RESPA FAQ

NAR has compiled below a list of questions that we commonly receive about the Real Estate Settlement Act, or "RESPA", for both real estate professionals and REALTOR® associations. Note the opinions below do not constitute legal advice and it is recommended that you consult with an attorney if you have questions about how to comply with RESPA.

A. Real Estate Professional FAQ

I. Referral fees

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 title company attends the open house to make a presentation or to otherwise market its services, such payments may be lawful under RESPA.

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. In the past, HUD stated that "[n]othing in RESPA prevents joint advertising[,]" but "if one party is paying less than a pro rata share for the brochure or advertisement, there could be a RESPA violation." Without guidance to the contrary, we assume the CFPB would agree with HUD's statement.

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.

QUESTION: A mortgage lender devises a contest among local real estate agents where the real estate agent who 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 professionals can be held responsible for the violation under RESPA.

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.

QUESTION: A settlement provider 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. 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. 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.

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 salespeople do not qualify for this exception. Real estate professionals 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.

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. 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.

QUESTION: Do RESPA's prohibitions on referral fees apply to all settlement service providers?

ANSWER: Yes, RESPA applies equally to all settlement service providers and does not distinguish among different types of settlement providers. A settlement service includes any service provided in connection with a real estate settlement including, but not limited to, 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, home warranty companies, services rendered by a real estate professional, the origination of a federally related mortgage loan, and the handling of the processing and closing or settlement.

This list is broad, but not all-inclusive.

QUESTION: Can a title/mortgage company sponsor a luncheon for real estate professionals and offer CLE?

ANSWER: Maybe—this would need to be evaluated on a case-by-case basis. A title company or mortgage company can sponsor an educational event as a way to promote its

services, so long as the costs associated with the event do not defray expenses that the real estate agent would otherwise encounter and are not conditioned on the referral of business. Note, however, that a rule of reason should be applied. An educational event hosted by a mortgage lender that was held at a local hotel and provided a lunch would be quite different from an educational event held in Hawaii in which one hour was dedicated to education and the remainder of the event was directed toward recreation. Additionally, the title/mortgage company would need to be promoting its services during the event as well in order to qualify for the advertising exception.

QUESTION: Can real estate professionals distribute to prospective buyers flyers containing current loan rate information branded by the mortgage lender?

ANSWER: Yes, the flyers appear to comply with RESPA. The providing of current rate information is consistent with the real estate professional's responsibility to provide information to his or her client about the current real estate market and no particular benefit flows to the mortgage lender. However, the real estate professional may not accept from lenders flyers which also promote the listed property, since that would result in the lender bearing a portion of the real estate professional's advertising expenses. Also note that the MAP Rule would apply to the providing of this information. Learn more.

QUESTION: In my business model, I pair buyers with real estate professionals in different geographical areas based upon information I received from consumers and from participating real estate professionals. I receive a referral fee from the other broker when a deal settles (I am a licensed broker). Can I expand my business model to pair real estate agents with mortgage brokers (and collect a fee) without violating RESPA?

ANSWER: No, this would violate RESPA. Section 8(c) of RESPA contains exceptions to RESPA's prohibitions on kickbacks. One of the exceptions is cooperative fees paid between real estate licensees, including referral fees. However, no such exception exists for payments made to mortgage brokers and so this would not be a permissible practice.

QUESTION: Is it a RESPA violation for the agent to refer her clients to the Bank's loan officer knowing that her receipt of future REO listings from the Bank may be dependent on the referrals she sends to the Bank?

ANSWER: Yes, this may violate RESPA. Section 8(a) prohibits payments for referrals, and providing a listing in exchange for referrals is a thing of value. It also requires an agreement between the parties for the referral arrangement, but this arrangement can be implied from the conduct of the parties and does not necessarily need to be reduced to writing. If the conduct of the parties could demonstrate that there was a referral arrangement, then this would violate RESPA. For example, if it could be shown that the REO listings given to the real estate professional was in direct proportion to the number of referrals received by the real estate professional, then it is likely that an agreement could be implied and this would violate RESPA.

II. Splitting Unearned Fees

QUESTION: A real estate broker charges a seller a $250 administrative fee and does not split the fee with anyone. Is this a violation of Section 8 of RESPA?

ANSWER: No, according to the U.S. Supreme Court, this is not a violation of RESPA. In Freeman v. Quicken Loans, the Supreme Court held that a single party cannot violate Section 8(b) of RESPA with its own, unilateral charges.

QUESTION: A mortgage lender occupies an office in a real estate broker's business in order to prequalify 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. Although the CFPB is now responsible for RESPA, HUD took 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, assuming the CFPB agrees with HUD's position, if a real estate agent takes the loan application, but does not perform any other function; he or she cannot receive payment under RESPA.

QUESTION: Is there a way to structure a marketing services agreement ("MSA") that complies with RESPA?

