AGENDA
2015 CONVENTIONAL FINANCING AND POLICY COMMITTEE
NATIONAL ASSOCIATION OF REALTORS®
2015 ANNUAL CONVENTION & TRADE EXPO
MARRIOTT MARQUIS & MARINA, SAN DIEGO BALLROOM B, NORTH TOWER
FRIDAY, NOVEMBER 13
1:30 PM - 4:00 PM

Chair:	**John Wong (CA)**
Vice Chair:	**Brad Boland (VA)**
Committee Liaison:	**Russell Grooms (FL)**
Committee Executive:	**Vijay Yadlapati & Charles Dawson**

I. Call to Order

II. Opening Remarks

III. NAR Conflict of Interest Statement

IV. Important RPAC Message

V. Approval of 2015 Mid-Year Meeting Minutes

VI. National Economic Update – Dr. Anthony Chan, Chief Economist for J.P Morgan Chase

VII. RESPA Marketing Service Agreements – Finley Maxson, NAR Senior Legal Counsel

VIII. Impact of Student Loan Debt on Housing – Jessica Lautz, NAR Managing Director of Surveys
   a. Discussion of Consumer Finance Protection Bureau (CFPB) Student Loan Servicer Enforcement

IX. Discussion of GSE Guarantee Fees & Proposed Transportation Legislation – Jerry Giovaniello, NAR Chief Lobbyist & Jamie Gregory, NAR Deputy Chief Lobbyist

X. Efforts to Promote the Availability of Credit
   a. Asian Real Estate Association of America (AREAA)
   b. National Association of Hispanic Real Estate Professionals (NAHREP)
   c. National Association of Real Estate Brokers (NAREB)

XI. Priority Issues for 2016

XII. New Business

XIII. Adjournment

NATIONAL ASSOCIATION OF REALTORS®
OWNERSHIP DISCLOSURE AND CONFLICT OF INTEREST POLICY

Ownership Disclosure Policy

Members of any NAR decision-making body must disclose the existence of any of the following: (1) an ownership interest* in, (2) a financial interest** in, or (3) service in a decision-making capacity for any entity prior to speaking to an NAR decision-making body on any matter involving that entity.

After making the required disclosure, such member may participate in the discussion and vote on the matter unless that member has a conflict of interest as defined below.

Conflict of Interest Policy

A member of any NAR decision-making body has a conflict of interest whenever that member:

(1) is a principal, partner, or corporate officer of a business providing, or being considered as a provider of, products or services to NAR ("Business"); or

(2) serves on the board of directors of the Business unless the individual's only relationship to the Business is service as NAR's representative on such board; or

(3) holds an ownership interest* of more than one percent of the Business.

Members with a conflict of interest must immediately disclose such conflict of interest prior to participating in any discussions or vote of an NAR decision-making body that pertains to the Business. Such members may not participate in any discussions related to that Business other than to respond to questions asked of them by other members of the body. A member may not vote on any matter in which the member has a conflict of interest.

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*Ownership interest is defined as the cumulative holdings of the individual; the individual's related spouse, children, and siblings; and of any trust, corporation, or partnership in which any of the foregoing individuals is an officer, director, or owns in the aggregate at least 50% of the (a) beneficial interest (if a trust), (b) stock (if a corporation), or (c) partnership interests (if a partnership).

**Financial interest means any interest involving money, investments, extension of credit or contractual rights.

Message on behalf of 2015 NAR President Chris Polychron

Dear NAR Committee Members:

The 2015 NAR Leadership Team, RPAC Leadership and I want to thank each of you for your commitment and hard work towards the 2015 RPAC Committee Challenge. Thanks to your dedication and hard work, we are able to get the message out loud and clear that RPAC is important and protects our industry and livelihood. Remember, the RPAC Committee Challenge is not over yet; there is still time for your Committee to invest and reach the 100% goal.

This year's RPAC Committee Challenge has already been met by an astonishing 56 committees compared to 48 last year. 69% of all NAR Committees invested in RPAC so far this year. These 58 committees, which are noted below, will be recognized during the 2015 Annual Convention Chair Lunch on Thursday, November 12 from 12noon - 1:00 PM in the Coronado Ballroom D located on the fourth floor at the Manchester Grand Hyatt. These committees will also be recognized at NAR 360⁰ on Thursday from 4:00pm - 5:00pm in Ballroom 20 on the upper level of the San Diego Convention Center.

- AEC Recommendations and Recognition Advisory Board
- AEC-AE Institute Advisory Board
- AEC-RCE Certification Advisory Board
- AEC-State EO Forum
- Amicus Brief Advisory Board
- Association Executives Committee
- Broker Involvement Council
- CIPS Advisory Board
- Commercial Economic Issues and Trends Forum
- Commercial Leadership Forum
- Consumer Communications Committee
- Corporate Investor Council
- Credentials and Campaign Rules Committee
- Emerging Business & Technology Forum
- Executive Committee
- Federal Financing & Housing Policy Committee
- Federal Independent Expenditures Advisory Board
- Federal Legislative and Political Forum
- Finance Committee
- Housing Opportunity Committee
- Idea Exchange Council for Brokers
- Insurance Committee
- Large Firm Involvement Advisory Board
- Leadership Academy Advisory Group
- Legal Action Committee
- Meeting and Conference Committee
- Member Communications Committee
- Membership Policy and Board Jurisdiction Committee
- MLS Technology and Emerging Issues Advisory Board
- Multiple Listing Service Forum
- Past Presidents' Advisory Group
- Professional Standards Forum
- Property Management Forum
- PS Interpretations and Procedures Advisory Board
- Public Advocacy Advisory Group
- Public Advocacy Advisory Group Core
- Real Property Operations Committee
- REALTOR® Party Member Involvement Committee
- REALTOR® Party Trustees for State and Local Campaign Services Committee
- Regulatory Issues Forum
- Research Committee
- Reserves Investment Advisory Board
- Residential Economic Issues & Trends Forum
- Risk Management and License Law Forum
- Risk Management Committee
- RPAC Fundraising Forum
- RPAC Major Investor Council
- RPAC Participation Council
- RPAC Trustees Federal Disbursement Committee
- RPAC Trustees Fundraising Committee
- Smart Growth Advisory Board
- State and Local Forum on Global Business
- State and Local Issues Mobilization Support Committee
- Strategic Thinking Advisory Committee
- Strategic Thinking Forum
- Young Professionals Network Advisory Board

You have all done an outstanding job of bringing the importance of RPAC to the forefront with your committee members. Thank you for your leadership and dedication to ***our*** real estate industry.

With Sincere Gratitude,

CFPC Pg. 3
President Chris Polychron

NATIONAL ASSOCIATION OF REALTORS®
2015 NAR REALTOR® PARTY CONVENTION & TRADE EXPO
WASHINGTON HILTON HOTEL
JEFFERSON ROOM WEST
WEDNESDAY, MAY 13
10:00 AM - 12:00 PM

I. Call to Order
Committee Chairman, John Wong, called the meeting to order at 10:00AM.

II. Opening Remarks
Mr. Wong welcomed the members of the Committee and gave an overview of the extremely full agenda.

III. NAR Ownership Disclosure and Conflict of Interest Statement
The Chairman referred members to the Ownership Disclosure and Conflict of Interest Statement and asked that Committee members recuse themselves from discussions if they had any conflict.

IV. Approval of Previous Meeting's Minutes
Committee Vice Chair, Brad Boland, asked the committee if there were any amendments to the minutes from the November 2014 Annual Meetings. There were no changes and the minutes were approved by general consent.

V. Speakers
a. The Committee received a report from NAR's Senior Economist, Ken Fears (NAR), on the current state of the housing market as well as a forecast for the rest of 2015. Mr. Fears also explained potential issues that may impact what is expected to be a strong 3rd quarter including implementation of new TILA-RESPA disclosures, potential interest rate increases by the Federal Reserve, and increased cost of private mortgage insurance.
b. Mike Trapanese, Senior Vice President of Vantage Score provided the Committee with an update on alternative credit scoring models aimed to promote a safe, but more robust mortgage market. By opening the mortgage market to newer scoring models, the housing market benefits with expanded access to mainstream mortgage credit for many borrowers without lowering standards, while creating competition to a corner of the market that has too long served as a protected monopoly.
c. Mike Stegman, Counselor to the Secretary of the Treasury for Housing Finance Policy, provided the Committee with an update on the Treasury Department's efforts on housing finance reform. Mr. Stegman noted that the Treasury Department was evaluating legislation recently introduced by the Chairman of the Senate Banking Committee that would prevent guarantee fees being used to pay for budget items

outside of housing. The bill also prevents the Treasury Department from divesting their ownership stake in the senior preferred shares in Fannie Mae and Freddie Mac.

d. The Committee received a report from NAR's Director of Survey Research and Communications, Jessica Lautz, on the impact of rising student loan debt on the housing market. While stagnant job and wage growth continue to create headwinds for the housing market, new research is showing a more direct linkage between student loan debt and housing. While many policy options have been presented to the Committee, there were no motions to modify existing policy.
e. NAR member Marty Wager presented the Committee with an update on implementation of Fannie Mae's Collateral Underwriter tool. Mr. Wager indicated more time will be needed to fully assess the impact of the tool but that a large lender indicated that their metrics demonstrated that a smaller number of transaction were being impacted than originally had been thought.

VI. Adjournment

Chairman Wong adjourned the meeting at 12:00 PM.

Anthony Chan
Chase Chief Economist

Anthony Chan joined J.P. Morgan in 1994 and currently serves as the Chief Economist for Chase. His responsibilities include economic analysis and research in support of Chase and the Private Bank's Global Investment Committee. In addition, Mr. Chan travels both globally and domestically to meet with clients and to make presentations on economics and investments.

Mr. Chan is a member of several forecasting panels, including the Blue Chip Monthly Forecasting panel, the National Association of Business Economists Quarterly Macro Panel and the Reuters, Bloomberg and Dow Jones Weekly Economic Indicator panels. From 2001 to 2002, he served on the Economic Advisory Committee of the American Banker's Association. One of the most important responsibilities of this ABA group was to brief Alan Greenspan and the rest of the board members in Washington, D.C., twice a year in an off-the-record session.

Mr. Chan received his B.B.A. in Finance & Investments from Baruch College in 1979 and his M.A. (1983) and Ph.D. (1986) in Economics from the University of Maryland. From 1985 to 1986, Mr. Chan was a Doctoral fellow at the Board of Governors of the Federal Reserve in Washington, D.C. After completing his doctoral studies, he was a Professor of Economics at the University of Dayton (1986 to 1989). He was an Economist at the Federal Reserve Bank of New York from 1989 to 1991 and was a Senior Economist at Barclays de Zoete Wedd Government Securities from 1991 to 1994.

Mr. Chan has been quoted in many media outlets, including *The Wall Street Journal*, *Barron's*, *The New York Times*, *The Washington Post*, the *Chicago Tribune*, the *Los Angeles Times* and *Investor's Daily*. He appears several times per month on CNBC, and often is featured in other media outlets such as Fox Business News, CNN, Reuters and public televison's *Nightly Business Report*.

NAR Issue Summary

RESPA Marketing Service Agreements (MSAs)

What is the fundamental issue?
Are marketing agreements legitimate under the Real Estate Settlement Procedures Act (RESPA)? What is the right way to do one?

I am a real estate professional. What does this mean for my business?
Guidance issued by the U.S. Department of Housing and Urban Development (HUD) in 2010 that is being followed by the CFPB called into question whether and under what circumstances real estate professionals can receive money for marketing other settlement services and service providers. This has led to much confusion in the industry and numerous lawsuits.

NAR Policy:
NAR believes that real estate professionals and brokers should be able to be compensated for services performed and marketing done. NAR supports better guidance from the Consumer Financial Protection Bureau and specifically rejects the contention that the marketing of settlement services is a mere referral.

Opposition Arguments:
Marketing agreements are a subterfuge for paying real estate professionals and brokers a fee for referrals.

Legislative/Regulatory Status/Outlook
In February 2008, HUD issued an informal letter (the Ceja Letter) that said that the sale of home warranty contracts by real estate agents for compensation was essentially a per se violation of RESPA. For the next two years, NAR and its industry partners disputed this letter and tried to convince of HUD of its error. In the summer of 2010, HUD issued new guidance which made the situation worse and led to even more lawsuits. NAR commented on HUD's guidance but the guidance remained in force.

RESPA is now under the purview of the new Consumer Financial Protection Bureau (CFPB). With regard to home warranty marketing agreements, NAR believes that agents and brokers provide bona fide and separate services for the reasonable compensation they receive. NAR believes HUD erroneously limited the ability of real estate professionals to market home warranty products to the detriment of consumers who benefit the most from such products. CFPB is now undertaking a broader effort to go after marketing agreements as a whole.

On Thursday, June 4, 2015 the Consumer Financial Protection Bureau (CFPB) issued a decision against PHH Corporation and a number of other defendants for among other things, violating the Real Estate Settlement Procedures Act (RESPA) by paying for referrals where there is federally related mortgage. CFPB Director Cordray disagreed with interpretations by an administrative law judge relying on a 1997 HUD interpretive letter and expanded the monetary value of the disgorgement from $6.4 million to $109.2 million. The decision is extensive and calls into question a number of practices relating to reinsurance arrangements as well as seemingly expanding the statute of limitations. PHH is expected by those in the legal community to appeal the decision. NAR intends to weigh in with a "Friend of the Court" brief defending properly implemented MSA's.

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NAR Issue Summary
RESPA Marketing Service Agreements (MSAs)

On July 30, Wells Fargo and Prospect Mortgage joined a growing number of lending institutions in discontinuing participation in Marketing Services Agreements (MSAs) with real estate agents and brokers. Citing "increasing uncertainty surrounding regulatory oversight of these types of arrangements . . . ," Wells said the action is effective August 1 and existing agreements with builders, real estate professionals and other referral sources will be winding down over the next 90 days. Prospect Mortgage, a top 30 ranked lender also announced on July 30 an end to its MSA's by the end of the 3rd quarter.

NAR will continue to work with CFPB and our industry partners to ensure that appropriate guidance is provided to industry. NAR will also work with Congress to ensure that any future legislative changes improve RESPA without imposing undue burdens on NAR members.

Current Legislation/Regulation (bill number or regulation)
No new legislation introduced in the 114th Congress.

Legislative Contact(s):
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Helen Devlin, hdevlin@realtors.org, 202-383-7559

Regulatory Contact(s):
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RESPA **Do's FOR MSAs**

Real estate brokers and agents must comply with the Real Estate Settlement Procedures Act, or RESPA, which prohibits brokers and agents from receiving any thing of value in return for the referral of settlement service business. RESPA, however, permits brokers and agents to receive reasonable payments in return for goods provided or services performed by brokers and agents. Marketing Services Agreements (MSAs), therefore, may be lawful under RESPA if carefully structured to comply with the Act. Violators of RESPA are subject to harsh penalties, including triple damages, fines, and even imprisonment. When contemplating an MSA, here are a few steps you should consider.

Do:

- **Be aware** that RESPA permits payments for services performed by a broker or agent only if actual services are performed and the fee is fair market value for the services performed.
- **Memorialize** an MSA in a written agreement that states in detail the marketing and advertising services to be performed and the fee to be paid in return for such services.
- **Ensure** that marketing and advertising services identified in a written MSA are, in fact, performed.
- **Consider** including a reporting and/or audit obligation in a written MSA that requires the service provider to document or otherwise provide evidence that services were performed.
- **Provide** a disclosure to consumers notifying them of the MSA relationship.
- **Document** how the parties arrived at the amount of the marketing fee and the determination of fair market value.
- **Consider** engaging an independent third party to establish the fair market value of the marketing and advertising services.
- **Modify** the amount of the marketing fee under an MSA only when objective changes are made to the services performed and/or other terms of the agreement. Verify the basis for the increase or decrease in fee amount and document the objective reason(s) for the change.
  Speak with a RESPA attorney to make sure you comply with all applicable laws. Some state and local laws prohibit activities that are permissible under RESPA.

Speak with a RESPA attorney to make sure you comply with all applicable laws.
Some state and local laws prohibit activities that are permissible under RESPA.

NATIONAL ASSOCIATION of REALTORS®

RESPA **Don'ts FOR MSAs**

RESPA prohibits brokers and agents from receiving any thing of value in return for the referral of settlement service business. RESPA, however, permits brokers and agents to receive reasonable payments in return for goods provided or services performed by brokers and agents. Marketing Services Agreements (MSAs), therefore, may be lawful under RESPA if carefully structured to comply with RESPA. Violators of RESPA are subject to harsh penalties, including triple damages, fines, and even imprisonment. When contemplating an MSA, here are a few things you should avoid under RESPA.

WARNING:

- **Do not** include "services" in the MSA that require a broker or agent to market a lender or title company directly to a consumer, like a sales pitch to a consumer or distributing lender or title company brochures or other materials directly to a consumer.
- **Do not** designate a settlement service provider as the broker's or agent's "preferred" company as part of the MSA.
- **Do not** enter into exclusive MSAs such that the broker agrees to perform marketing and advertising services for only one lender or title company.
- **Do not** accept fees that are in excess of the fair market value of the marketing services actually performed.
- **Do not** base the amount of marketing fees on the volume of referrals or success of the referrals.
- **Do not** accept fees under an MSA for allowing access to sales meetings, conducting customer surveys, or creating monthly reports.
- **Do not** make frequent changes to the fees paid under an MSA based on the volume or success of referrals or any other non-objective criteria.
- **Do not** enter into an MSA with a company that is an affiliate of the broker or agent.
- **Do not** enter into an MSA with a month-to-month term.

Disclaimer: The DO's and DON'Ts listed here are not all-inclusive and small variations in the facts can lead to different outcomes. They also do not take into consideration any additional regulations that may have been imposed in your state, which may prohibit activities that are permissible under RESPA. Speak with a RESPA attorney to make sure you comply with all applicable laws.

