

Real Estate Settlement Procedures Act (RESPA)

I. WHAT IS RESPA'S REFERRAL FEE PROHIBITION?

Section 8 of the Real Estate Settlement Procedures Act (RESPA) was enacted in 1974 for the purpose of prohibiting so-called "kickback" for the referral of residential settlement services that Congress determined could unnecessarily increase the cost of settlement services to consumers.

II. WHO ENFORCES RESPA?

The Department of Housing and Urban Development (HUD), in conjunction with State Attorneys General and State Insurance Commissioners. HUD's RESPA Enforcement Office receives hundreds to thousands of complaints alleging RESPA violations (primarily from competitors) every year. HUD's RESPA Enforcement Office can be contacted at:

Office of Consumer and Regulatory Affairs
Interstate Land State/RESPA Division
451 Seventh Street, S.W., Room 9146
Washington, D.C. 20410
202-708-4560, 202-708-4559 (f)
hsg-respa@hud.gov

Consumer also have a private right of action under Section 8 or RESPA. Recently, the plaintiff's bar has filed class actions on behalf of consumers to enforce Section 8 of RESPA privately.

III. WHAT ARE THE CONSEQUENCES OF VIOLATING RESPA?

- A. **Criminal Penalties:** Section 8 of RESPA says: "Any person or persons who violate the provisions of this section shall be fined not more than \$10,000, or imprisoned for not more than one year, or both, for each violation". "Each violation" means "things of value" you give and accept. Moreover, there is no requirement that your violation be "knowing or "willful" for criminal penalties to be imposed.
- B. **Civil Penalties:** RESPA also allows individuals to recover three times the settlement service charge plus legal fees through civil actions.
- C. **Both "Giver" and "Receiver" are Liable:** RESPA violations are a "two-way street". HUD will consider the party who offers the referral fee and the party who accepts the referral fee to be equally liable and subject to the above penalties.

IV. WHAT ACTIVITIES DOES SECTION 8 OF RESPA PROHIBIT?

- A. **Basic Prohibition:** Section 8 makes it illegal to: Give or receive any *thing of value* (or split fees) pursuant to an *agreement or understanding to refer* real estate

settlement services to a particular entity in connection with a *federally related mortgage loan* as long as no RESPA exception is available.

B. Key Elements: The key elements of a Section 8 violation are highlighted above in italics. Let's look at each of these elements.

1. **Things of Value:** You must give or receive a "thing of value" in exchange for the referral. However, HUD has broadly defined "thing of value" to include virtually anything that would be worth giving or obtaining --- money, property, salaries, discounts, credits, dividends, interest free loans, eligibility for a lottery with a one in a million chance to win a TV set, frequent flier miles, and much more.
2. **Agreement or Understanding:** You must have an "agreement or understanding" with another person to give or receive a thing or value in exchange for referrals or to split fees. However, the agreement or understanding need not be formal and may be sufficient in HUD's eyes.
3. **A Referral:** You must actually "refer" business (or have business referral to you) in exchange for the thing of value. However, HUD broadly defines a "referral" to mean "any oral or written action directed to a person that has the effect of affirmatively influencing the selection by any person of a provider of settlement services when that person will pay in part of whole for such services." Examples of "referrals" include recommending another provider, verbal or written discussions about the merits of another provider, and most other verbal or written individual actions designed to influence the selection of the provider.
4. **Referral of A "Settlement Service":** You must refer (or give a thing of value to have referred to you) "settlement service" business to violate RESPA. HUD has broadly defined "a settlement service" to include any service provided in connection with a prospective or actual settlement including the origination, processing or funding of a federally related mortgage loan or related services, mortgage brokerage services, title services, legal services, document preparation services, credit reports and appraisals, home inspections, escrow and closing services, home inspection/pest inspection, mortgage insurance homeowners insurance, homeowners warranties, mortgage life insurance, real estate brokerage service, real property tax service, and any other service which a settlement service provider requires a borrower to sell or pay.
5. **A Federally-Related Mortgage Loan:** The settlement service you refer (or have referred to you) must involve a "federally-related mortgage loan" for the referral to violate RESPA. HUD consider the term "federally-related mortgage loan" to include most loans, which are secured by **1-4 unit residential dwellings** (including individual units of condominiums and cooperatives), and which include first mortgages, subordinate liens, and home equity loans. However, unsecured lines of credit most construction loans, commercial loans, and secondary market transactions (the sale of a loan that occurs after closing and is not table-funded) are not considered settlement services involving a "federally-related mortgage loan" and therefore are not covered by RESPA.