ANSWER: RESPA permits the marketing of other settlement services by another settlement service provider so long as the payments made for these services represents the fair value for the services provided. A lawful MSA will need to contain the following elements: first, the real estate professional can perform services for other companies in the same field of business (i.e., the agreement is not exclusive); the compensation is not based on the volume of business, but rather on the value of the services provided by the real estate professional; a written contract between the parties which documents the services to be provided pursuant to the agreement; and a written disclosure is provided to the consumer describing the real estate professional's role in selling the third-party service. That said, CFPB has been active in initiating enforcement actions in this area and appears to take the view that these agreements are going to almost always be an improper referral fee, so anyone entering into a MSA will need to be exercise extreme caution.

III. Affiliated Business Relationship FAQ

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.

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 or investors a proportionate share of the profits based on their ownership interest in the affiliate. So if they own 50% of the business, they may receive 50% of the profits 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.

B. Association RESPA Issues

QUESTION: Can a REALTOR® association solicit sponsorships from affiliate members who provide settlement services for association functions that are not education-related, such as awards and recognition ceremonies and association fundraisers?

ANSWER: Maybe—this will need to be examined on a case-by-case basis. While the association is not a settlement service provider, the subsidizing of the costs of the event for real estate professionals could be seen as conferring a benefit upon the members in return for referrals, as the members may not have to pay the costs normally associated with such an event. In order for the event to not violate RESPA, the affiliate would need to qualify for the advertising exception in Section 8(c) and so the affiliate member would need to advertise its services during the event and there would need to be a reasonable relationship between the costs of sponsorship and the advertising.

QUESTION: Can affiliate members who are settlement service providers sponsor continuing education or new-member orientation classes?

ANSWER: Maybe—this will need to be examined on a case-by-case basis. It will depend on whether some of the expenses a real estate professional would otherwise bear are defrayed by the affiliate member and whether the sponsorship would qualify for the RESPA advertising exception. In the case of an orientation course, there is probably no problem because new members pay an application fee that is likely the same whether an affiliate sponsors the course or not. If the affiliate member is simply recognized as a sponsor, it is similar to an affiliate running an advertisement in the association paper and would be considered normal marketing activity. Sponsorship of continuing education is more likely to be a violation because members normally have to pay a fee to attend such programs. If the cost of the course is underwritten by the affiliate so that the agents need not pay fees that they otherwise would have to pay, such sponsorship could be interpreted as a thing of value received by the agent for RESPA purposes.

QUESTION: Is it legal for settlement providers to put on education courses about the services the affiliate member provides to real estate professionals?

ANSWER: Yes, settlement service providers may put on classes about their business, since such informational programs are consistent with the marketing of the settlement service provider's business.

IV. Other Questions

QUESTION: A prospective buyer's credit union has told her that in order to qualify for a special package of services, she must use certain settlement service providers, including specific real estate professionals. Does RESPA allow this? Also, the real estate professionals appear to be required to rebate a portion of their commission to the buyer through this program- can real estate professionals provide such a rebate?

ANSWER: Yes, those arrangements could be legal under Section 8 of RESPA. The credit union can offer the consumer a package of settlement services at a reduced cost to the consumer if the consumer elects to use certain settlement service providers for settlement services, even if those providers are affiliates of the credit union. The credit union also could require a consumer to use a particular provider for settlement services without the offering of a discount, as long as the credit union and settlement service provider are not affiliates. However, the credit union cannot require the consumer to use an affiliate settlement service provider. The credit union's offering of a package of services at a discount tied to the use of an affiliate provider is not considered required use, as long as the consumer is notified of his/her option to shop for settlement services and the discount is a true discount to the consumer that is not made up elsewhere in the cost of the transaction. A real estate professional can also agree to rebate a portion of his/her commission to a consumer. However, note that some states do have laws prohibiting the payments of rebates to unlicensed individuals, and so this would not be legal in those jurisdictions.

QUESTION: A seller has stated that in

order for an offer to be accepted, a buyer must agree to pay for a title company selected by the seller. Doesn't that violate RESPA? What if the seller required the buyer to pay for a third-party short sale negotiator? What if the seller was bank-owned REO?

ANSWER: Yes, this does violate RESPA. Section 9 of RESPA prohibits a seller from requiring the use of a particular title insurance company when the buyer will pay for the title insurance. This prohibition applies to any seller, whether a private individual, a home builder, or a lender with REO properties. This prohibition also applies only when the buyer will pay for the cost of title insurance. If a seller were to pay the full cost of title insurance on the buyer's behalf, the seller could require that the title insurance be issued by a particular company. Finally, this prohibition only applies to title insurance. It does not prohibit a seller, for instance, from requiring a buyer to pay for a particular third-party short sale negotiator, as long as that negotiator is not also the company issuing title insurance or the seller's affiliate company. It also does not prohibit a seller from requiring a buyer to use a particular settlement or escrow company, as long as the settlement agent does not control the issuance of title insurance and is not the seller's affiliate company.

QUESTION: Is it permissible, under RESPA, for a buyer's lender to say they won't finance the transaction based solely on the amount of the commission the real estate brokers are to receive, even though the commission is being paid by the Seller?

ANSWER: RESPA does not regulate the amounts that settlement service providers can receive, and so would not address this practice.