126-123 (12/14 OMG)

NATIONAL ASSOCIATION *of* REALTORS®

ORAL ARGUMENT NOT YET SCHEDULED

No. 15-1177

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PHH CORPORATION, PHH MORTGAGE CORPORATION, PHH HOME LOANS, LLC, ATRIUM INSURANCE CORPORATION, AND ATRIUM REINSURANCE CORPORATION,

Petitioners,

v.

CONSUMER FINANCIAL PROTECTION BUREAU,

Respondent.

On Petition for Review of an Order of
the Consumer Financial Protection Bureau

BRIEF OF THE NATIONAL ASSOCIATION OF REALTORS® AS *AMICUS CURIAE* SUBMITTED IN SUPPORT OF PETITIONERS AND REVERSAL OF THE JUNE 4, 2015 ORDER OF THE DIRECTOR OF THE CONSUMER FINANCIAL PROTECTION BUREAU

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), *Amicus Curiae* The National Association of Realtors® states as follows to the best of its knowledge:

(a) Parties and Amici:

Except for the *amici* supporting Petitioners that filed notices of intent to file an *amicus curiae* brief on October 5, 2015, all parties appearing in this Court are listed in the Brief for Petitioners.

(b) Rulings Under Review

References to the ruling under review appears in the Brief for Petitioners.

(c) Related Cases

This matter has not previously been before this Court. Counsel is not aware of any related cases currently pending in this Court or in any other court.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, *Amicus Curiae* The National Association of Realtors® ("NAR") states that it is the country's largest trade association with over one million members. NAR's membership is composed of residential and commercial Realtors®, who are brokers, salespeople, property managers, appraisers, counselors and others engaged in all aspects of the real estate industry. NAR is the leader in developing standards for efficient, effective, and ethical real estate business practices. NAR is not a publicly held corporation, does not have any parent corporations, and that no publicly held corporation owns 10 percent or more of its stock.

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TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Other Authorities

GLOSSARY

CFPB	Consumer Financial Protection Bureau
Culpepper (2001)	*Culpepper v. Irwin Mortg. Corp.*, 253 F.3d 1324 (11th Cir. 2001)
HUD	United States Department of Housing and Urban Development
NAR	The National Association of Realtors®
PHH Decision	*In re PHH Corp.*, No. 2014-CFPB-0002 (June 4, 2015), which is the decision Petitioners appeal
Regulation X	12 C.F.R. Part 1024, formerly 24 C.F.R. Part 3500
RESPA	Real Estate Settlement Procedures Act, 12 U.S.C. §§ 2601, *et seq*.
S. Rep. 93-866	S. Rep. 93-866, 93rd Cong., 2d Sess. (1974), 1974 WL 11646

STATEMENT OF THE IDENTITY OF *AMICUS CURIAE*, ITS INTEREST IN THE CASE, AND THE SOURCE OF ITS AUTHORITY TO FILE

Pursuant to Federal Rule of Appellate Procedure 29(c)(4), *Amicus Curiae* The National Association of Realtors® states as follows:

All parties have consented to the filing of this brief. NAR and its members have unique and significant experience, knowledge, and perspective to aid the Court in the proper resolution of this case. NAR, and its members, have a strong interest in the proper and consistent construction and application of existing federal statutes governing the real estate industry. With over one million members, NAR is the largest trade association in the country, and thus the largest trade association for residential and commercial real estate agents. NAR members are involved in the majority of real estate transactions that take place throughout the nation each business day, and they provide numerous services to support home buyers and home sellers. The activities of NAR's members are regulated by, among other statutes, the Real Estate Settlement Procedures Act, 12 U.S.C. §§ 2601, *et seq.*, and its implementing regulations, 12 C.F.R. Part 1024, formerly 24 C.F.R. Part 3500 – which are at issue here. NAR's members have significant experience with the legal construction and practical application of RESPA, including Section 8(c), to real estate transactions and the services provided to home buyers and sellers. The decision of the CFPB's Director, which is currently under review, would have a profound impact NAR's members. To the extent that Section 8(c)(2) is now to be

applied to permit a conclusion that a payment is not *bona fide* if it is "tied in any way to a referral of business," such a standard is unworkable, unreasonable, and will result in elimination of the ability of real estate professionals to offer consumers useful and important services. As such, NAR is uniquely situated to explain the knowledge and experience of its members to the Court.[1]

CERTIFICATE OF COUNSEL REGARDING NECESSITY OF SEPARATE *AMICUS CURIAE* BRIEF

Pursuant to Circuit Rule 29(d), counsel for *Amicus Curiae* The National Association of Realtors® certifies that it is submitting a separate brief from other *amici* in this case because, as the country's largest trade organization with over one million members, and dedicated to developing standards for efficient, effective, and ethical real estate business practices, NAR has the ability to offer matchless insight into the activities of its membership that would be dramatically affected by the Director's decision in this case. A member of NAR is involved in a substantial majority of residential real estate closings in this country. The perspective of NAR and particularly the examples of its legitimate and substantial business activities that are described in its brief are not covered or addressed in the briefs of any other

[1] No counsel for any party authored this brief in whole or in part, and no party, counsel for any party, or any person other than *Amicus Curiae* the National Association of Realtors®, its members, or its counsel contributed any money intended to fund the preparation or submission of this brief.

amici. Accordingly, a joint brief with other *amici curiae* would not capture the important experiences of NAR's members that may be acutely impacted by the outcome of this case.

I. STATUTES AND REGULATIONS AT ISSUE

Except for the additional materials contained in the Addendum submitted herewith, all pertinent statutes, regulations, and administrative materials are contained in the Addendum to the Brief for Petitioners.

II. SUMMARY OF ARGUMENT

"Notwithstanding the general prohibition of exchanging any thing of value for a referral, a statutory safe harbor exempts a payment from RESPA violation if the payment – *despite being made simultaneously with a referral* – [is] 'for goods or facilities actually furnished or for services actually performed.' [12 U.S.C.] § 2607(c)(2)." *Edwards v. First American Corp.*, --- F.3d ----, 2015 WL 4999329, *3 (9th Cir. Aug. 24, 2015) (emphasis added). This well-established rule is supported by the plain language of Section 8(c)(2), its implementing regulations, RESPA's legislative history, published HUD guidance, and a substantial body of case law. It has been reasonably relied upon by NAR's members as they have engaged in numerous legitimate business activities – such as joint advertising, marketing and services agreements, and office leases – that not only benefit consumers, but are carefully structured to comply with RESPA.

At no time has the CFPB sought from Congress clarification or modification of Section 8(c)(2); it has not attempted to change RESPA's implementing regulations through notice-and-comment rulemaking; and it has not abrogated,

rather it has adopted, HUD's numerous published policy statements, which have provided further interpretation and meaningful guidance of the statute and regulations.[2] Yet, by holding that any transaction that involves a referral is subject to Section 8(a), the Director's troubling decision in this case would nullify Section 8(c)(2)'s exemption as it has been consistently interpreted and applied for more than four decades. The result is unfair and leaves a wake of doubt and confusion among real estate practitioners, divesting them of any certainty that their activities – described in Section III.E below – are protected from the imposition of substantial civil or criminal penalties under RESPA.

III. ARGUMENT

A. The Prohibitions And Exemptions In Section 8 Of RESPA

For decades, NAR's members have relied upon Section 8(c) of RESPA in conducting their business activities. The Director's new interpretation of Section 8(c)(2) – that it merely "clarifies section 8(a), providing direction as to how that section should be interpreted, but does not provide a substantive exemption from

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[2] *See* Identification of Enforceable Rules and Orders, 76 Fed. Reg. 43,569, 43,570 (July 21, 2011).

section 8(a)"[3] – cannot be reconciled with RESPA's legislative history, the plain language of the statute itself, or RESPA's implementing regulations.

Except as set forth in Section 8(c), Congress intended Section 8(a) "to prohibit all kickback or referral fee arrangements whereby any payment is made or 'thing of value' furnished for the referral of real estate settlement business." *See* S. Rep. 93-866, 93rd Cong., 2d Sess. (1974) at 6551, 1974 WL 11646 ("S. Rep. 93-866"). Section 8(b) prohibits two persons from splitting a fee "except in return for services actually performed." *Id.* When enacting RESPA, however, Congress did *not* intend to prohibit all payment arrangements where both compensated and uncompensated referrals are involved.

Section 8(c) expressly permits numerous payment arrangements that specifically involve referrals such as the "payment of a fee" to attorneys, title company agents, or lender agents "for services actually performed," 12 U.S.C. § 2607(c)(1), and – in the subsection expressly at issue in this appeal – "the 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." *Id.* at 8(c)(2). Section 8(c)(2) is consistent with RESPA's legislative history, which

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[3] *In re PHH Corp.*, No. 2014-CFPB-0002 at 16 (June 4, 2015) ("*PHH* Decision") available at *www.consumerfinance.gov/f/201506_cfpb_decision-by-director-cordray-redacted-226.pdf.*

expressly emphasized that Section 8 permits "[r]easonable payments in return for services actually performed or goods actually furnished." S. Rep. 93-866 at 6551.

Moreover, and significantly, Section 8(c) also permits compensated referrals in certain circumstances. For example, Section 8(c)(3) exempts from Section 8(a)'s referral fee prohibition "payments pursuant to cooperative brokerage and referral arrangement or agreements between real estate agents and [real estate] brokers." 12 U.S.C. § 2607(c)(3); 12 C.F.R. § 1024.14(g)(1)(v). Section 8(c)(3) is of particular importance to NAR's members. It was created to legalize compensation paid where one real estate agent refers a customer to another real estate agent or broker, typically in a different geographic region, who is better able to serve the customer's needs, and also to allow the decades-long industry practice of home seller's agents cooperating with home buyer's agents by sharing a portion of the commission due to the seller's agent from the seller on the sale of the property with the buyer's agent who produces the ready, willing, and able buyer for the property. But for the Section 8(c) exemption, these arrangements – that NAR's members routinely depend upon – would violate Section 8.

HUD reinforced Section 8(c)'s exemptions, and in particular Section 8(c)(2), when it issued RESPA's implementing regulations, known as Regulation X (12

C.F.R. Part 1024, formerly 24 C.F.R. Part 3500).[4] These regulations closely follow RESPA's legislative history (*see* S. Rep. 93-866 at 6551) in further interpreting Section 8(c)(2) by stating, in part:

> The Bureau may investigate high prices to see if they are the result of a referral fee or a split of a fee. If the payment of a thing of value bears no reasonable relationship to the market value of the goods or services provided, then *the excess* is not for services or goods actually performed or provided.

12 C.F.R. § 1024.14(g)(2) (formerly 24 C.F.R. § 3500.14(g)(2)) (emphasis added).[5] Plainly, Regulation X contemplates that reasonable payments for services are permissible where referrals are involved.

When read together, the plain language of Section 8(c)(2), its implementing regulations, along with RESPA's legislative history squarely sets forth an objective rule that payments for goods or facilities actually furnished or services actually performed are not prohibited fees for the referral of business if the payments bear a reasonable relationship to the market value of the goods, services, or facilities provided. *See, e.g.*, S. Rep. 93-866 at 6552. This imperative provides precisely the check against purported market distortions that Section 8(a) was intended to

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[4] Regulation X was originally implemented by HUD and later adopted by the CFPB without substantive change to the relevant provisions. 12 C.F.R. Part 1024; *see also id.* § 1024.14(g)(2).

[5] *See also* 12 C.F.R. § 1024.14(g)(3).

prevent. *PHH Decision* at 16. The Director's interpretation of Section 8(c)(2), however, would nullify the entirety of Section 8(c), including Section 8(c)(3), despite the statute's plain text and purpose.

B. HUD Has Provided Continuous Guidance To NAR's Members Regarding Permissible Conduct That Is Exempted From Section 8(a)

Through many policy statements published in the Federal Register, HUD has issued, and the CFPB as adopted, guidance to the real estate industry that unambiguously follows and implements Section 8(c)(2)'s substantive exemption to the anti-referral fee proscription of Section 8(a).

1. HUD Statement of Policy 1996-1, Regarding Computer Loan Origination Systems

In an early policy statement, HUD considered the legality of payments for services from computer systems (called CLOs) used by settlement service providers in connection with the origination of mortgage loans or the provision of other settlement services. 61 Fed. Reg. 29,255 (June 7, 1996). According to HUD, "Section 8(a) of RESPA *prohibits* payments for the referral of a consumer to a settlement service provider; however, Section 8(c)(2) *permits* payments for goods or facilities actually furnished or for services actually performed. 12 U.S.C. 2607(c)(2)." *Id.* at 29,256 (emphasis added). In considering whether payments to CLOs are legal under RESPA, HUD stated that "compensable goods, facilities, or services must be provided by the CLO in return for payments by settlement service

providers. Any such payment must bear a reasonable relationship to the value of the goods, facilities, or services provided. 24 C.F.R. § 3500.14(g)(2). A charge for which no or nominal services are performed or for which duplicative fees are charged is an unearned fee. 24 C.F.R. § 3500.14(c)." *Id.*[6]

2. HUD Statement of Policy 1996-3, Rental of Office Space, Lock-Outs, and Retaliation

In 1996, HUD issued another Statement of Policy, also published in the Federal Register, addressed to the circumstances under which a lender could lawfully rent office space in a real estate brokerage office without running afoul of Section 8(a) of RESPA. 61 Fed. Reg. 29,264 (June 7, 1996). HUD noted that Section 8(a) prohibits the payment of a "thing of value" in exchange for a referral, and a rental payment "that is higher than that ordinarily paid for the facilities" provided could be a "thing of value." *Id.* at 29,265. However, RESPA Section 8(c) "*permits* payments for goods or facilities actually furnished or for services actually performed… Thus, when faced with a complaint that a settlement service provider is paying a high rent for referrals of settlement service business, HUD analyzes whether the rental payment is *bona fide* or is really a disguised referral fee." *Id.* (emphasis added).

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[6] 24 C.F.R. Part 3500 (Regulation X) is now located at 12 C.F.R. Part 1024.

To determine whether the rental payment is "*bona fide*," HUD "examines the facts to determine whether the rental payment bears a reasonable relationship to the market value of the rental space provided … The market value of the rental space may include an appropriate proportion of the cost for office services actually provided to the tenant, such as secretarial services, utilities, telephone and other office equipment." *Id.* Further, HUD explained what a "general market value" means for the purpose of ensuring that regulated entities comply with the statute:

> In a rental situation, the general market value is the rent that a non-settlement service provider would pay for the same amount of space and services in the same or a comparable building. A general market value standard allows payments for facilities and services actually furnished, but does not take into account any value for the referrals that might be reflected in the rental payment. A general market standard is not only consistent with the existing regulations, it furthers the statute's purpose
> …
> [I]f a settlement service provider rents space from a person *who is referring* settlement service business to the provider, then HUD will examine whether the rental payments are reasonably related to the general market value of the facilities and services actually furnished. If the rental payments exceed the general market value of the space provided, then HUD will consider the *excess amount* to be for the referral of business in violation of Section 8(a).

Id. (emphasis added). In short, office rental payments are allowed under Section 8(c), but a *portion* of any payment will be prohibited if it is in excess of the general market value of the space provided. As discussed below, real estate brokers for years have relied upon this guidance in renting office space to settlement service providers to assist consumers in obtaining a mortgage loan or title insurance.

3. HUD Statements of Policy 1999-1 and 2001-1 Regarding Lender Payments To Mortgage Brokers

In 1998, the Conference Committee for the Department of Veterans Affairs and Housing and Urban Development issued a Conference Report requesting that HUD clarify how payments to mortgage brokers by mortgage lenders in exchange for services rendered should be treated under RESPA. Reflecting the importance of HUD guidance to the interpretation and implementation of RESPA by affected parties, the Conference Report directed HUD to provide guidance "to consumers, brokers, and the courts." H.R. Report 105-769, 105th Congress, 2d Sess. at 260 (1998), 1998 WL 961055. Following the Congressional Report, HUD issued Statement of Policy 1999-1 addressing the interplay of Sections 8(a) and (c)(2) for payments by lenders to mortgage brokers. *See* 64 Fed. Reg. 10,080 (Mar. 1, 1999).

When analyzing lender payments to mortgage brokers in connection with the origination of mortgage loans to determine if they are "permissible under Section 8 of RESPA," HUD emphasized – as in its prior policy statements -- that the two key questions are: (1) "whether goods or facilities were actually furnished or services were actually performed for the compensation paid" and (2) whether the payments are reasonably related to the value of the goods or facilities that were actually furnished or the services that were actually performed." 64 Fed. Reg. at 10,084 (citing 24 C.F.R. § 3500.14(g)(2)). If a payment satisfies both parts of this test, it is "legal under RESPA." *Id.* Referring back to RESPA's legislative history, HUD

noted that "Congress was clear that for payments *to be legal under Section 8*, they must bear a reasonable relationship to the value received by the person or company making the payment. (S. Rep. 93-866, at 6551)." *Id.* at 10,086 (emphasis added).

HUD also issued clear guidance on what it considers a *bona fide* payment under Section 8(c)(2): "[i]n making the determination of whether a payment is *bona fide* compensation for goods or facilities actually furnished or services actually performed, HUD has, in the past, indicated that it would examine *whether the price paid for the goods, facilities or services is truly a market price*; that is, if in an arm's length transaction a purchaser would buy the services at or near the amount charged." *Id.* at 10,087 (emphasis added).

In 2001, and consistent with its statements discussed above, HUD issued a second policy statement addressed to lender payments to mortgage brokers to reiterate that the applicability Section 8(c)(2) was determined solely by application of the two-part test described above. 66 Fed. Reg. 53,052, 53,052-53 (Oct. 18, 2001).

