



REALTIES

The National Association of REALTORS®
RESPA Awareness Campaign

HUD TARGETS REAL ESTATE BROKERS FOR ALLEGED REFERRAL FEES IN ITS TWO LATEST RESPA SETTLEMENTS

HUD alleged that the real estate broker offered its sales agents incentives, including trips, baseball tickets, and certain newspaper advertisements based on the volume of referrals to an affiliated title agency.

In connection with the U.S. Department of Housing and Urban Development's ("HUD" or "Department") increased enforcement under the Real Estate Settlement Procedures Act of 1974 ("RESPA"), 12 U.S.C. §§ 2607 et seq., on September 1, 2005, the Department announced a settlement agreement with Atlanta-based Coldwell Banker Residential Real Estate, Inc. ("CBRRE") for alleged payment of referral fees under Section 8 of RESPA. In

this case, the Department alleged that the real estate broker offered its sales agents incentives, including trips, baseball tickets, and certain newspaper advertisements based on the volume of referrals the agents made to CBRRE's affiliated title agency, Regency Title Company. Additionally, HUD alleged that CBRRE real estate agents that referred business to Regency Title Company received higher sales commissions or were paid their commissions immediately at the time of closing. HUD assigned no wrongdoing to CBRRE; however, in order to settle the matter, CBRRE agreed to make a \$250,000 payment to the U.S. Treasury, to provide written notice of RESPA requirements to all of its real estate agents, and to cease the alleged business practices.

In a second action against real estate brokers, on September 20, 2005, the Department announced a settlement agreement with Prudential Locations, LLC ("Prudential") for alleged payment of referral fees under Section 8 of RESPA. In this case, the Department alleged that Prudential, which operated a real estate brokerage office in Honolulu, Hawaii, offered its sales agents prizes and incentives based on the volume of business referred to Wells Fargo Home Mortgage Hawaii, LLC ("Wells Fargo Hawaii"), an affiliated business of Prudential. Specifically, HUD alleged that Prudential sponsored and paid for a "First Annual Wells Fargo Friends Party" and invited only those real estate agents with \$1 million in referrals to Wells Fargo Hawaii. HUD also alleged that Prudential gave a real estate agent a three-year Mercedes-Benz lease, paid for agents' trips to Thailand, Las Vegas, and San Francisco, provided agents with restaurant gift certificates, and gave real estate agents opportunities to win these prizes and incentives in return for the referral of business. Although Prudential admitted no liability in connection with these allegations, in an effort to resolve the matter, Prudential agreed to pay a \$48,000 fine, to notify all Prudential real estate agents of RESPA's requirements, and to cease the alleged business practices.

As you may know, Section 8(a) of RESPA makes it a violation to give or receive a thing of value pursuant to an agreement or understanding for the referral of settlement service business. RESPA broadly defines a “thing of value” to include items such as money, commissions, fees, trips and payment of another person’s expenses, the opportunity to participate in a money-making program, or other consideration. See 24 C.F.R. § 2602(2).

Section 8(a) of RESPA makes it a violation to give or receive a thing of value pursuant to an agreement or understanding for the referral of settlement service business.

Thus, brokers and agents should be aware that the giving or receiving of a higher real estate agent commission, an all-expense paid trip, tickets to sporting events, automobile leases, or the chance to win any of these incentives will qualify as a thing of value and will violate RESPA if HUD deems there to be a pattern or practice of giving such items in exchange for the referral of business. Moreover, it is a violation of Section 8 of RESPA to give or receive a thing of value. In the context of a real estate brokerage company, therefore, both the payment by the broker and the receipt of the thing of value by the real estate agent make them equally liable for a RESPA violation under the Act.

In addition, please be aware that RESPA does not exempt payments made between a real estate broker and an independent contractor real estate agent. Specifically, Section 8(c) of RESPA provides that an employer may pay its own employees for any referral activities and such payment will not be considered a violation of RESPA. See 24 C.F.R. § 3500.14(g)(1)(vii). Although HUD has not articulated a position on who constitutes an “employee” under RESPA, arguably if a person satisfies the Internal Revenue Service requirements for employment, he or she will be considered an employee under RESPA. These requirements mandate that a person receive paychecks and a W-2 form from the employer, work a set number of hours for the employer, and be subject to the employer’s supervision and control, to name a few. At the very least, therefore, a real estate agent must be employed as a W-2 employee of the real estate broker, or any payments made or incentives given to the agent do not qualify for the RESPA exemption. As real estate agents are typically independent contractors, we, therefore, caution both real estate brokers and agents that any payments made based on the volume of referrals or in exchange for the referral of business – even incentives as seemingly minor as baseball tickets or restaurant gift certificates – can be deemed to be a violation of RESPA.

HUD appears to be positioning itself to target not only the brokers alleged to have provided referral fees, but the agents who receive them. Real estate brokers and agents should be prepared to defend their business practices under the principles of RESPA.

As RESPA violations can carry serious consequences, if you have questions or concerns about your own practices under RESPA, we encourage you to seek additional resources and legal advice. Moreover, with these two settlement agreements, HUD appears to be positioning itself to target not only the brokers alleged to have provided referral fees, but the agents who

receive them. As a result, real estate brokers and agents should be prepared to defend their business practices under the principles of RESPA.

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