with which the real estate agent is associated. When offering to assist buyers with whom the real estate agent is working in securing financing for their purchase, what, if any, disclosure is required?**

A. The fact that the real estate brokerage is not directly affiliated with the mortgage lender does not affect the real estate agent's responsibilities under RESPA in this scenario. If the real estate agent is referring a customer to a mortgage lender with whom the real estate agent is affiliated, then the real estate agent should provide an affiliated business arrangement disclosure statement to the person being referred in accordance with 24 C.F.R. 3500.15(b)(1). In addition, to be compliant with the requirements of § 3500.15, the real estate agent cannot require the customer to use a particular mortgage lender, and the only thing of value that can be received by the real estate agent from the affiliated business arrangement with the lender, other than generally permitted compensation, is a return on an ownership interest. See 24 C.F.R. 3500.15(b)(2) and (b)(3).

**Q. Would paying compensation to a settlement service provider sooner than they would otherwise be paid violate RESPA if such payment is made because the settlement service provider used a particular company in the transaction?**

A. The question assumes compensation that is accelerated as a result of an agreement to refer settlement service business. Under Section 8(a) of RESPA, no person shall give and no person shall accept any fee, kickback, or thing of value pursuant to an agreement or understanding, oral or otherwise, that business incident to or a part of a real estate settlement service involving a federally related mortgage loan will be referred to any person. Accelerated payment of compensation is a "thing of value."

For example, if compensation to a settlement service provider is typically paid *after* the closing, then payment of such compensation *at* closing would constitute a "thing of value" because the compensation would be provided sooner than would otherwise occur, and, under the facts of the question, there would be a violation of Section 8(a).

**Q. Does RESPA permit a settlement service provider to make a donation to another settlement service provider's favorite charity in exchange for the referral of business?**

A. Under Section 8(a) of RESPA, no person may give and no person may accept any fee, kickback, or thing of value pursuant to an agreement or understanding that business incident to or a part of a real estate settlement service involving a federally related mortgage loan will be referred to any person.

The donation to the charity would be considered a "thing of value" given in exchange for the referral of business and, as such, would be prohibited under RESPA. The fact that the "thing of value" would be paid to a charity, and not directly to the referring settlement service provider, does not remove such a payment from RESPA's prohibitions since the referring settlement service provider is, in effect, receiving a "thing of value", i.e., a donation to his or her favorite charity.