C. The Federal Appellate Courts Have Overwhelmingly Concluded That Section 8(c)(2) Provides A Substantive Exemption To Section 8(a)

Federal Circuit Courts of Appeal across the country have long held that Section 8(c)(2) constitutes a substantive exemption to Section 8(a) liability where referrals among settlement service providers are involved. *See, e.g., Edwards v.*

First American Corp., --- F.3d ---- 2015 WL 4999329 (9th Cir. Aug. 24, 2015). In issuing these decisions, the courts, like NAR's members, have relied on HUD's interpretations of Section 8(c)(2) as set forth in Regulation X and its Policy Statements, each of which the CFPB has adopted. *See, e.g., Galiano v. Fid. Nat. Title Ins. Co.*, 684 F.3d 309, 314 (2d Cir. 2012) (Section 8(c) "provides that § 8(a) shall not be construed as prohibiting payments by a title company for goods, facilities actually furnished, or services actually performed."); *O'Sullivan v. Countrywide Home Loans, Inc.*, 319 F.3d 732, 740 (5th Cir. 2003) ("[w]e defer to 24 C.F.R. § 3500.14(g)(2), as a broad agency rule"); *Mims v. Stewart Title Guar. Co.*, 590 F.3d 298, 304 (5th Cir. 2009) ("Section 8(c) of RESPA contains several exceptions to the general rule…"); *Carter v. Welles-Bowen Realty, Inc.*, 736 F.3d 722, 728 (6th Cir. 2013) (holding Section 8(c)(2) "protects 'the 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'"); *Egerer v. Woodland Realty, Inc.*, 556 F.3d 415, 420-21 (6th Cir. 2009) ("Under RESPA, the referral of settlement service business is not compensable, except as provided by 12 U.S.C. § 2607(c), which contains a list of fees, salaries, compensation and payments that are not prohibited by § 2607(a)."); *Howland v. First Am Title Ins. Co.*, 672 F.3d 525, 531 (7th Cir. 2012); *Glover v. Standard Fed. Bank*, 283 F.3d 953, 962-963 (8th Cir. 2002) ("applying either *Christensen* or *Skidmore*, we find

that the Policy Statements issued by HUD reflect a reasoned view of a responsible agency which is consistent with the statute and regulation and which constitutes a body of experience and informed judgment that this court may look to as determinative authority"); *Bjustrom v. Trust One Mortg. Corp.*, 322 F.3d 1201, 1208 (9th Cir. 2003) (holding payments did not violate Section 8 where "total compensation received … was reasonably related to the services it provided"); *Schuetz v. Banc One Mortg. Corp.*, 292 F.3d 1004, 1011-1012 (9th Cir. 2002) (conduct undertaken in "good faith compliance with HUD rules, regulations, and interpretations" is protected under RESPA); *Smith v. Argent Mortgage Co.*, 331 Fed. Appx. 549, 555 (10th Cir. 2009); *Culpepper v. Irwin Mortg. Corp.*, 491 F.3d 1260, 1276 (11th Cir. 2007) (*see infra*); *Hirsch v. BankAmerica Corp.*, 328 F.3d 1306, 1308-09 (11th Cir. 2003).

For example, in *Howland*, the Seventh Circuit stated that "*as long as the [defendant] performed any services* … they are allowed a reasonable fee under Section 8(c)(2). To establish a violation of Section 8, the plaintiffs would need to show that the fee paid was not reasonably related to the services provided." 672 F.3d at 531-33 (emphasis added). Similarly, in *Glover*, the Eighth Circuit held that "Section 8(c) clearly anticipates payments to individuals for goods or facilities actually furnished or for services actually performed, and specifically excludes these payments from the Section 8(a) proscription." 283 F.3d at 965. Each of

these decisions, along with the others cited above, concludes that the amount of the payment for services rendered is ***decisive*** in determining whether the payment is *bona fide* and therefore lawful under Section 8(a) and 8(c)(2). None of them takes into consideration the existence of an agreement in which one party receives business as a result of the referral or whether that agreement is "tied to" the payments for services in some vague, ambiguous fashion.

D. The Director's Interpretation Of Section 8(c)(2) Starkly Diverges From Well-Established Authority Upon Which NAR's Members Have Relied

The Director's new interpretation of Section 8(c)(2) exceeds the CFPB's authority under RESPA, because rather than exercising its ability to "administer, enforce, and otherwise implement the provisions of Federal consumer financial law," see 12 U.S.C. § 5512(a), the CFPB has re-written those provisions such that Section 8(c)'s substantive exemptions no longer exist.

1. Section 8(c)(2) is a substantive exemption to Section 8(a); *Culpepper (2001)* is not reliable authority

According to the Director, even if payments made for services rendered are at (or even below) market rate, Section 8(c)(2) does not insulate the parties from liability under Section 8(a) if there is a referral in the transaction, because the payments would merely be a "pretext to provide compensation for a referral." *See PHH* Decision at 17. This interpretation flies in the face of Congressional intent when enacting Section 8(c)(2) of providing an objective standard to protect

reasonable, market-value compensation paid in exchange for the provision of actual services rendered where referrals among settlement service providers are involved.[7]

The Director cited *Culpepper v. Irwin Mortg. Corp.*, 253 F.3d 1324 (11th Cir. 2001) ("*Culpepper (2001)*"), to justify the reasoning underlying his decision, even though *Culpepper (2001)*'s analysis of Section 8(c)(2) was expressly rejected by HUD, and later reversed by the Eleventh Circuit. *See Heimmermann v. First Union Mortgage Corp.*, 305 F.3d 1257, 1259 (11th Cir. 2002), and *Culpepper v. Irwin Mortg. Corp.*, 491 F.3d 1260, 1272 (11th Cir. 2007) (concluding that the "approach to RESPA liability" taken by the Court in *Culpepper (2001)* was "'clearly erroneous' such that continuing to apply it 'would work manifest injustice'").

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[7] Indeed, in a 2014 Consent Order, the CFPB took the opposite position to that which it articulated in this matter – referring to Section 8(c)(2) as an "exemption" – although it ultimately concluded that the payments at issue still violated Section 8(a), because "[e]ntering a contract with the agreement or understanding that in exchange the counterparty will refer settlement services … violated Section 8(a)." *See* Consent Order, *In re Lighthouse Title, Inc.*, No. 2014-CFPB-0015, Doc. 1 ¶ 9 (Sept. 30, 2014) *available at http://files.consumerfinance.gov/f/201409_cfpb_consent-order_lighthouse-title.pdf* ("RESPA Section 8(c)(2) provides an exemption for 'payment[s] to any person of a *bona fide* salary or compensation or other payment for goods or facilities actually furnished or for services actually performed.'").

Despite HUD's clear direction in its 1999-1 Policy Statement (*see* Section III.B.3 *supra*), the Eleventh Circuit held in *Culppepper (2001)* that certain lender payments to mortgage brokers ("yield spread premiums") were not legal under Section 8(a) of RESPA – even where the broker provided actual services and the fee received was reasonable relative to the market value of the services – if the purpose of the lender payment was only for referrals and not for services. Under this test, rather than objectively crediting the services provided and evaluating whether the payment for those services was reasonable, the factfinder would be required to attempt to glean the lender's purported intent in making the payment. Along with numerous courts, HUD swiftly rejected the *Culpepper (2001)* analysis through its 2001-1 Policy Statement. *Culpepper (2001)* was incorrectly decided, because

> inventive minds making clever arguments can turn virtually *any* payment flowing from a lender to a broker, in connection with the placement of a mortgage loan, into a purported payment for the unlawful referral of business. However, Section 8(c) clashes with this result. It clearly states that reasonable payments for goods, facilities or services actually furnished are *not prohibited* by RESPA, *even when done in connection with the referral* of a particular loan to a particular lender.

Glover v. Standard Federal Bank, 283 F.3d 953, 964 (8th Cir. 2002) (emphasis added and in original).

Just like the Director's decision here, the *Culpepper (2001)* approach turned Section 8 upside down, "putting total emphasis on the prohibitory language of

Section 8(a) and no emphasis on the permissive language of Section 8(c)." *Id.* HUD's two-part analysis reconciles both "facets" of RESPA policy by requiring a determination of "whether goods or facilities were actually furnished or services actually performed and whether the amounts of the payments are reasonably related to the value of these goods, facilities or services." *Id.*

HUD thus expressly rejected *Culpepper (2001)*'s holding – the same reasoning the Director resuscitates here – of "focusing exclusively on the presumed intent of the lender in making the payments" rather than looking at whether the payments were reasonably related to the actual services performed. 66 Fed. Reg. at 53,054. What mattered under the Section 8(c)(2) exemption, HUD said, was *only* (1) whether actual services were provided, and (2) whether the payment was reasonably related to the *market value* of those services; what did not matter was the manner in which the payment was calculated, what it was called, the lender's intent in making the payment, or indeed, any "value" conveyed to the provider by the opportunity to enter into an agreement under which it would receive market value payments in exchange for services provided. *Id.*

Based on HUD's 2001-1 Policy Statement, the Eleventh Circuit ultimately reversed its 2001 decision in *Culpepper (2001)* and adopted HUD's analysis. In 2007, the Eleventh Circuit concluded that "the 2001 [Statement of Policy] had made clear that 'it [was] necessary to determine whether compensable services

were provided by the broker and whether the total amount of broker compensation was reasonable in the light of the circumstances of each loan.'" *Culpepper v. Irwin Mortg. Corp.*, 491 F.3d 1260, 1276 (11th Cir. 2007). In his decision in this case, the Director not only ignores that *Culpepper (2001)*'s logic was rejected by HUD and reversed by the Eleventh Circuit, he fails to address both the agency's and the Court's reasoning for doing so.[8]

2. A contract to provide market value services is not a "thing of value."

In his decision, the Director suggests that entering into a contract with an entity in a position to refer settlement service business is the predicate of a Section 8(a) violation. For example, the Director states that "Atrium received (profitable) business from the mortgage insurers it would not have otherwise received," and that the benefit to PHH was tied to the referral of business *by virtue of* Petitioners' reinsurance agreements. *PHH Decision* at 16.

But providers routinely enter into contracts with each other to govern the provision of, and payment for, settlement services. As such, that payments are made pursuant to a contract should not negate the availability of Section 8(c)(2)'s

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[8] The Director's reliance on *Arthur v. Ticor Title Ins. Co. of Florida*, 569 F.3d 154 (4th Cir. 2009), also is misplaced as the court there recognized that the examples listed in Section 8(c) create exemptions to liability under Section 8. *Id.* at 158.

exemption. The only factors that matter for the statutory protection are whether actual goods, services, and/or facilities are provided and, if so, whether the amount of the payment is reasonably related to the market value of those actual goods, services or facilities. Moreover, because RESPA presumes that contracts will exist among service providers, a contract is not included within the statute's definition of "thing of value." In *Edwards*, the Ninth Circuit expressly declined to provide any deference to the CFPB's interpretation of the definition of "thing of value," because the definition set forth in Regulation X is unambiguous. 2015 WL 4999329, *5, n. 4.

3. A "*bona fide*" payment as used in Section 8(c)(2) refers to a payment that is based on market value.

The Director held that Section 8(c)(2) requires not only that any payments constitute reasonable compensation for "services actually performed," but also that the payments be "*bona fide*," which he erroneously interpreted to mean that they not be "tied in any way to a referral of business." *PHH* Decision at 17. The Director's analysis of "*bona fide*" is incorrect and inconsistent with RESPA's legislative history and HUD guidance. Only in connection with Section 8(c)(2) does RESPA use "*bona fide*" in conjunction with the term "payment." This usage specifically signals the importance of scrutinizing the payment to determine if it is in fact reasonably related to the market value of the goods, services, or facilities provided or, if not, indicative of a referral. *See, e.g.*, S. Rep. 93-866 at 6551; 64

Fed. Reg. at 10,087 ("[i]n making the determination of whether a payment is *bona fide* compensation for goods or facilities actually furnished or services actually performed, HUD has, in the past, indicated that it would examine whether the price paid for the goods, facilities or services is truly a market price; that is, if in an arm's length transaction a purchaser would buy the services at or near the amount charged"). Whether a payment is *bona fide* is RESPA's mechanism for discerning whether a referral is being compensated; a payment is *bona fide* if it is commensurate with market value, regardless of whether a referral has been made.

E. Numerous Business Activities That NAR's Members Have Considered Lawful Under RESPA Would Be Adversely Affected By The CFPB's New Interpretation And Application Of Section 8(c)(2)

Unless the decision is vacated, the Director's holding will have far-reaching consequences for NAR's members who have relied for decades on the body of RESPA law and policy that has, until now, guided their daily business activities. The following types of arrangements are examples of conduct now threatened by the *PHH Decision.*

1. Marketing and Services Agreements (MSAs)

HUD has recognized the right of settlement service providers to pay fair and reasonable fees for normal marketing and advertising efforts. When purchasing a home, a consumer relies on numerous vendors to provide various services, from the real estate agent to the home inspector to the mortgage bank, and so on. MSAs

enable downstream settlement service providers to purchase general advertising services from upstream providers – real estate brokers, for example – directed towards the consumer population in need of services. In a typical MSA between a mortgage lender and a real estate broker, the lender agrees to pay the real estate broker a specified fixed monthly or annual fee in exchange for the broker agreeing to market various loan products and programs to the broker's agents and customers. The marketing services may include website banner advertisements, physical signage, inclusion of mortgage company logos and marks on publications and other resources, and the availability of brochures and other materials in the broker's office. Fees generally are structured to compensate the broker, or other service provider, only for the marketing and advertising services actually performed. The payments made are not based on the volume of business received. MSAs benefit consumers by providing access to information about other settlement service providers, products, and pricing to assist them in deciding with whom to contract.

Companies entering into MSAs have been guided by an interpretive rule issued by HUD in 2010 regarding "Home Warranty Companies' Payments to Real Estate Brokers and Agents:" 75 Fed. Reg. 36,271 (Jun. 25, 2010) (Interpretative Rule) and 75 Fed. Reg. 74,620 (Dec. 1, 2010) (Response to Public Comments). In these statements, HUD confirmed, consistent with its policy statements described

above, that Section 8(c)(2) permits a person to pay another person in a position to refer settlement service business for the performance of general marketing and advertising services that do not involve direct-to-consumer solicitations, as long as the payment for the marketing services is fair market value for the actual services performed. *See* 75 Fed. Reg. at 36,272, 74,621. The interpretive rule detailed other considerations that HUD deemed indicative of a valid services agreement under RESPA, which many settlement service providers have incorporated into their MSAs.

Real estate brokers who enter into MSAs generally ensure that fair market value is paid by retaining a third-party valuator to provide an opinion that takes into account the full array of goods, services, and facilities that are being made available through the MSA. To verify that the promised goods, services, and facilities are being provided to the paying vendors, the real estate broker may also audit the arrangement on a periodic basis to ensure RESPA compliance. In addition, among other things, many brokers offer a written disclosure to the consumer describing the real estate professional's role in connection with third-party services.

Under the *PHH* decision, the legality of MSAs has been substantially called into question, because marketing alone could be construed as a referral, the MSAs include a written contract (now a "thing of value" in the CFPB's new interpretation

of RESPA), and the entities involved are in a position to, and do, provide business referrals to each other. But MSAs provide a valuable service to settlement service providers, and they enable the home-buying public access to important information in a convenient and efficient manner.

2. Office leases

Real estate brokers for years have rented office space, including conference rooms, in their facilities for use by title agencies for loan closings or for mortgage lenders to pre-qualify or qualify borrowers for home financing. Typically, the space is rented by entities that have received, or expect to receive, referrals of business from the broker. The arrangement represents a substantial convenience and benefit for both the settlement service providers involved, and the consumer who is aided by being able to obtain various vendor services at the point of sale. In its Statement of Policy 1996-3 (*see* Section III.B.2), HUD affirmed the permissibility of room rental arrangements as long as the renter pays fair market value for the goods, services, and facilities received. 61 Fed. Reg. at 29,265.

Office lease arrangements are important for the industry and benefit consumers. For example, in a typical real estate closing, the real estate broker's office is the point of sale and the central location from which other activities related to the transaction take place. For the convenience of all parties, the title agency conducting the closing may wish to rent conference room space at the

broker's office. Similarly, lenders may have a loan officer available in a broker's office to prequalify prospective borrowers before they begin looking for a home to buy.

These arrangements are common, and, to ensure compliance with RESPA, real estate brokers may obtain independent third-party valuations of the general market value of the goods, facilities, and services they provide to the settlement service providers, like title agencies, that use the space. The valuations include, as necessary, the use of photocopy and fax equipment, telephones, kitchen facilities and common areas, administrative support, and any other services provided. Accordingly, if a broker rents conference room space to a settlement service provider, the provider pays a rental rate based on the location of the building, square footage of the building, facilities used inside the building, and any additional services provided. This standard, announced by HUD and relied upon by NAR's members for nearly twenty years, ensures that no compensation for referrals is built into the rental rates paid. Both HUD and the CFPB have enforced, and thereby reiterated, this standard through their enforcement activity. *See, e.g.*, Metropolitan Title Company Settlement Agreement (May 27, 2005) *available at http://portal.hud.gov/hudportal/documents/huddoc?id=DOC_23729.pdf;* Consent Order *In the Matter of Fidelity Mortgage Corporation and Mark Figert*, No. 2014-CFPB-0001, Doc. 1 (January 16, 2014) *available at http://files.consumerfinance.*

gov/f/201401_cfpb_consent-order_fidelity.pdf (finding that rental arrangement did not satisfy general market value test set out in HUD Statement of Policy 1996-3, 61 Fed. Reg. 29,264 (June 7, 1996)). Yet, the *PHH Decision* could now render these arrangements illegal under Section 8(a) because of the presence of referrals between the broker and the service provider.

3. Joint advertising arrangements

Settlement service providers engage in joint or co-advertising arrangements to share the cost of advertising, and to help consumers choose from the wide array of options that are available for the services required to complete the purchase of a home. For example, a real estate broker or agent and a mortgage lender may jointly advertise through the use of mailed post cards, magazines, or newspapers. They share the cost of printing, mailing, and ad space on a pro rata basis. Or, a mortgage loan officer might purchase a real estate rider sign from a real estate broker, which enables the loan officer to advertise in conjunction with a broker's "for sale" sign. To comply with RESPA, the loan officer will pay the market value of the signage provided. This offers convenience and efficiency for the potential home buyer who might be interested in the property. While the potential borrower can and should "shop around" for the best terms available, having more information available rather than less makes the process more efficient.