V. WHAT ACTIVITIES ARE EXEMPT FROM RESPA?

1. **Payments For Services Rendered Or Goods Actually Provided:** RESPA exempts payments for the fair market value of services or goods actually provided. In determining the "fair market value" of a service, HUD will not count the value of the "referral" services that are not necessary, or services that duplicate services already provided to or received by the consumer.
 - a. **Mortgage Origination Services:** In 1999 HUD Published a RESPA Policy Statement with a two-part test to help you determine what payments you can give to others or receive from others for performing mortgage origination services.
 - i. **Are There Goods or Facilities Actually Furnished or Services Actually Performed?** HUD's 1999 RESPA Policy Statement listed 14 services that are normally performed in the origination of a mortgage loan and said that if a person performs that first service (taking information from the borrower and filling out the application) and at least 5 other services on the list, HUD will consider enough services to have been performed to justify compensation for those services.
 - Taking information from the borrower and filling out the application.
 - Analyzing the prospective borrower's income and debt and pre-qualifying the prospective borrower to determine the maximum mortgage that the prospective borrower can afford*
 - Educating the prospective borrower in the home buying and financing process, advising the borrower about the different types of loan products available, and demonstrating how closing costs and monthly payments could vary under each product.
 - Collecting financial information and other related documents that are part of the application process*
 - Initiating/ordering VOE'S (verifications of employment) and VODs (verifications of deposit)
 - Initiating/ordering requests for mortgage and other loan verifications
 - Initiating/ordering appraisals
 - Initiating/ordering inspections or engineering reports
 - Providing disclosure (TILA, GFE, etc.) to the borrower
 - Assisting the borrower in understanding and clearing credit problems
 - Maintaining regular contact with the borrowers, realtors®, lender, between application and closing to appraise them of the status of the application and gather any additional information as needed*
 - Ordering legal documents

- Determining whether the property was located in a flood zone or ordering such service
 - Participating in the loan closing
 - *If the mortgage broker includes any "counseling-type" services to make up its 5 "other" services (noted with an asterisk (*) above), HUD will look at the following to assure that there is no "steering" disguised as compensation:*
 - The counseling must give the borrower the opportunity to consider products from at least three different lenders.
 - The entity performing the counseling must receive the same compensation regardless of which lender's product was ultimately selected; and
 - Any payment made for the service is reasonably related to the service performed and not based on the amount of loan business referred to a particular lender.
 - ii. **Is the Payment Reasonably Related to the Value of the Good or Facilities Furnished or Service Performed?**
 - Even if you or the person you pay performs the required number of services, the payment must be reasonably related to the mortgage origination services performed.
 - This is a complicated area of RESPA and whether or not a payment is too high depends on the particular market and fact situation. You should consult with a legal advisor as to whether a particular payment is too high.
- b. **"Core" Title Services:** HUD also has guidelines to help you determine what payments you can give others or receive from others for performing title services. HUD says that it will not scrutinize payments from a title company to its agent or contractor the following "core title services":
 - i. Examination and evaluation of title evidence to determine title insurability
 - ii. Clearing of underwriting objections and taking of steps necessary to satisfy any conditions
 - iii. Preparation and issuance of the policies
 - iv. Liability to the insurance company for performing these services
 - v. Handling the closing where customary for performing these services
 - vi. Conducting the title search, where customary.
 - *If "core" title services are not performed, HUD will review the services performed to see that they are commensurate with the fee received. For example, HUD investigated certain title underwriters in Florida for providing proforma commitments to title agents, thereby preventing the agents from providing the "core" title services. Because the title underwriter still gave the title agents who did not perform "core" title services their highest*

commission compensation was excessive and in violation of RESPA.

2. **Cooperative Brokerage Agreement Between Real Estate Licensees:** RESPA exempts referral fees between or among real estate licensees. Therefore, real estate commission splits among licensed real estate brokers, licensed real estate agents and even licensed employee relocation Companies are not covered by RESPA's referred fee prohibition.
3. **Certain Promotion and Educational Activities:** RESPA exempts Promotional and educational activities if the are:
 - a. Normal
 - b. Not conditioned on the referral of Business; and
 - c. Do not defray the expenses that otherwise would be incurred by those in a position to refer settlement business.
4. **Employee Compensation:** HUD currently exempts from RESPA from RESPA any payment by an employer to "bona fide" employee (i.e., loan officer, title agent, branch manager) for referrals of business to affiliated settlement service companies. This exemption does not extend, however, to real estate agents (who are independent contractors) or to franchisees.
5. **Consumer Rebates:** HUD has traditionally taken an informal position that rebates to the customers of a settlement service provider - and not to the provider himself - do not violate RESPA. Therefore, any fee or portion of a fee is paid to a provider that the provider subsequently passes along to the customer in the form of a consumer discount or rebate would be exempt from RESPA.
6. **Returns on Ownership and Franchise Interest:** In 1983, Congress exempted from RESPA any returns on ownership interest (i.e., dividends, profits) in other settlement service providers and returns on franchise interests (e.g., royalties) under the "controlled business as the "affiliated business arrangement" exemption.

Disclosure: This Guide only provides an overview of RESPA's referral fee requirements. It is not intended to provide legal advice with regard to individual situations. Whether or not a payment is in violation of RESPA is often highly dependent upon particular facts; in addition, there are often state laws and regulations that apply to payments between settlement service providers. Do not rely on this Guide as a substitute for consultations with your individual company legal counsel regarding the legality of any particular payment.