HUD has not considered joint advertising prohibited by RESPA if the advertising costs of each party are reasonably related to the value of the goods or service received in return (that is, the amount of advertising).[9] Yet, such arrangements would be called into question under the Director's strained reading of Section 8(c)(2) to the extent that the two entities involved in co-advertising refer consumers to each other in the ordinary course of their business.

IV. CONCLUSION

RESPA permits good faith reliance on any "rule, regulation, or interpretation" issued by HUD or the CFPB interpreting Section 8 (12 U.S.C. § 2617(b); 12 C.F.R. § 1024.4), and NAR's members have so relied. In light of RESPA's penalties, the Director's decision in this case represents an unfair and unprecedented departure from substantial, uniform precedent and agency guidance. On behalf of its members, NAR respectfully requests that the decision be reversed and vacated.

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[9] *See* FAQs about RESPA for the Industry (No. 18) *available at* http://portal.hud.gov/hudportal/documents/huddoc?id=faqsjuly16.pdf ("Nothing in RESPA prevents joint advertising. However, if one party is paying less than a pro-rata share for the brochure or advertisement, there could be a RESPA violation").

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 29(d) and 32(a)(7)(B) because it contains 6,338 words, including the Statement of Identity of *Amicus Curiae*, Its Interest in the Case, and Source of Its Authority to File as well as the Certificate of Counsel Regarding Necessity of Separate *Amici Curiae* Brief, but excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced type face using Microsoft Word 2010 in 14-point Times New Roman type style.

October 5, 2015

/s/ David T. Case
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CERTIFICATE OF SERVICE

I hereby certify that, on October 5, 2015, an electronic copy of the foregoing brief was filed with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the Court's CM/ECF system and was served electronically by the Notice of Docket Activity upon the following counsel for petitioners and respondent, who are registered CM/ECF users:

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ADDENDUM

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§ 2606. Exempted transactions

(a) In general

This chapter does not apply to credit transactions involving extensions of credit—

(1) primarily for business, commercial, or agricultural purposes; or

(2) to government or governmental agencies or instrumentalities.

(b) Interpretation

In prescribing regulations under section 2617(a) of this title, the Bureau shall ensure that, with respect to subsection (a) of this section, the exemption for credit transactions involving extensions of credit primarily for business, commercial, or agricultural purposes, as provided in subsection (a)(1)[1] of this section shall be the same as the exemption for such credit transactions under section 1603(1) of title 15.

(Pub. L. 93–533, §7, as added Pub. L. 103–325, title III, §312, Sept. 23, 1994, 108 Stat. 2221; amended Pub. L. 104–208, div. A, title II, §2103(b), Sept. 30, 1996, 110 Stat. 3009–399; Pub. L. 111–203, title X, §1098(5), July 21, 2010, 124 Stat. 2104.)

REFERENCES IN TEXT

Subsection (a)(1) of this section, referred to in subsec. (b), was in the original "section 7(1) of the Real Estate Settlement Procedures Act of 1974", and was translated as referring to section 7(a)(1) of that Act to reflect the probable intent of Congress.

PRIOR PROVISIONS

A prior section 2606, Pub. L. 93–533, §7, Dec. 22, 1974, 88 Stat. 1727, related to seller or his agent confirming that information concerning an existing residence was disclosed to buyer in writing before a commitment for a mortgage loan was made, prior to repeal by Pub. L. 94–205, §6, Jan. 2, 1976, 89 Stat. 1158.

AMENDMENTS

2010—Subsec. (b). Pub. L. 111–203 substituted "Bureau" for "Secretary".

1996—Pub. L. 104–208 designated existing provisions as subsec. (a), inserted heading, and added subsec. (b).

EFFECTIVE DATE OF 2010 AMENDMENT

Amendment by Pub. L. 111–203 effective on the designated transfer date, see section 1100H of Pub. L. 111–203, set out as a note under section 552a of Title 5, Government Organization and Employees.

§ 2607. Prohibition against kickbacks and unearned fees

(a) Business referrals

No person shall give and no person shall accept any fee, kickback, or thing of value pursuant to any 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 shall be referred to any person.

(b) Splitting charges

No person shall give and no person shall accept any portion, split, or percentage of any charge made or received for the rendering of a real estate settlement service in connection with a transaction involving a federally related mortgage loan other than for services actually performed.

(c) Fees, salaries, compensation, or other payments

Nothing in this section shall be construed as prohibiting (1) the payment of a fee (A) to attorneys at law for services actually rendered or (B) by a title company to its duly appointed agent for services actually performed in the issuance of a policy of title insurance or (C) by a lender to its duly appointed agent for services actually performed in the making of a loan, (2) the 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, (3) payments pursuant to cooperative brokerage and referral arrangements or agreements between real estate agents and brokers, (4) affiliated business arrangements so long as (A) a disclosure is made of the existence of such an arrangement to the person being referred and, in connection with such referral, such person is provided a written estimate of the charge or range of charges generally made by the provider to which the person is referred (i) in the case of a face-to-face referral or a referral made in writing or by electronic media, at or before the time of the referral (and compliance with this requirement in such case may be evidenced by a notation in a written, electronic, or similar system of records maintained in the regular course of business); (ii) in the case of a referral made by telephone, within 3 business days after the referral by telephone,[1] (and in such case an abbreviated verbal disclosure of the existence of the arrangement and the fact that a written disclosure will be provided within 3 business days shall be made to the person being referred during the telephone referral); or (iii) in the case of a referral by a lender (including a referral by a lender to an affiliated lender), at the time the estimates required under section 2604(c) of this title are provided (notwithstanding clause (i) or (ii)); and any required written receipt of such disclosure (without regard to the manner of the disclosure under clause (i), (ii), or (iii)) may be obtained at the closing or settlement (except that a person making a face-to-face referral who provides the written disclosure at or before the time of the referral shall attempt to obtain any required written receipt of such disclosure at such time and if the person being referred chooses not to acknowledge the receipt of the disclosure at that time, that fact shall be noted in the written, electronic, or similar system of records maintained in the regular course of business by the person making the referral), (B) such person is not required to use any particular provider of settlement services, and (C) the only thing of value that is received from the arrangement, other than the payments permitted under this subsection, is a return on the ownership interest or franchise relationship, or (5) such other payments or classes of payments or other transfers as are specified in regulations prescribed by the Bureau, after consultation with the Attorney General, the Secretary of Veterans Affairs, the Federal Home Loan Bank Board, the Federal De-

[1] See References in Text note below.

[1] So in original.

posit Insurance Corporation, the Board of Governors of the Federal Reserve System, and the Secretary of Agriculture. For purposes of the preceding sentence, the following shall not be considered a violation of clause (4)(B): (i) any arrangement that requires a buyer, borrower, or seller to pay for the services of an attorney, credit reporting agency, or real estate appraiser chosen by the lender to represent the lender's interest in a real estate transaction, or (ii) any arrangement where an attorney or law firm represents a client in a real estate transaction and issues or arranges for the issuance of a policy of title insurance in the transaction directly as agent or through a separate corporate title insurance agency that may be established by that attorney or law firm and operated as an adjunct to his or its law practice.

(d) Penalties for violations; joint and several liability; treble damages; actions for injunction by Bureau and Secretary and by State officials; costs and attorney fees; construction of State laws

(1) 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.

(2) Any person or persons who violate the prohibitions or limitations of this section shall be jointly and severally liable to the person or persons charged for the settlement service involved in the violation in an amount equal to three times the amount of any charge paid for such settlement service.

(3) No person or persons shall be liable for a violation of the provisions of subsection (c)(4)(A) of this section if such person or persons proves by a preponderance of the evidence that such violation was not intentional and resulted from a bona fide error notwithstanding maintenance of procedures that are reasonably adapted to avoid such error.

(4) The Bureau, the Secretary, or the attorney general or the insurance commissioner of any State may bring an action to enjoin violations of this section. Except, to the extent that a person is subject to the jurisdiction of the Bureau, the Secretary, or the attorney general or the insurance commissioner of any State, the Bureau shall have primary authority to enforce or administer this section, subject to subtitle B of the Consumer Financial Protection Act of 2010 [12 U.S.C. 5511 et seq.].

(5) In any private action brought pursuant to this subsection, the court may award to the prevailing party the court costs of the action together with reasonable attorneys fees.

(6) No provision of State law or regulation that imposes more stringent limitations on affiliated business arrangements shall be construed as being inconsistent with this section.

(Pub. L. 93–533, § 8, Dec. 22, 1974, 88 Stat. 1727; Pub. L. 94–205, § 7, Jan. 2, 1976, 89 Stat. 1158; Pub. L. 98–181, title I [title IV, § 461(b), (c)], Nov. 30, 1983, 97 Stat. 1231; Pub. L. 100–242, title V, § 570(g), Feb. 5, 1988, 101 Stat. 1950; Pub. L. 102–54, § 13(d)(4), June 13, 1991, 105 Stat. 275; Pub. L. 104–208, div. A, title II, § 2103(c)(2), (d), Sept. 30, 1996, 110 Stat. 3009–400; Pub. L. 111–203, title X, § 1098(6), (7), July 21, 2010, 124 Stat. 2104.)

REFERENCES IN TEXT

The Consumer Financial Protection Act of 2010, referred to in subsec. (d)(4), is title X of Pub. L. 111–203, July 21, 2010, 124 Stat. 1955. Subtitle B of the Act is classified generally to part B (§ 5511 et seq.) of subchapter V of chapter 53 of this title. For complete classification of this Act to the Code, see Short Title note set out under section 5301 of this title and Tables.

AMENDMENTS

2010—Subsec. (c)(5). Pub. L. 111–203, § 1098(6), which directed substituting "Bureau" for "Secretary", was executed by making the substitution for "Secretary" the first time appearing, to reflect the probable intent of Congress.

Subsec. (d). Pub. L. 111–203, § 1098(7)(A), inserted "Bureau and" before "Secretary" in heading that had been supplied editorially.

Subsec. (d)(4). Pub. L. 111–203, § 1098(7)(B), added par. (4) and struck out former par. (4) which read as follows: "The Secretary, the Attorney General of any State, or the insurance commissioner of any State may bring an action to enjoin violations of this section."

1996—Subsec. (c)(4). Pub. L. 104–208, § 2103(c)(2), substituted "affiliated business arrangements" for "controlled business arrangements".

Subsec. (c)(4)(A). Pub. L. 104–208, § 2103(d), amended subcl. (A) generally. Prior to amendment, subcl. (A) read as follows: "at or prior to the time of the referral a disclosure is made of the existence of such an arrangement to the person being referred and, in connection with the referral, such person is provided a written estimate of the charge or range of charges generally made by the provider to which the person is referred, except that where a lender makes the referral, this requirement may be satisfied as part of and at the time that the estimates of settlement charges required under section 2604(c) of this title are provided,".

Subsec. (d)(6). Pub. L. 104–208, § 2103(c)(2), substituted "affiliated business arrangements" for "controlled business arrangements".

1991—Subsec. (c)(5). Pub. L. 102–54 substituted "Secretary of Veterans Affairs" for "Administrator of Veterans' Affairs".

1988—Subsec. (c)(5). Pub. L. 100–242 substituted "clause (4)(B)" for "clause 4(B)".

1983—Subsec. (c). Pub. L. 98–181, § 461(b), redesignated cl. (4) as (5), added cl. (4) and provisions following cl. (5), as so redesignated, relating to arrangements which shall not be considered a violation of cl. (4)(B).

Subsec. (d)(2). Pub. L. 98–181, § 461(c), substituted provisions setting forth the liability of persons violating the prohibitions or limitations of this section for provisions setting forth liability, in addition to penalties provided in par. (1), of persons violating subsecs. (a) and (b) of this section, plus costs and attorney's fees.

Subsec. (d)(3) to (6). Pub. L. 98–181, § 461(c), added pars. (3) to (6).

1976—Subsec. (c). Pub. L. 94–205 added cls. (3) and (4).

EFFECTIVE DATE OF 2010 AMENDMENT

Amendment by Pub. L. 111–203 effective on the designated transfer date, see section 1100H of Pub. L. 111–203, set out as a note under section 552a of Title 5, Government Organization and Employees.

EFFECTIVE DATE OF 1983 AMENDMENT

Amendment by Pub. L. 98–181 effective Jan. 1, 1984, see section 461(f) of Pub. L. 98–181, set out as a note under section 2602 of this title.

EFFECTIVE DATE OF 1976 AMENDMENT

Amendment by Pub. L. 94–205 effective Jan. 2, 1976, see section 12 of Pub. L. 94–205, set out as a note under section 2602 of this title.

TRANSFER OF FUNCTIONS

Federal Home Loan Bank Board abolished and functions transferred, see sections 401 to 406 of Pub. L. 101–73, set out as a note under section 1437 of this title.

§ 2608. Title companies; liability of seller

(a) No seller of property that will be purchased with the assistance of a federally related mortgage loan shall require directly or indirectly, as a condition to selling the property, that title insurance covering the property be purchased by the buyer from any particular title company.

(b) Any seller who violates the provisions of subsection (a) of this section shall be liable to the buyer in an amount equal to three times all charges made for such title insurance.

(Pub. L. 93–533, § 9, Dec. 22, 1974, 88 Stat. 1728.)

§ 2609. Limitation on requirement of advance deposits in escrow accounts

(a) In general

A lender, in connection with a federally related mortgage loan, may not require the borrower or prospective borrower—

(1) to deposit in any escrow account which may be established in connection with such loan for the purpose of assuring payment of taxes, insurance premiums, or other charges with respect to the property, in connection with the settlement, an aggregate sum (for such purpose) in excess of a sum that will be sufficient to pay such taxes, insurance premiums and other charges attributable to the period beginning on the last date on which each such charge would have been paid under the normal lending practice of the lender and local custom, provided that the selection of each such date constitutes prudent lending practice, and ending on the due date of its first full installment payment under the mortgage, plus one-sixth of the estimated total amount of such taxes, insurance premiums and other charges to be paid on dates, as provided above, during the ensuing twelve-month period; or

(2) to deposit in any such escrow account in any month beginning with the first full installment payment under the mortgage a sum (for the purpose of assuring payment of taxes, insurance premiums and other charges with respect to the property) in excess of the sum of (A) one-twelfth of the total amount of the estimated taxes, insurance premiums and other charges which are reasonably anticipated to be paid on dates during the ensuing twelve months which dates are in accordance with the normal lending practice of the lender and local custom, provided that the selection of each such date constitutes prudent lending practice, plus (B) such amount as is necessary to maintain an additional balance in such escrow account not to exceed one-sixth of the estimated total amount of such taxes, insurance premiums and other charges to be paid on dates, as provided above, during the ensuing twelve-month period: *Provided, however*, That in the event the lender determines there will be or is a deficiency he shall not be prohibited from requiring additional monthly deposits in such escrow account to avoid or eliminate such deficiency.

(b) Notification of shortage in escrow account

If the terms of any federally related mortgage loan require the borrower to make payments to the servicer (as the term is defined in section 2605(i) of this title) of the loan for deposit into an escrow account for the purpose of assuring payment of taxes, insurance premiums, and other charges with respect to the property, the servicer shall notify the borrower not less than annually of any shortage of funds in the escrow account.

(c) Escrow account statements

(1) Initial statement

(A) In general

Any servicer that has established an escrow account in connection with a federally related mortgage loan shall submit to the borrower for which the escrow account has been established a statement clearly itemizing the estimated taxes, insurance premiums, and other charges that are reasonably anticipated to be paid from the escrow account during the first 12 months after the establishment of the account and the anticipated dates of such payments.

(B) Time of submission

The statement required under subparagraph (A) shall be submitted to the borrower at closing with respect to the property for which the mortgage loan is made or not later than the expiration of the 45-day period beginning on the date of the establishment of the escrow account.

(C) Initial statement at closing

Any servicer may submit the statement required under subparagraph (A) to the borrower at closing and may incorporate such statement in the uniform settlement statement required under section 2603 of this title. The Bureau shall issue regulations prescribing any changes necessary to the uniform settlement statement under section 2603 of this title that specify how the statement required under subparagraph (A) of this section shall be incorporated in the uniform settlement statement.

(2) Annual statement

(A) In general

Any servicer that has established or continued an escrow account in connection with a federally related mortgage loan shall submit to the borrower for which the escrow account has been established or continued a statement clearly itemizing, for each period described in subparagraph (B) (during which the servicer services the escrow account), the amount of the borrower's current monthly payment, the portion of the monthly payment being placed in the escrow account, the total amount paid into the escrow account during the period, the total amount paid out of the escrow account during the period for taxes, insurance premiums, and other charges (as separately identified), and the balance in the escrow account at the conclusion of the period.

(B) Time of submission

The statement required under subparagraph (A) shall be submitted to the borrower not less than once for each 12-month period,

§ 2103(e), Sept. 30, 1996, 110 Stat. 3009–400; Pub. L. 111–203, title X, § 1098(9), July 21, 2010, 124 Stat. 2104.)

AMENDMENTS

2010—Pub. L. 111–203 inserted "the Bureau," before "the Secretary".

1996—Pub. L. 104–208 substituted "section 2605, 2607, or 2608 of this title" for "section 2607 or 2608 of this title" and "within 3 years in the case of a violation of section 2605 of this title and 1 year in the case of a violation of section 2607 or 2608 of this title" for "within one year".

1983—Pub. L. 98–181 amended section generally, striking out a reference to section 2605 of this title, and inserting provision allowing action in district where violation is alleged to have occurred, and provision relating to time limitations in actions brought by the Secretary, the Attorney General of any State, or the insurance commissioner of any State.

EFFECTIVE DATE OF 2010 AMENDMENT

Amendment by Pub. L. 111–203 effective on the designated transfer date, see section 1100H of Pub. L. 111–203, set out as a note under section 552a of Title 5, Government Organization and Employees.

EFFECTIVE DATE OF 1983 AMENDMENT

Amendment by Pub. L. 98–181 effective Jan. 1, 1984, see section 461(f) of Pub. L. 98–181, set out as a note under section 2602 of this title.

§ 2615. Contracts and liens; validity

Nothing in this chapter shall affect the validity or enforceability of any sale or contract for the sale of real property or any loan, loan agreement, mortgage, or lien made or arising in connection with a federally related mortgage loan.

(Pub. L. 93–533, § 17, Dec. 22, 1974, 88 Stat. 1731.)

§ 2616. State laws unaffected; inconsistent Federal and State provisions

This chapter does not annul, alter, or affect, or exempt any person subject to the provisions of this chapter from complying with, the laws of any State with respect to settlement practices, except to the extent that those laws are inconsistent with any provision of this chapter, and then only to the extent of the inconsistency. The Bureau is authorized to determine whether such inconsistencies exist. The Bureau may not determine that any State law is inconsistent with any provision of this chapter if the Bureau determines that such law gives greater protection to the consumer. In making these determinations the Bureau shall consult with the appropriate Federal agencies.

(Pub. L. 93–533, § 18, Dec. 22, 1974, 88 Stat. 1731; Pub. L. 94–205, § 9, Jan. 2, 1976, 89 Stat. 1159; Pub. L. 111–203, title X, § 1098(10), July 21, 2010, 124 Stat. 2104.)

AMENDMENTS

2010—Pub. L. 111–203 substituted "Bureau" for "Secretary" wherever appearing.

1976—Pub. L. 94–205 struck out "(a)" before "This chapter" and struck out subsec. (b) which provided for Federal protection against liability for acts done or omitted in good faith in accordance with the rules, regulations, or interpretations issued by the Secretary. See section 2617 (b) of this title.

EFFECTIVE DATE OF 2010 AMENDMENT

Amendment by Pub. L. 111–203 effective on the designated transfer date, see section 1100H of Pub. L. 111–203, set out as a note under section 552a of Title 5, Government Organization and Employees.

EFFECTIVE DATE OF 1976 AMENDMENT

Amendment by Pub. L. 94–205 effective Jan. 2, 1976, see section 12 of Pub. L. 94–205, set out as a note under section 2602 of this title.

§ 2617. Authority of Bureau

(a) Issuance of regulations; exemptions

The Bureau is authorized to prescribe such rules and regulations, to make such interpretations, and to grant such reasonable exemptions for classes of transactions, as may be necessary to achieve the purposes of this chapter.

(b) Liability for acts done in good faith in conformity with rule, regulation, or interpretation

No provision of this chapter or the laws of any State imposing any liability shall apply to any act done or omitted in good faith in conformity with any rule, regulation, or interpretation thereof by the Bureau or the Attorney General, notwithstanding that after such act or omission has occurred, such rule, regulation, or interpretation is amended, rescinded, or determined by judicial or other authority to be invalid for any reason.

(c) Investigations; hearings; failure to obey order; contempt

(1) The Secretary[1] may investigate any facts, conditions, practices, or matters that may be deemed necessary or proper to aid in the enforcement of the provisions of this chapter, in prescribing of rules and regulations thereunder, or in securing information to serve as a basis for recommending further legislation concerning real estate settlement practices. To aid in the investigations, the Bureau is authorized to hold such hearings, administer such oaths, and require by subpena the attendance and testimony of such witnesses and production of such documents as the Bureau deems advisable.

(2) Any district court of the United States within the jurisdiction of which an inquiry is carried on may, in the case of contumacy or refusal to obey a subpena of the Bureau issued under this section, issue an order requiring compliance therewith; and any failure to obey such order of the court may be punished by such court as a contempt thereof.

(d) Delay of effectiveness of recent final regulation relating to payments to employees

(1) In general

The amendment to part 3500 of title 24 of the Code of Federal Regulations contained in the final regulation prescribed by the Secretary and published in the Federal Register on June 7, 1996, which will, as of the effective date of such amendment—

(A) eliminate the exemption for payments by an employer to employees of such employer for referral activities which is currently codified as section 3500.14(g)(1)(vii) of such title 24; and

(B) replace such exemption with a more limited exemption in new clauses (vii), (viii), and (ix) of section 3500.14 of such title 24,

[1] Probably should be "The Bureau".

shall not take effect before July 31, 1997.

(2) Continuation of prior rule

The regulation codified as section 3500.14(g)(1)(vii) of title 24 of the Code of Federal Regulations, relating to employer-employee payments, as in effect on May 1, 1996, shall remain in effect until the date the amendment referred to in paragraph (1) takes effect in accordance with such paragraph.

(3) Public notice of effective date

The Secretary shall provide public notice of the date on which the amendment referred to in paragraph (1) will take effect in accordance with such paragraph not less than 90 days and not more than 180 days before such effective date.

(Pub. L. 93–533, § 19, as added Pub. L. 94–205, § 10, Jan. 2, 1976, 89 Stat. 1159; amended Pub. L. 98–181, title I [title IV, § 461(e)], Nov. 30, 1983, 97 Stat. 1232; Pub. L. 104–208, div. A, title II, § 2103(f), Sept. 30, 1996, 110 Stat. 3009–401; Pub. L. 111–203, title X, § 1098(11), July 21, 2010, 124 Stat. 2104.)

AMENDMENTS

2010—Pub. L. 111–203, § 1098(11)(A), substituted "Bureau" for "Secretary" in section catchline.

Subsec. (a). Pub. L. 111–203, § 1098(11)(B), substituted "Bureau" for "Secretary".

Subsecs. (b), (c). Pub. L. 111–203, § 1098(11)(C), substituted "the Bureau" for "the Secretary" wherever appearing.

1996—Subsec. (d). Pub. L. 104–208 added subsec. (d).

1983—Subsec. (c). Pub. L. 98–181 added subsec. (c).

EFFECTIVE DATE OF 2010 AMENDMENT

Amendment by Pub. L. 111–203 effective on the designated transfer date, see section 1100H of Pub. L. 111–203, set out as a note under section 552a of Title 5, Government Organization and Employees.

EFFECTIVE DATE OF 1983 AMENDMENT

Amendment by Pub. L. 98–181 effective Jan. 1, 1984, see section 461(f) of Pub. L. 98–181, set out as a note under section 2602 of this title.

EFFECTIVE DATE

Section effective Jan. 2, 1976, see section 12 of Pub. L. 94–205, set out as an Effective Date of 1976 Amendment note under section 2602 of this title.

CHAPTER 28—EMERGENCY MORTGAGE RELIEF

§ 2701. Congressional findings and declaration of purpose

(a) The Congress finds that—

(1) the Nation is in a severe recession and that the sharp downturn in economic activity has driven large numbers of workers into unemployment and has reduced the incomes of many others;

(2) as a result of these adverse economic conditions the capacity of many homeowners to continue to make mortgage payments has deteriorated and may further deteriorate in the months ahead, leading to the possibility of widespread mortgage foreclosures and distress sales of homes; and

(3) many of these homeowners could retain their homes with temporary financial assistance until economic conditions improve.

(b) It is the purpose of this chapter to provide a standby authority which will prevent widespread mortgage foreclosures and distress sales of homes resulting from the temporary loss of employment and income through a program of emergency loans and advances and emergency mortgage relief payments to homeowners to defray mortgage expenses.

(Pub. L. 94–50, title I, § 102, July 2, 1975, 89 Stat. 249.)

SHORT TITLE

Pub. L. 94–50, § 1, July 2, 1975, 89 Stat. 249, provided: "That this Act [enacting this chapter, amending sections 1723e and 1735b of this title and sections 1452 and 4106 of Title 42, The Public Health and Welfare, enacting provisions set out as a note under this section, and amending provisions set out as a note under section 1723e of this title] may be cited as the 'Emergency Housing Act of 1975'."

Pub. L. 94–50, title I, § 101, July 2, 1975, 89 Stat. 249, provided that: "This title [enacting this chapter] may be cited as the 'Emergency Homeowners' Relief Act'."

§ 2702. Mortgages eligible for assistance

No assistance shall be extended with respect to any mortgage under this chapter unless—

(1) the holder of the mortgage has indicated to the mortgagor its intention to foreclose;

(2) the mortgagor and holder of the mortgage have certified that circumstances makes it probable that there will be a foreclosure and that the mortgagor is in need of emergency mortgage relief as authorized by this chapter;

(3) payments under the mortgage have been delinquent for at least three months;

(4) the mortgagor has incurred a substantial reduction in income as a result of involuntary unemployment or underemployment due to adverse economic conditions or medical conditions and is financially unable to make full mortgage payments;

(5) there is a reasonable prospect that the mortgagor will be able to make the adjustments necessary for a full resumption of mortgage payments; and

(6) the mortgaged property is the principal residence of the mortgagor.

(Pub. L. 94–50, title I, § 103, July 2, 1975, 89 Stat. 249; Pub. L. 111–203, title XIV, § 1496(b)(1), July 21, 2010, 124 Stat. 2207.)

AMENDMENTS

2010—Par. (2). Pub. L. 111–203, § 1496(b)(1)(A), substituted "have certified" for "have indicated in writing to the Secretary of Housing and Urban Development (hereinafter referred to as the 'Secretary') and to any agency or department of the Federal Government re-

report regarding the funding of the Bureau, including the assets and liabilities of the Bureau, and the extent to which the funding needs of the Bureau are anticipated to exceed the level of the amount set forth in subsection (a)(2). The Director shall submit the report to the President and to the Committee on Appropriations of the Senate and the Committee on Appropriations of the House of Representatives.

(2) Authorization of appropriations

If the Director makes the determination and submits the report pursuant to paragraph (1), there are hereby authorized to be appropriated to the Bureau, for the purposes of carrying out the authorities granted in Federal consumer financial law, $200,000,000 for each of fiscal years 2010, 2011, 2012, 2013, and 2014.

(3) Apportionment

Notwithstanding any other provision of law, the amounts in paragraph (2) shall be subject to apportionment under section 1517 of title 31 and restrictions that generally apply to the use of appropriated funds in title 31 and other laws.

(4) Annual report

The Director shall prepare and submit a report, on an annual basis, to the Committee on Appropriations of the Senate and the Committee on Appropriations of the House of Representatives regarding the financial operating plans and forecasts of the Director, the financial condition and results of operations of the Bureau, and the sources and application of funds of the Bureau, including any funds appropriated in accordance with this subsection.

(Pub. L. 111–203, title X, §1017, July 21, 2010, 124 Stat. 1975.)

REFERENCES IN TEXT

This title, referred to in subsec. (a)(2)(C), is title X of Pub. L. 111–203, July 21, 2010, 124 Stat. 1955, known as the Consumer Financial Protection Act of 2010, which enacted this subchapter and enacted, amended, and repealed numerous other sections and notes in the Code. For complete classification of title X to the Code, see Short Title note set out under section 5301 of this title and Tables.

CODIFICATION

In subsec. (a)(5)(C), "section 6101 of title 41" substituted for "section 3709 of the Revised Statutes of the United States (41 U.S.C. 5)" on authority of Pub. L. 111–350, §6(c), Jan. 4, 2011, 124 Stat. 3854, which Act enacted Title 41, Public Contracts.

PART B—GENERAL POWERS OF THE BUREAU

§ 5511. Purpose, objectives, and functions

(a) Purpose

The Bureau shall seek to implement and, where applicable, enforce Federal consumer financial law consistently for the purpose of ensuring that all consumers have access to markets for consumer financial products and services and that markets for consumer financial products and services are fair, transparent, and competitive.

(b) Objectives

The Bureau is authorized to exercise its authorities under Federal consumer financial law for the purposes of ensuring that, with respect to consumer financial products and services—

(1) consumers are provided with timely and understandable information to make responsible decisions about financial transactions;

(2) consumers are protected from unfair, deceptive, or abusive acts and practices and from discrimination;

(3) outdated, unnecessary, or unduly burdensome regulations are regularly identified and addressed in order to reduce unwarranted regulatory burdens;

(4) Federal consumer financial law is enforced consistently, without regard to the status of a person as a depository institution, in order to promote fair competition; and

(5) markets for consumer financial products and services operate transparently and efficiently to facilitate access and innovation.

(c) Functions

The primary functions of the Bureau are—

(1) conducting financial education programs;

(2) collecting, investigating, and responding to consumer complaints;

(3) collecting, researching, monitoring, and publishing information relevant to the functioning of markets for consumer financial products and services to identify risks to consumers and the proper functioning of such markets;

(4) subject to sections 5514 through 5516 of this title, supervising covered persons for compliance with Federal consumer financial law, and taking appropriate enforcement action to address violations of Federal consumer financial law;

(5) issuing rules, orders, and guidance implementing Federal consumer financial law; and

(6) performing such support activities as may be necessary or useful to facilitate the other functions of the Bureau.

(Pub. L. 111–203, title X, §1021, July 21, 2010, 124 Stat. 1979.)

EFFECTIVE DATE

Pub. L. 111–203, title X, §1029A, July 21, 2010, 124 Stat. 2005, provided that: "This subtitle [subtitle B (§§1021–1029A), enacting this part] shall become effective on the designated transfer date, except that sections 1022, 1024, and 1025(e) [12 U.S.C. 5512, 5514, and 5515(e)] shall become effective on the date of enactment of this Act [July 21, 2010]."

[The term "designated transfer date" is defined in section 5481(9) of this title as the date established under section 5582 of this title.]

§ 5512. Rulemaking authority

(a) In general

The Bureau is authorized to exercise its authorities under Federal consumer financial law to administer, enforce, and otherwise implement the provisions of Federal consumer financial law.

(b) Rulemaking, orders, and guidance

(1) General authority

The Director may prescribe rules and issue orders and guidance, as may be necessary or appropriate to enable the Bureau to administer and carry out the purposes and objectives

of the Federal consumer financial laws, and to prevent evasions thereof.

(2) Standards for rulemaking

In prescribing a rule under the Federal consumer financial laws—

(A) the Bureau shall consider—

(i) the potential benefits and costs to consumers and covered persons, including the potential reduction of access by consumers to consumer financial products or services resulting from such rule; and

(ii) the impact of proposed rules on covered persons, as described in section 5516 of this title, and the impact on consumers in rural areas;

(B) the Bureau shall consult with the appropriate prudential regulators or other Federal agencies prior to proposing a rule and during the comment process regarding consistency with prudential, market, or systemic objectives administered by such agencies; and

(C) if, during the consultation process described in subparagraph (B), a prudential regulator provides the Bureau with a written objection to the proposed rule of the Bureau or a portion thereof, the Bureau shall include in the adopting release a description of the objection and the basis for the Bureau decision, if any, regarding such objection, except that nothing in this clause shall be construed as altering or limiting the procedures under section 5513 of this title that may apply to any rule prescribed by the Bureau.

(3) Exemptions

(A) In general

The Bureau, by rule, may conditionally or unconditionally exempt any class of covered persons, service providers, or consumer financial products or services, from any provision of this title,[1] or from any rule issued under this title,[1] as the Bureau determines necessary or appropriate to carry out the purposes and objectives of this title,[1] taking into consideration the factors in subparagraph (B).

(B) Factors

In issuing an exemption, as permitted under subparagraph (A), the Bureau shall, as appropriate, take into consideration—

(i) the total assets of the class of covered persons;

(ii) the volume of transactions involving consumer financial products or services in which the class of covered persons engages; and

(iii) existing provisions of law which are applicable to the consumer financial product or service and the extent to which such provisions provide consumers with adequate protections.

(4) Exclusive rulemaking authority

(A) In general

Notwithstanding any other provisions of Federal law and except as provided in section 5581(b)(5) of this title, to the extent that a provision of Federal consumer financial law authorizes the Bureau and another Federal agency to issue regulations under that provision of law for purposes of assuring compliance with Federal consumer financial law and any regulations thereunder, the Bureau shall have the exclusive authority to prescribe rules subject to those provisions of law.

(B) Deference

Notwithstanding any power granted to any Federal agency or to the Council under this title,[1] and subject to section 5581(b)(5)(E) of this title, the deference that a court affords to the Bureau with respect to a determination by the Bureau regarding the meaning or interpretation of any provision of a Federal consumer financial law shall be applied as if the Bureau were the only agency authorized to apply, enforce, interpret, or administer the provisions of such Federal consumer financial law.

(c) Monitoring

(1) In general

In order to support its rulemaking and other functions, the Bureau shall monitor for risks to consumers in the offering or provision of consumer financial products or services, including developments in markets for such products or services.

(2) Considerations

In allocating its resources to perform the monitoring required by this section, the Bureau may consider, among other factors—

(A) likely risks and costs to consumers associated with buying or using a type of consumer financial product or service;

(B) understanding by consumers of the risks of a type of consumer financial product or service;

(C) the legal protections applicable to the offering or provision of a consumer financial product or service, including the extent to which the law is likely to adequately protect consumers;

(D) rates of growth in the offering or provision of a consumer financial product or service;

(E) the extent, if any, to which the risks of a consumer financial product or service may disproportionately affect traditionally underserved consumers; or

(F) the types, number, and other pertinent characteristics of covered persons that offer or provide the consumer financial product or service.

(3) Significant findings

(A) In general

The Bureau shall publish not fewer than 1 report of significant findings of its monitoring required by this subsection in each calendar year, beginning with the first calendar year that begins at least 1 year after the designated transfer date.

(B) Confidential information

The Bureau may make public such information obtained by the Bureau under this

[1] See References in Text note below.

section as is in the public interest, through aggregated reports or other appropriate formats designed to protect confidential information in accordance with paragraphs (4), (6), (8), and (9).

(4) Collection of information

(A) In general

In conducting any monitoring or assessment required by this section, the Bureau shall have the authority to gather information from time to time regarding the organization, business conduct, markets, and activities of covered persons and service providers.

(B) Methodology

In order to gather information described in subparagraph (A), the Bureau may—

(i) gather and compile information from a variety of sources, including examination reports concerning covered persons or service providers, consumer complaints, voluntary surveys and voluntary interviews of consumers, surveys and interviews with covered persons and service providers, and review of available databases; and

(ii) require covered persons and service providers participating in consumer financial services markets to file with the Bureau, under oath or otherwise, in such form and within such reasonable period of time as the Bureau may prescribe by rule or order, annual or special reports, or answers in writing to specific questions, furnishing information described in paragraph (4), as necessary for the Bureau to fulfill the monitoring, assessment, and reporting responsibilities imposed by Congress.

(C) Limitation

The Bureau may not use its authorities under this paragraph to obtain records from covered persons and service providers participating in consumer financial services markets for purposes of gathering or analyzing the personally identifiable financial information of consumers.

(5) Limited information gathering

In order to assess whether a nondepository is a covered person, as defined in section 5481 of this title, the Bureau may require such nondepository to file with the Bureau, under oath or otherwise, in such form and within such reasonable period of time as the Bureau may prescribe by rule or order, annual or special reports, or answers in writing to specific questions.

(6) Confidentiality rules

(A) Rulemaking

The Bureau shall prescribe rules regarding the confidential treatment of information obtained from persons in connection with the exercise of its authorities under Federal consumer financial law.

(B) Access by the Bureau to reports of other regulators

(i) Examination and financial condition reports

Upon providing reasonable assurances of confidentiality, the Bureau shall have access to any report of examination or financial condition made by a prudential regulator or other Federal agency having jurisdiction over a covered person or service provider, and to all revisions made to any such report.

(ii) Provision of other reports to the Bureau

In addition to the reports described in clause (i), a prudential regulator or other Federal agency having jurisdiction over a covered person or service provider may, in its discretion, furnish to the Bureau any other report or other confidential supervisory information concerning any insured depository institution, credit union, or other entity examined by such agency under authority of any provision of Federal law.

(C) Access by other regulators to reports of the Bureau

(i) Examination reports

Upon providing reasonable assurances of confidentiality, a prudential regulator, a State regulator, or any other Federal agency having jurisdiction over a covered person or service provider shall have access to any report of examination made by the Bureau with respect to such person, and to all revisions made to any such report.

(ii) Provision of other reports to other regulators

In addition to the reports described in clause (i), the Bureau may, in its discretion, furnish to a prudential regulator or other agency having jurisdiction over a covered person or service provider any other report or other confidential supervisory information concerning such person examined by the Bureau under the authority of any other provision of Federal law.

(7) Registration

(A) In general

The Bureau may prescribe rules regarding registration requirements applicable to a covered person, other than an insured depository institution, insured credit union, or related person.

(B) Registration information

Subject to rules prescribed by the Bureau, the Bureau may publicly disclose registration information to facilitate the ability of consumers to identify covered persons that are registered with the Bureau.

(C) Consultation with State agencies

In developing and implementing registration requirements under this paragraph, the Bureau shall consult with State agencies regarding requirements or systems (including

coordinated or combined systems for registration), where appropriate.

(8) Privacy considerations

In collecting information from any person, publicly releasing information held by the Bureau, or requiring covered persons to publicly report information, the Bureau shall take steps to ensure that proprietary, personal, or confidential consumer information that is protected from public disclosure under section 552(b) or 552a of title 5 or any other provision of law, is not made public under this title.[1]

(9) Consumer privacy

(A) In general

The Bureau may not obtain from a covered person or service provider any personally identifiable financial information about a consumer from the financial records of the covered person or service provider, except—

(i) if the financial records are reasonably described in a request by the Bureau and the consumer provides written permission for the disclosure of such information by the covered person or service provider to the Bureau; or

(ii) as may be specifically permitted or required under other applicable provisions of law and in accordance with the Right to Financial Privacy Act of 1978 (12 U.S.C. 3401 et seq.).

(B) Treatment of covered person or service provider

With respect to the application of any provision of the Right to Financial Privacy Act of 1978,[2] to a disclosure by a covered person or service provider subject to this subsection, the covered person or service provider shall be treated as if it were a "financial institution", as defined in section 1101 of that Act (12 U.S.C. 3401).

(d) Assessment of significant rules

(1) In general

The Bureau shall conduct an assessment of each significant rule or order adopted by the Bureau under Federal consumer financial law. The assessment shall address, among other relevant factors, the effectiveness of the rule or order in meeting the purposes and objectives of this title[1] and the specific goals stated by the Bureau. The assessment shall reflect available evidence and any data that the Bureau reasonably may collect.

(2) Reports

The Bureau shall publish a report of its assessment under this subsection not later than 5 years after the effective date of the subject rule or order.

(3) Public comment required

Before publishing a report of its assessment, the Bureau shall invite public comment on recommendations for modifying, expanding, or eliminating the newly adopted significant rule or order.

(Pub. L. 111–203, title X, § 1022, July 21, 2010, 124 Stat. 1980.)

[2] So in original. The comma probably should not appear.

REFERENCES IN TEXT

This title, where footnoted in subsecs. (b)(3)(A), (4)(B), (c)(8), and (d)(1), is title X of Pub. L. 111–203, July 21, 2010, 124 Stat. 1955, known as the Consumer Financial Protection Act of 2010, which enacted this subchapter and enacted, amended, and repealed numerous other sections and notes in the Code. For complete classification of title X to the Code, see Short Title note set out under section 5301 of this title and Tables.

The Right to Financial Privacy Act of 1978, referred to in subsec. (c)(9)(A)(ii), (B), is title XI of Pub. L. 95–630, Nov. 10, 1978, 92 Stat. 3697, which is classified generally to chapter 35 (§ 3401 et seq.) of this title. For complete classification of this Act to the Code, see Short Title note set out under section 3401 of this title and Tables.

EFFECTIVE DATE

Section effective July 21, 2010, see section 1029A of Pub. L. 111–203, set out as a note under section 5511 of this title.

§ 5513. Review of Bureau regulations

(a) Review of Bureau regulations

On the petition of a member agency of the Council, the Council may set aside a final regulation prescribed by the Bureau, or any provision thereof, if the Council decides, in accordance with subsection (c), that the regulation or provision would put the safety and soundness of the United States banking system or the stability of the financial system of the United States at risk.

(b) Petition

(1) Procedure

An agency represented by a member of the Council may petition the Council, in writing, and in accordance with rules prescribed pursuant to subsection (f), to stay the effectiveness of, or set aside, a regulation if the member agency filing the petition—

(A) has in good faith attempted to work with the Bureau to resolve concerns regarding the effect of the rule on the safety and soundness of the United States banking system or the stability of the financial system of the United States; and

(B) files the petition with the Council not later than 10 days after the date on which the regulation has been published in the Federal Register.

(2) Publication

Any petition filed with the Council under this section shall be published in the Federal Register and transmitted contemporaneously with filing to the Committee on Banking, Housing, and Urban Affairs of the Senate and the Committee on Financial Services of the House of Representatives.

(c) Stays and set asides

(1) Stay

(A) In general

Upon the request of any member agency, the Chairperson of the Council may stay the effectiveness of a regulation for the purpose of allowing appropriate consideration of the petition by the Council.

(B) Expiration

A stay issued under this paragraph shall expire on the earlier of—

(9) Conducting of settlement by a settlement agent and any related services;
(10) Provision of services involving mortgage insurance;
(11) Provision of services involving hazard, flood, or other casualty insurance or homeowner's warranties;
(12) Provision of services involving mortgage life, disability, or similar insurance designed to pay a mortgage loan upon disability or death of a borrower, but only if such insurance is required by the lender as a condition of the loan;
(13) Provision of services involving real property taxes or any other assessments or charges on the real property;
(14) Rendering of services by a real estate agent or real estate broker; and
(15) Provision of any other services for which a settlement service provider requires a borrower or seller to pay.

Special information booklet means the booklet adopted pursuant to section 5 of RESPA (12 U.S.C. 2604) to help persons understand the nature and costs of settlement services. The Bureau publishes the form of the special information booklet in the FEDERAL REGISTER or by other public notice. The Bureau may issue or approve additional booklets or alternative booklets by publication of a Notice in the FEDERAL REGISTER.

State means any state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

Table funding means a settlement at which a loan is funded by a contemporaneous advance of loan funds and an assignment of the loan to the person advancing the funds. A table-funded transaction is not a secondary market transaction (see §1024.5(b)(7)).

Third party means a settlement service provider other than a loan originator.

Title company means any institution, or its duly authorized agent, that is qualified to issue title insurance.

Title service means any service involved in the provision of title insurance (lender's or owner's policy), including but not limited to: Title examination and evaluation; preparation and issuance of title commitment; clearance of underwriting objections; preparation and issuance of a title insurance policy or policies; and the processing and administrative services required to perform these functions. The term also includes the service of conducting a settlement.

Tolerance means the maximum amount by which the charge for a category or categories of settlement costs may exceed the amount of the estimate for such category or categories on a GFE.

[76 FR 78981, Dec. 20, 2011, as amended at 78 FR 10873, Feb. 14, 2013]

§ 1024.3 E-Sign applicability.

The disclosures required by this part may be provided in electronic form, subject to compliance with the consumer consent and other applicable provisions of the Electronic Signatures in Global and National Commerce Act (E-Sign Act) (15 U.S.C. 7001 *et seq.*).

[78 FR 10873, Feb. 14, 2013]

§ 1024.4 Reliance upon rule, regulation or interpretation by the Bureau. Reliance upon rule, regulation, or interpretation by the Bureau.

(a) *Rule, regulation or interpretation.* (1) For purposes of sections 19(a) and (b) of RESPA (12 U.S.C. 2617(a) and (b)), only the following constitute a rule, regulation or interpretation of the Bureau:

(i) All provisions, including appendices and supplements, of this part. Any other document referred to in this part is not incorporated in this part unless it is specifically set out in this part;

(ii) Any other document that is published in the FEDERAL REGISTER by the Bureau and states that it is an "interpretation," "interpretive rule," "commentary," or a "statement of policy" for purposes of section 19(a) of RESPA. Except in unusual circumstances, interpretations will not be issued separately but will be incorporated in an official interpretation to this part, which will be amended periodically.

(2) A "rule, regulation, or interpretation thereof by the Bureau" for purposes of section 19(b) of RESPA (12 U.S.C. 2617(b)) shall not include the special information booklet prescribed by the Bureau or any other statement or issuance, whether oral or written, by

an officer or representative of the Bureau, letter or memorandum by the Director, General Counsel, or other officer or employee of the Bureau, preamble to a regulation or other issuance of the Bureau, Public Guidance Document, report to Congress, pleading, affidavit or other document in litigation, pamphlet, handbook, guide, telegraphic communication, explanation, instructions to forms, speech or other material of any nature which is not specifically included in paragraph (a)(1) of this section.

(b) All informal counsel's opinions and staff interpretations issued by HUD before November 2, 1992, were withdrawn as of that date. Courts and administrative agencies, however, may use previous opinions to determine the validity of conduct under the previous Regulation X.

[76 FR 78981, Dec. 20, 2011, as amended at 78 FR 10874, Feb. 14, 2013]

§ 1024.5 Coverage of RESPA.

(a) *Applicability.* RESPA and this part apply to all federally related mortgage loans, except for the exemptions provided in paragraph (b) of this section.

(b) *Exemptions.* (1) A loan on property of 25 acres or more.

(2) *Business purpose loans.* An extension of credit primarily for a business, commercial, or agricultural purpose, as defined by 12 CFR 1026.3(a)(1) of Regulation Z. Persons may rely on Regulation Z in determining whether the exemption applies.

(3) *Temporary financing.* Temporary financing, such as a construction loan. The exemption for temporary financing does not apply to a loan made to finance construction of 1- to 4-family residential property if the loan is used as, or may be converted to, permanent financing by the same lender or is used to finance transfer of title to the first user. If a lender issues a commitment for permanent financing, with or without conditions, the loan is covered by this part. Any construction loan for new or rehabilitated 1- to 4-family residential property, other than a loan to a *bona fide* builder (a person who regularly constructs 1- to 4-family residential structures for sale or lease), is subject to this part if its term is for two years or more. A "bridge loan" or "swing loan" in which a lender takes a security interest in otherwise covered 1- to 4-family residential property is not covered by RESPA and this part.

(4) *Vacant land.* Any loan secured by vacant or unimproved property, unless within two years from the date of the settlement of the loan, a structure or a manufactured home will be constructed or placed on the real property using the loan proceeds. If a loan for a structure or manufactured home to be placed on vacant or unimproved property will be secured by a lien on that property, the transaction is covered by this part.

(5) *Assumption without lender approval.* Any assumption in which the lender does not have the right expressly to approve a subsequent person as the borrower on an existing federally related mortgage loan. Any assumption in which the lender's permission is both required and obtained is covered by RESPA and this part, whether or not the lender charges a fee for the assumption.

(6) *Loan conversions.* Any conversion of a federally related mortgage loan to different terms that are consistent with provisions of the original mortgage instrument, as long as a new note is not required, even if the lender charges an additional fee for the conversion.

(7) *Secondary market transactions.* A bona fide transfer of a loan obligation in the secondary market is not covered by RESPA and this part, except with respect to RESPA (12 U.S.C. 2605) and subpart C of this part (§§ 1024.30–1024.41). In determining what constitutes a *bona fide* transfer, the Bureau will consider the real source of funding and the real interest of the funding lender. Mortgage broker transactions that are table-funded are not secondary market transactions. Neither the creation of a dealer loan or dealer consumer credit contract, nor the first assignment of such loan or contract to a lender, is a secondary market transaction (see § 1024.2).

(c) *Relation to State laws.* (1) State laws that are inconsistent with RESPA or this part are preempted to the extent of the inconsistency. However, RESPA and these regulations do not

in paragraphs (c) and (d) of this section.

(c) *Waiver.* The borrower may waive the right to delivery of the completed HUD–1 or HUD–1A no later than at settlement by executing a written waiver at or before settlement. In such case, the completed HUD–1 or HUD–1A shall be mailed or delivered to the borrower, seller, and lender (if the lender is not the settlement agent) as soon as practicable after settlement.

(d) *Exempt transactions.* When the borrower or the borrower's agent does not attend the settlement, or when the settlement agent does not conduct a meeting of the parties for that purpose, the transaction shall be exempt from the requirements of paragraphs (a) and (b) of this section, except that the HUD–1 or HUD–1A shall be mailed or delivered as soon as practicable after settlement.

(e) *Recordkeeping.* The lender shall retain each completed HUD–1 or HUD–1A and related documents for five years after settlement, unless the lender disposes of its interest in the mortgage and does not service the mortgage. In that case, the lender shall provide its copy of the HUD–1 or HUD–1A to the owner or servicer of the mortgage as a part of the transfer of the loan file. Such owner or servicer shall retain the HUD–1 or HUD–1A for the remainder of the five-year period. The Bureau shall have the right to inspect or require copies of records covered by this paragraph (e).

§ 1024.11 Mailing.

The provisions of this part requiring or permitting mailing of documents shall be deemed to be satisfied by placing the document in the mail (whether or not received by the addressee) addressed to the addresses stated in the loan application or in other information submitted to or obtained by the lender at the time of loan application or submitted or obtained by the lender or settlement agent, except that a revised address shall be used where the lender or settlement agent has been expressly informed in writing of a change in address.

§ 1024.12 No fee.

No fee shall be imposed or charge made upon any other person, as a part of settlement costs or otherwise, by a lender in connection with a federally related mortgage loan made by it (or a loan for the purchase of a manufactured home), or by a servicer (as that term is defined under 12 U.S.C. 2605(i)(2)) for or on account of the preparation and distribution of the HUD–1 or HUD–1A settlement statement, escrow account statements required pursuant to section 10 of RESPA (12 U.S.C. 2609), or statements required by the Truth in Lending Act (15 U.S.C. 1601 *et seq.*).

§ 1024.13 [Reserved]

§ 1024.14 Prohibition against kickbacks and unearned fees.

(a) *Section 8 violation.* Any violation of this section is a violation of section 8 of RESPA (12 U.S.C. 2607).

(b) *No referral fees.* No person shall give and no person shall accept any fee, kickback or other thing of value pursuant to any agreement or understanding, oral or otherwise, that business incident to or part of a settlement service involving a federally related mortgage loan shall be referred to any person. Any referral of a settlement service is not a compensable service, except as set forth in § 1024.14(g)(1). A company may not pay any other company or the employees of any other company for the referral of settlement service business.

(c) *No split of charges except for actual services performed.* No person shall give and no person shall accept any portion, split, or percentage of any charge made or received for the rendering of a settlement service in connection with a transaction involving a federally related mortgage loan other than for services actually performed. A charge by a person for which no or nominal services are performed or for which duplicative fees are charged is an unearned fee and violates this section. The source of the payment does not determine whether or not a service is compensable. Nor may the prohibitions of this part be avoided by creating an arrangement wherein the purchaser of services splits the fee.

(d) *Thing of value.* This term is broadly defined in section 3(2) of RESPA (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. The term "payment" is used throughout §§ 1024.14 and 1024.15 as synonymous with the giving or receiving of any "thing of value" and does not require transfer of money.

(e) *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 a 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.

(f) *Referral.* (1) 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.

(2) A referral also occurs whenever a person paying for a settlement service or business incident thereto is required to use (see § 1024.2, "required use") a particular provider of a settlement service or business incident thereto.

(g) *Fees, salaries, compensation, or other payments.* (1) Section 8 of RESPA permits:

(i) A payment to an attorney at law for services actually rendered;

(ii) A payment by a title company to its duly appointed agent for services actually performed in the issuance of a policy of title insurance;

(iii) A payment by a lender to its duly appointed agent or contractor for services actually performed in the origination, processing, or funding of a loan;

(iv) 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;

(v) A payment pursuant to cooperative brokerage and referral arrangements or agreements between real estate agents and real estate brokers. (The statutory exemption restated in this paragraph refers only to fee divisions within real estate brokerage arrangements when all parties are acting in a real estate brokerage capacity, and has no applicability to any fee arrangements between real estate brokers and mortgage brokers or between mortgage brokers.);

(vi) Normal promotional and educational activities that are not conditioned on the referral of business and that do not involve the defraying of expenses that otherwise would be incurred by persons in a position to refer settlement services or business incident thereto; or

(vii) An employer's payment to its own employees for any referral activities.

(2) The Bureau may investigate high prices to see if they are the result of a referral fee or a split of a fee. If the payment of a thing of value bears no reasonable relationship to the market value of the goods or services provided, then the excess is not for services or goods actually performed or provided. These facts may be used as evidence of a violation of section 8 and may serve as a basis for a RESPA investigation. High prices standing alone are not proof of a RESPA violation. The value of a referral (*i.e.*, the value of any additional business obtained thereby) is not

to be taken into account in determining whether the payment exceeds the reasonable value of such goods, facilities or services. The fact that the transfer of the thing of value does not result in an increase in any charge made by the person giving the thing of value is irrelevant in determining whether the act is prohibited.

(3) *Multiple services.* When a person in a position to refer settlement service business, such as an attorney, mortgage lender, real estate broker or agent, or developer or builder, receives a payment for providing additional settlement services as part of a real estate transaction, such payment must be for services that are actual, necessary and distinct from the primary services provided by such person. For example, for an attorney of the buyer or seller to receive compensation as a title agent, the attorney must perform core title agent services (for which liability arises) separate from attorney services, including the evaluation of the title search to determine the insurability of the title, the clearance of underwriting objections, the actual issuance of the policy or policies on behalf of the title insurance company, and, where customary, issuance of the title commitment, and the conducting of the title search and closing.

(h) *Recordkeeping.* Any documents provided pursuant to this section shall be retained for five (5) years from the date of execution.

(i) *Appendix B of this part.* Illustrations in appendix B of this part demonstrate some of the requirements of this section.

§ 1024.15 Affiliated business arrangements.

(a) *General.* An affiliated business arrangement is defined in section 3(7) of RESPA (12 U.S.C. 2602(7)).

(b) *Violation and exemption.* An affiliated business arrangement is not a violation of section 8 of RESPA (12 U.S.C. 2607) and of § 1024.14 if the conditions set forth in this section are satisfied. Paragraph (b)(1) of this section shall not apply to the extent it is inconsistent with section 8(c)(4)(A) of RESPA (12 U.S.C. 2607(c)(4)(A)).

(1) The person making each referral has provided to each person whose business is referred a written disclosure, in the format of the Affiliated Business Arrangement Disclosure Statement set forth in appendix D of this part, of the nature of the relationship (explaining the ownership and financial interest) between the provider of settlement services (or business incident thereto) and the person making the referral and of an estimated charge or range of charges generally made by such provider (which describes the charge using the same terminology, as far as practical, as section L of the HUD–1 settlement statement). The disclosures must be provided on a separate piece of paper no later than the time of each referral or, if the lender requires use of a particular provider, the time of loan application, except that:

(i) Where a lender makes the referral to a borrower, the condition contained in paragraph (b)(1) of this section may be satisfied at the time that the good faith estimate or a statement under § 1024.7(d) is provided; and

(ii) Whenever an attorney or law firm requires a client to use a particular title insurance agent, the attorney or law firm shall provide the disclosures no later than the time the attorney or law firm is engaged by the client.

(iii) Failure to comply with the disclosure requirements of this section may be overcome if the person making a referral can prove by a preponderance of the evidence that procedures reasonably adopted to result in compliance with these conditions have been maintained and that any failure to comply with these conditions was unintentional and the result of a *bona fide* error. An error of legal judgment with respect to a person's obligations under RESPA is not a *bona fide* error. Administrative and judicial interpretations of section 130(c) of the Truth in Lending Act shall not be binding interpretations of the preceding sentence or section 8(d)(3) of RESPA (12 U.S.C. 2607(d)(3)).

(2) No person making a referral has required (as defined in § 1024.2, "required use") any person to use any particular provider of settlement services or business incident thereto, except if such person is a lender, for requiring a buyer, borrower or seller to pay for the

9. Appendix E is removed and Appendix F is redesignated as Appendix E.

Dated: May 31, 1996.

Nicolas P. Retsinas,

Assistant Secretary for Housing-Federal Housing Commissioner.

[FR Doc. 96–14329 Filed 6–6–96; 8:45 am]

BILLING CODE 4210–27–P

24 CFR Part 3500

[Docket No. FR–3638–N–03]

Office of the Assistant Secretary for Housing-Federal Housing Commissioner; Real Estate Settlement Procedures Act (RESPA); Statement of Policy 1996–1, Regarding Computer Loan Origination Systems (CLOs)

AGENCY: Office of the Assistant Secretary for Housing-Federal Housing Commissioner, HUD.

ACTION: Statement of Policy 1996–1: Computer Loan Origination Systems (CLOs).

SUMMARY: This Statement of Policy sets forth the Department's interpretation of Section 8 of the Real Estate Settlement Procedures Act (RESPA) and its implementing regulations with regard to the applicability of RESPA to payments for services from certain computer systems, frequently called CLOs, used by settlement service providers in connection with the origination of mortgage loans or the provision of other settlement services covered by RESPA. This statement explains the statutory and regulatory framework for HUD's treatment of payments to CLOs.

In reading this policy statement, the reader should be aware that HUD's RESPA rule was recently streamlined through a separate rulemaking. 61 FR 13232 (Mar. 26, 1996). This streamlining caused several provisions of the RESPA rule to be renumbered. Except as is otherwise indicated in the context of the policy statement, this policy statement refers to provisions by their current section number, incorporating all revisions to date as a result of the streamlining and today's rulemaking, published elsewhere in the Federal Register.

FOR FURTHER INFORMATION CONTACT: David Williamson, Director, Office of Consumer and Regulatory Affairs, Room 5241, telephone (202) 708–4560; or, for legal questions, Kenneth Markison, Assistant General Counsel for GSE/RESPA, or Grant E. Mitchell, Senior Attorney for RESPA, Room 9262, telephone (202) 708–1550. (The telephone numbers are not toll-free.) For hearing- and speech-impaired persons, this number may be accessed via TTY (text telephone) by calling the Federal Information Relay Service at 1–800–877–8339. The address for the above-listed persons is: Department of Housing and Urban Development, 451 Seventh Street, SW, Washington, DC 20410.

SUPPLEMENTARY INFORMATION: Individuals and firms have developed and are developing various systems that employ computer technology to assist consumers in finding a lender, selecting a mortgage product, originating a mortgage, or choosing among other settlement service providers and products. These systems are sometimes called computer loan origination systems (hereafter "CLOs"), although other terminology may be used, such as computer loan information systems. These systems differ in the way they interact with consumers, in the way they collect and display information on mortgage options, in the range of choices of products and services they provide to consumers, and in the extent to which they share work with other providers in the settlement service process. HUD expects product diversity to increase as technology evolves and new telecommunication options become available.

The following exemption was set forth in the November 2, 1992 final rule, effective December 2, 1992: Section 8 of RESPA does not prohibit * * * any payment by a borrower for computer loan origination services, so long as the disclosure set forth in Appendix E of this part is provided to the borrower. 24 CFR 3500.14(g)(2)(iii).

This exemption from Section 8 was for "any payment by a borrower for computer loan origination services," as long as certain disclosures were provided. This rule did not address payments made by lenders, thus leaving such payments subject to Section 8 scrutiny. Although the term "CLO exemption" is frequently used, including in the preamble of the 1992 final rule, the exemption was not for the CLO itself, but only for payments made for CLO services by borrowers. The 1992 final rule did not speak to other issues; notably it did not define a CLO or explain how RESPA applies to payments by lenders to CLOs for CLO services. The November 2, 1992 rule also withdrew all previous informal legal opinions, including those stating the Department's views on various CLO issues.

In response to numerous expressions of concern about the new exemption and other aspects of the revised regulations, HUD requested public comments in a Federal Register Notice on July 6, 1993, and held public hearings on August 6, 1993.

On July 21, 1994, HUD issued proposed regulations that would repeal the general CLO exemption for borrower payments and, in its place, establish an exemption for borrower payments to certain "qualified CLOs", that is, CLOs having characteristics that HUD considered beneficial to consumers. The proposed exemption would apply only to payments by borrowers, but HUD did solicit public comments on whether to provide a similar exemption for payments by lenders to qualified CLOs. Under the proposed rule, payments by borrowers to CLO systems that did not qualify for the exemption were subject to scrutiny under section 8 of RESPA. HUD also invited those with active CLOs or those developing CLOs to demonstrate their systems at a Technology Demonstration Fair on September 30, 1994. Twenty-one CLO operators accepted the invitation and participated in this all-day demonstration in Washington, D.C.

The public comments in response to the proposed rule raised a number of specific questions about the proposed exemption for payments to qualified CLOs, and generally displayed skepticism or uncertainty about the usefulness of the proposal. Concerned that the comments did not adequately address all the issues, HUD held two informal meetings with industry and consumer groups to seek additional individual input on the likely future development of CLOs. These meetings were held on August 11, 1995, and September 21, 1995. While HUD learned many things from the public comments and the meetings with industry and consumer groups, one message seemed to predominate. All parties wanted clearer guidance from HUD on how RESPA's disclosure and anti-kickback provisions apply to borrower and lender payments for CLO services.

Both the 1992 and the proposed 1994 exemptions for borrower payments to CLOs were offered because of concern that uncertainty about how RESPA applied to payments to CLOs might be impeding the development or use of potentially beneficial technology. However, by limiting the exemptions to borrower payments, in both cases, HUD did not address the primary issue of how RESPA's anti-kickback provisions applied to lender payments to CLOs.

Many participants in the informal meetings urged that it was impossible to

create a useful safe harbor or exemption for "qualified CLOs", because changes in technology and in its use in the market would repeatedly make that safe harbor obsolete. CLO service providers would take their chances of running afoul of RESPA, rather than develop systems to meet the "qualified CLO" criteria. More helpful, many participants argued, would be if HUD explained clearly how RESPA's anti-kickback prohibitions and disclosure requirements applied to various sorts of CLO payments.

After considering the public comments and informal meetings, HUD has decided: (1) To eliminate the exemption for borrower payments to CLOs and the associated disclosure; (2) to abandon the idea of establishing a similar or broader exemption for qualified CLOs; and (3) to issue this policy statement to help those developing and using CLOs to understand better how RESPA applies to their activities.

HUD does not think it is useful to continue a modest exemption or to develop a separate and elaborate regulatory structure for a still emerging industry. However, clarification of certain matters in the form of a policy statement would be useful to the industry and consumers. The effect of this action is to subject payments to CLOs to the same RESPA provisions as payments for any other service; however, HUD is providing specific guidance on how HUD will apply these provisions in the CLO context.

Today HUD is simultaneously issuing a revision to the 1992 rule. The preamble to this new final rule contains a fuller discussion of the decision-making process leading from the November 2, 1992 rule to the withdrawal of the exemption and the issuance of this guidance.

To the extent this guidance interprets rules that become effective 120 days from the date of this publication, then this guidance will be applicable as of the effective date of such rules.

Statement of Policy—1996–1

To give guidance to interested members of the public on the application of RESPA and its implementing regulations to these issues, the Secretary, pursuant to Section 19(a) of RESPA (12 U.S.C. 2617(a)) and 24 CFR 3500.4(a)(1)(ii), hereby issues the following statement of policy.

For purposes of this statement of policy, a CLO is a computer system that is used by or on behalf of a consumer to facilitate a consumer's choice among alternative products or settlement service providers in connection with a particular RESPA-covered real estate transaction. Such a computer system: (1) may provide information concerning products or services; (2) may pre-qualify a prospective borrower; (3) may provide consumers with an opportunity to select ancillary settlement services; (4) may provide prospective borrowers with information regarding the rates and terms of loan products for a particular property in order for the borrower to choose a loan product; (5) may collect and transmit information concerning the borrower, the property, and other information on a mortgage loan application for evaluation by a lender or lenders; (6) may provide loan origination, processing, and underwriting services, including but not limited to, the taking of loan applications, obtaining verifications and appraisals, and communicating with the borrower and lender; and (7) may make a funding decision.

This definition is not meant to be restrictive or exhaustive; it merely attempts to describe existing practices of service providers. With the use of technology evolving so rapidly, however, it is difficult for the Department to provide guidance on future unspecified practices in the abstract.

This statement of policy provides guidance on how RESPA applies to service providers and interprets existing law. It does not add any new restrictions on business practices.

Section 3 of RESPA defines "settlement services" to include:

> [A]ny service provided in connection with a real estate settlement including, but not limited to * * * 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).

The regulations define a "settlement service" to mean "any service provided in connection with a prospective or actual settlement." 24 CFR 3500.2. This definition specifically includes the providing of any services related to the origination, processing, or funding of a federally-related mortgage loan. 24 CFR 3500.2. To the extent that a CLO performs "settlement services", it is a settlement service provider. Conversely, if a CLO does not perform settlement services, it is not a settlement service provider.

NOTHING IN THIS POLICY STATEMENT SHOULD BE READ AS A HUD ENDORSEMENT OF ANY CHARGE TO CONSUMERS OR AS A REQUIREMENT FOR ANY CHARGE TO CONSUMERS.

1. Payments by Consumers to CLOs

CLOs that provide services to consumers may charge consumers for services performed. 12 U.S.C. 2607(c)(2). RESPA requires that all charges for settlement services be reported on the Good Faith Estimate and the HUD–1 or HUD–1A; however, the regulations do not address the exact timing of the payment. 12 U.S.C. 2603(a) and 2604(c). Similarly, any payment for CLO services that is paid outside of closing must be so identified on the HUD–1 or HUD–1A settlement statement. 24 CFR 3500, App. A, General Instructions. In addition, settlement service providers whose products are made available on CLOs may reimburse consumers for any fee charged them by the CLO.

2. Payments by Settlement Service Providers to CLOs

Section 8(a) of RESPA prohibits payments for the referral of a consumer to a settlement service provider; however, Section 8(c)(2) permits payments for goods or facilities actually furnished or for services actually performed. 12 U.S.C. 2607(c)(2).

The definition used in this policy statement encompasses various types of CLOs. Regardless of the type of CLO, compensable goods, facilities, or services must be provided by the CLO in return for payments by settlement service providers. Any such payment must bear a reasonable relationship to the value of the goods, facilities, or services provided. 24 CFR 3500.14(g)(2). A charge for which no or nominal services are performed or for which duplicative fees are charged is an unearned fee. 24 CFR 3500.14(c). For example, if a CLO lists only one settlement service provider and only presents basic information to the consumer on the provider's products, then there would appear to be no or nominal compensable services provided by the CLO to either the settlement service provider or the consumer, only a referral; and any payment by the settlement service provider for the CLO listing could be considered a referral fee in violation of section 8 of RESPA. Note, however, that a new provision of HUD's RESPA rules at 24 CFR 3500.14(g)(1)(ix), discussed at Section 4 below, allows employees who do not perform settlement services to market settlement services or products of an affiliated entity and to receive employer payments for these referrals. A company may not pay any other company for the

referral of settlement service business. 24 CFR 3500.14(b).

RESPA places no restrictions on the pricing structure of CLOs as long as the payments are not referral fees and are reasonably related to the value of the services provided. However, the value of a referral is not to be taken into account in determining whether the payment exceeds the reasonable value of the goods, facilities, or services. 24 CFR 3500.14(g)(2). If these requirements are met, CLOs may charge settlement service providers a fixed or periodic fee or a fee for each closed transaction arising from the use of the CLO. However, if a CLO charges different fees to different settlement service providers in similar situations, an incentive may exist for the CLO to steer the consumer to the settlement service provider paying the highest fees. HUD may scrutinize these circumstances to determine if the differentials constitute referral fees.[1]

Settlement service providers may pay CLOs a reasonable fee for services provided by the CLO to the settlement service provider, such as, having information about the provider's products made available to consumers for comparison with the products of other settlement service providers. If a CLO elects to act as a mortgage broker, as that term is defined in 24 CFR 3500.2, then all RESPA rules related to compensation of mortgage brokerage services apply to the CLO. On December 13, 1995, HUD convened a negotiated rulemaking that could result in changes to these RESPA rules. CLOs should review carefully any changes in the regulations applicable to mortgage brokers and others that result from this rulemaking.

3. CLOs in a Controlled Business Context

When a CLO is used in a controlled business arrangement, the RESPA regulations relating to controlled business arrangements apply. Section 3(7) of RESPA (12 U.S.C. 2602(7)) defines a controlled business arrangement in terms of an affiliate relationship or a direct or beneficial ownership. The regulations provide definitions of affiliate relationship, beneficial ownership, and direct ownership. 24 CFR 3500.15(c). Separate entities are a necessary component of the controlled business arrangement definitions. For example, if a real estate brokerage firm uses a CLO within its own business structure and there is no separate affiliated business entity involved, then the CLO is not being used in a controlled business arrangement with the real estate brokerage firm.

A controlled business arrangement does not violate RESPA if three conditions are met. 12 U.S.C. 2607(c)(4)(A)–(C). Section 3500.15(b) of the regulations elaborates on the three requirements. First, when consumers are referred from one business entity to an affiliated business entity, a written disclosure of the affiliate relationship must be provided. For example, if a real estate firm has an affiliate relationship with a company providing CLO services and an agent of the real estate firm refers a customer to the CLO company, then the real estate agent must provide the required disclosure to the customer at the time of the referral. Similarly, if the CLO company has an affiliate relationship with one of the settlement service providers listed on the CLO, then the CLO operator must provide the customer with the required disclosure before the consumer uses the CLO. Second there can be no required use, i.e., the referring entity cannot require the consumer to use the CLO and the CLO cannot require the consumer to use an affiliated company listed on the CLO. Thirdly, the only thing of value that is received by one business entity from other business entities in the controlled business arrangement, other than payments permitted under 24 CFR 3500.14(g) for services actually performed, is a return on an ownership interest or franchise relationship.

4. Payments of Commissions or Bonuses to Employees

CLOs are subject to the same RESPA provisions regarding employee compensation as any service provider. For example, a settlement service provider listed on the CLO may not pay a CLO employee a referral fee or commission if the consumer selects that settlement service provider. 24 CFR 3500.14(b). Employees of a CLO may receive a *bona fide* salary or compensation from the CLO—their employer. 24 CFR 3500.14(g)(1)(iv). Compensation from CLOs to their employees may include commissions for transactions closed on the system. 24 CFR 3500.14(g)(1)(vii). However, if a CLO pays commissions for transactions closed with some settlement service providers but not for transactions closed with other settlement service providers, HUD may scrutinize these payments to determine if the commissions constitute referral fees or are exempt under other provisions (see below).

HUD established two new exemptions related to compensation of employees in a final rule published today and effective 120 days from their publication. The first exemption (24 CFR 3500.14(g)(1)(viii)) allows an employer to pay managerial employees who do not routinely deal with the public bonuses related to the referral of settlement service business to a business entity in a controlled business arrangement. The CLO employee who routinely deals with customers is not considered a managerial employee within the meaning of 24 CFR 3500.2. A CLO may have managerial employees within the meaning of 24 CFR 3500.2, such as a district manager who oversees several CLO operators who work in different locations. Such a managerial employee may receive bonuses based on criteria related to the performance of a business entity in an affiliate relationship, such as profitability, capture rate, or other thresholds. However, the amount of such bonus may not be calculated as a multiple of the number or value of referrals of settlement services business to a business entity in a controlled business arrangement. 24 CFR 3500.14(g)(1)(viii).

The second exemption (24 CFR 3500.14(g)(1)(ix)) allows employer payments to their own bona fide employees for referrals of business to affiliated entities if the employee does not perform settlement services in any transaction and provides the consumer with a written disclosure in the format of the Controlled Business Arrangement Disclosure Statement. Employer payments to a CLO employee who does not perform settlement services may qualify for this exemption. This exemption permits employer payments to employees who do not perform settlement services for referrals to affiliates. Under this exemption, the employee may market a settlement service or product of an affiliated entity, including collecting and conveying information and taking an application or order for the services of an affiliated entity. Marketing also may include incidental communications with the consumer after the application or order, such as providing the consumer with information about the status of an application or order; marketing may not include serving as the ongoing point of contact for coordinating the delivery and provision of settlement services. Under the exemption, a CLO employee who takes an application and collects information for an affiliate but performs no other settlement services, may receive a payment from his or her

[1] Depending upon the circumstances of the referrals and the design of the CLO system, this steering of consumers may violate the Fair Housing Act, as may selective marketing of CLO systems.

employer for a referral to an affiliated entity.

5. Neutral Display of Information on Settlement Service Providers and Their Products

Section 8(a) of RESPA prohibits compensated referrals. HUD may scrutinize non-neutral displays of information on settlement service providers and their products because favoring one settlement service provider over others may be affirmatively influencing the selection of a settlement service provider which could constitute a referral under RESPA. 24 CFR 3500.14(f). An agreement or understanding for the referral of business incident to or part of a settlement service may be established by a practice, pattern, or course of conduct. 24 CFR 3500.14(e). For example, if one lender always appears at the top of any listing of mortgage products and there is no real difference in interest rates and charges between the products of that lender and other lenders on a particular listing, then this may be a non-neutral presentation of information which affirmatively influences the selection of a settlement service provider. Furthermore, if there is an affiliate relationship between the CLO and a favored settlement service provider, the non-neutral presentation of information under certain circumstances could constitute a required use in violation of 3500.15(b)(2). This guidance on neutral displays should not be read to discourage CLOs from assisting consumers in determining which products are most advantageous to them. For example, if a CLO consistently ranks lenders and their mortgage products on the basis of some factor relevant to the borrower's choice of product, such as APR calculated to include all charges and to account for the expected tenure of the buyer, HUD would consider this practice as a neutral display of information.

Authority: 12 U.S.C. 2617; 42 U.S.C. 3535(d).

Dated: May 31, 1996.

Nicolas P. Retsinas,

Assistant Secretary for Housing-Federal Housing Commissioner.

[FR Doc. 96–14330 Filed 6–6–96; 8:45 am]

BILLING CODE 4210–27–P

24 CFR Part 3500

[Docket No. FR–3638–N–04]

Office of the Assistant Secretary for Housing-Federal Housing Commissioner; Real Estate Settlement Procedures Act (RESPA); Statement of Policy 1996–2 Regarding Sham Controlled Business Arrangements

AGENCY: Office of the Assistant Secretary for Housing-Federal Housing Commissioner, HUD.

ACTION: Statement of policy 1996–2, sham controlled business arrangements.

SUMMARY: This statement sets forth the factors that the Department uses to determine whether a controlled business arrangement is a sham under the Real Estate Settlement Procedures Act (RESPA) or whether it constitutes a *bona fide* provider of settlement services. It provides an interpretation of the legislative and regulatory framework for HUD's enforcement practices involving sham arrangements that do not come within the definition of and exception for controlled business arrangements under Sections 3(7) and 8(c)(4) of the Real Estate Settlement Procedures Act (RESPA). It is published to give guidance and to inform interested members of the public of the Department's interpretation of this section of the law.

FOR FURTHER INFORMATION CONTACT: David Williamson, Director, Office of Consumer and Regulatory Affairs, Room 5241, telephone (202) 708–4560. For legal enforcement questions, Rebecca J. Holtz, Attorney, Room 9253, telephone: (202) 708–4184. (The telephone numbers are not toll-free.) For hearing- and speech-impaired persons, this number may be accessed via TTY (text telephone) by calling the Federal Information Relay Service at 1–800–877–8339. The address for the above-listed persons is: Department of Housing and Urban Development, 451 Seventh Street, SW, Washington, DC 20410.

SUPPLEMENTARY INFORMATION:

General Background

Section 8 (a) of the Real Estate Settlement Procedures Act (RESPA) prohibits any person from giving or accepting any fee, kickback, or thing of value for the referral of settlement service business involving a federally related mortgage loan. 12 U.S.C. § 2607(a). Congress specifically stated it intended to eliminate kickbacks and referral fees that tend to increase unnecessarily the costs of settlement services. 12 U.S.C. § 2601(b)(2).

After RESPA's passage, the Department received many questions asking if referrals between affiliated settlement service providers violated RESPA. Congress held hearings in 1981. In 1983, Congress amended RESPA to permit controlled business arrangements (CBAs) under certain conditions, while retaining the general prohibitions against the giving and taking of referral fees. Congress defined the term "controlled business arrangement" to mean an arrangement:

> [I]n which (A) 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 1 percent in a *provider of settlement services;* and (B) 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) (emphasis added).

In November 1992, HUD issued its first regulation covering controlled business arrangements, 57 FR 49599 (Nov. 2, 1992), codified at 24 CFR 3500.15.[1] That rule provided that a controlled business arrangement was not a violation of Section 8 and allowed referrals of business to an affiliated settlement service provider so long as: (1) The consumer receives a written disclosure of the nature of the relationship and an estimate of the affiliate's charges; (2) the consumer is not required to use the controlled entity; and (3) the only thing of value received from the arrangement, other than payments for services rendered, is a return on ownership interest.

Section 3500.15(b) sets out the three conditions of the controlled business arrangement exception. The first condition concerns the disclosure of the relationship. The rule provides that the person making the referral must provide the consumer with a written statement, in the format set out in appendix D to part 3500. This statement must be provided on a separate piece of paper. The referring party must give the statement to the consumer no later than the time of the referral. 24 CFR 3500.15(b)(1).

The second condition involves the non-required use of the referred entity. Section 3500.15(b)(2) provides that the person making the referral may not require the consumer to use any particular settlement service provider, except in limited circumstances. A

[1] All citations in this Statement of Policy refer to recently streamlined regulations published on March 26, 1996 (61 FR 13232), in the Federal Register (to be codified at 24 CFR part 3500).

Renton, Washington 98057–3356; telephone (425) 917–6510; fax (425) 917–6508. Or, e-mail information to *9-ANM-Seattle-ACO-AMOC-Requests@faa.gov.*

(2) To request a different method of compliance or a different compliance time for this AD, follow the procedures in 14 CFR 39.19. Before using any approved AMOC on any airplane to which the AMOC applies, notify your principal maintenance inspector (PMI) or principal avionics inspector (PAI), as appropriate, or lacking a principal inspector, your local Flight Standards District Office. The AMOC approval letter must specifically reference this AD.

Material Incorporated by Reference

(k) You must use Boeing Service Bulletin 737–57A1279, Revision 2, dated February 2, 2010, to do the actions required by this AD, unless the AD specifies otherwise.

(1) The Director of the Federal Register approved the incorporation by reference of this service information under 5 U.S.C. 552(a) and 1 CFR part 51.

(2) For service information identified in this AD, contact Boeing Commercial Airplanes, Attention: Data & Services Management, P.O. Box 3707, MC 2H–65, Seattle, Washington 98124–2207; telephone 206–544–5000, extension 1; fax 206–766–5680; e-mail *me.boecom@boeing.com;* Internet *https://www.myboeingfleet.com.*

(3) You may review copies of the service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington. For information on the availability of this material at the FAA, call 425–227–1221.

(4) You may also review copies of the service information that is incorporated by reference at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

Issued in Renton, Washington on November 18, 2010.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2010–29792 Filed 11–30–10; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Part 3500

[Docket No. FR–5425–IA–02]

Real Estate Settlement Procedures Act (RESPA): Home Warranty Companies' Payments to Real Estate Brokers and Agents Interpretive Rule: Response to Public Comments

AGENCY: Office of General Counsel, HUD.

ACTION: Interpretive rule; response to public comments.

SUMMARY: On June 25, 2010, HUD issued a rule interpreting certain provisions of RESPA as applied to the payment of fees to real estate brokers and agents by home warranty companies. The public was invited to comment on the interpretive rule. After reviewing and considering the comments, HUD determined that changes are not needed to the interpretive rule. Through this document, HUD responds to certain questions raised in the comments. HUD believes that its response to these questions serves to provide additional guidance relating to matters covered in the interpretive rule and the comments.

FOR FURTHER INFORMATION CONTACT: For legal questions, contact Paul S. Ceja, Assistant General Counsel for RESPA/SAFE, telephone number 202–708–3137; or Peter S. Race, Assistant General Counsel for Compliance, telephone number 202–708–2350; Department of Housing and Urban Development, 451 7th Street, SW., Room 9262, Washington, DC 20410. For other questions, contact Barton Shapiro, Director, or Mary Jo Sullivan, Deputy Director, Office of RESPA and Interstate Land Sales, Office of Housing, Department of Housing and Urban Development, 451 7th Street, SW., Room 9158, Washington, DC 20410; telephone number 202–708–0502. These telephone numbers are not toll-free. Persons with hearing or speech impairments may access these numbers via TTY by calling the toll-free Federal Information Relay Service at 1–800–877–8339.

SUPPLEMENTARY INFORMATION:

I. Background

The requirements and prohibitions under RESPA apply to residential real estate transactions that include a federally related mortgage loan. Section 8 of RESPA prohibits giving and receiving "kickbacks" for the referral of real estate settlement services, and unearned fees, involving real estate transactions. Since 1992, HUD's RESPA regulations have defined "settlement service" to include "homeowner's warranties". 24 CFR 3500.2(11). While a referral of settlement services is not compensable under RESPA, a real estate broker or agent (or other person in a position to refer settlement service business) may be compensated for services that are actual, necessary and distinct from the primary services provided by the real estate broker or agent, if the services are not nominal, and the payment is not a duplicative charge. (*See* 24 CFR 3500.14(b), (c), (g)(1), and (g)(3)).

On June 25, 2010 (75 FR 36271), HUD issued an interpretive rule on the propriety under Section 8 of RESPA (12 U.S.C. 2607) of payments to real estate brokers and agents from home warranty companies (HWCs). The interpretive rule concluded:

(1) A payment by an HWC for marketing services performed by real estate brokers or agents on behalf of the HWC that are directed to particular homebuyers or sellers is an illegal kickback for a referral under section 8;

(2) Depending upon the facts of a particular case, an HWC may compensate a real estate broker or agent for services when those services are actual, necessary and distinct from the primary services provided by the real estate broker or agent, and when those additional services are not nominal and are not services for which there is a duplicative charge; and

(3) The amount of compensation from the HWC that is permitted under section 8 for such additional services must be reasonably related to the value of those services and not include compensation for referrals of business.

75 FR at 36273.

HUD received 72 comments in response to publication of the interpretive rule. HUD reviewed all of the comments, and appreciates the input and information provided by the commenters. Some commenters supported the interpretive rule and others did not. HUD found that the comments that were not supportive of its interpretation did not present concerns or information that warrant any changes to the interpretive rule. HUD, however, has identified and is responding to seven specific questions to provide additional guidance relating to matters covered in the interpretive rule and the comments.

II. Questions and Responses

1. *Question:* Is a home warranty company's flat fee payment (*e.g.*, monthly or annual payment) to a real estate broker or agent for marketing a home warranty product directly to particular homebuyers or sellers a permissible payment under section 8 of RESPA?

HUD Response: No, as provided in the interpretive rule, payments for marketing services directed to particular homebuyers or sellers are considered to be payments for affirmatively influencing their choice of settlement service providers and would therefore violate section 8 of RESPA as an illegal kickback for a referral, regardless of whether the payment is made to the broker or agent on a "per transaction" or a "flat fee" basis.

2. *Question:* Is the list of items in footnote 2 of the interpretive rule an exhaustive list of the services that a real estate broker or agent can be legally compensated for by a home warranty company under section 8 of RESPA?

HUD Response: No, the footnote itself begins with the introduction, "For example". The list in the footnote is not exhaustive but exemplary of services that, in a particular case, may be compensable. However, as discussed in the interpretive rule, to be compensable the services must be services that are "actual, necessary and distinct from the primary services provided by the real estate broker or agent, that are not nominal, and for which duplicative fees are not charged" (*see* fn.1 of the interpretive rule). Referrals of settlement service business are not compensable services. Therefore, payments made for "services" that were fabricated to disguise a payment to a real estate broker or agent for referrals and are not, in fact, "necessary" would be illegal under section 8 of RESPA.

3. *Question:* What is meant by the statement in the interpretive rule that evidence in support of a determination that compensable services have been performed by a real estate broker or agent may include: "The real estate broker or agent is by contract the legal agent of the HWC, and the HWC assumes responsibility for any representations made by the broker or agent about the warranty product."

HUD Response: While not conclusive, the fact that a home warranty company is willing to be legally committed by the work and representations of a real estate broker or agent who is compensated by the HWC for performing services is one indicator that those services provided are "actual, necessary and distinct" and not nominal—i.e., that actual work is being performed by the real estate broker or agent for which the home warranty company is willing to assume liability. Specifically, such a legal relationship indicates that the HWC has worked with the real estate broker or agent closely enough to understand the value of the services performed by the broker or agent, and to be confident enough of the broker's or agent's services and representations, that the HWC is willing to take responsibility for those services and representations. Conversely however, if in a contract with a consumer, for example, the HWC disclaims liability for acts and representations of the real estate broker or agent in connection with the home warranty, this may indicate that no actual services of value have been performed by the real estate broker or agent.

4. *Question:* Why is it a relevant factor in analyzing a potential section 8 violation that a home warranty company's payment to a real estate broker or agent was made under an exclusive-representation arrangement?

HUD Response: Section 8 of RESPA prohibits payments for referrals and unearned fees. Stated another way, referrals are not compensable services under section 8. See 24 CFR 3500.14(b). HUD's interpretive rule states that, in initially evaluating whether a payment from an HWC to a real estate broker or agent is a violation of section 8, HUD may look at whether the payment is tied to an arrangement that prohibits the broker or agent from receiving from a competitor comparable payment for comparable actual services. In other words, such an exclusive-representation arrangement between the HWC and the real estate broker or agent is evidence of an unlawful-payment-for-referral arrangement whereby the real estate broker or agent is only being paid for steering customers exclusively to the HWC and its products. However, as it is further noted in the interpretive rule, if it is determined that the HWC's payment is only for compensable services, the existence of an exclusive-representation arrangement would be permissible under section 8.

5. *Question:* Does the interpretive rule prohibit payments from an HWC to real estate brokers or agents for general advertising services performed by the brokers or agents on behalf of the HWC?

HUD Response: No. The interpretive rule specifically prohibits compensation for marketing performed by a real estate broker or agent on behalf of an HWC when the marketing is directed to selling the HWC's home warranty product to particular homebuyers or sellers. HUD would evaluate the permissibility of compensation provided by an HWC to real estate brokers or agents for other advertising by applying the definition of "referral" in § 3500.14(f) of HUD's RESPA regulations. For example, a reasonable payment for an advertisement by an HWC in a real estate broker's or agent's publication or on the broker's or agent's website would not, in and of itself, be a payment for a referral under RESPA. If the marketing services for which the HWC is paying the real estate broker or agent are services directed to a homebuyer or seller that have the effect of "affirmatively influencing" the selection by the homebuyer or seller of the HWC's home warranty product in connection with the real estate settlement, then those marketing services would be subject to RESPA's prohibitions on referral payments.

6. *Question:* Is a home warranty always considered to be a "settlement service" for purposes of RESPA coverage?

HUD Response: No. RESPA's kickback and referral fee prohibitions are applicable in the context of "settlement services", a term that is defined broadly under RESPA and HUD's RESPA regulations. RESPA defines "settlement services" to include "any service provided in connection with a real estate settlement" and provides a nonexclusive listing of such services (12 U.S.C. 2602(3)). In its regulations HUD has long defined "settlement service" to include "any service provided in connection with a prospective or actual settlement * * *" (24 CFR 3500.2). As noted above and in the interpretive rule, "homeowner's warranties" have been specifically included in HUD's definition of "settlement service" since 1992 (24 CFR 3500.2(11)). Therefore, when a home warranty is "provided in connection with a prospective or actual settlement", it is a "settlement service" under HUD's regulatory interpretation of RESPA.

In determining whether services involving a home warranty are provided in connection with a prospective or actual settlement, HUD would consider, among other things: (i) Whether the charge for the home warranty is paid out of the proceeds at the settlement; and (ii) if the charge is not paid at settlement, whether the timing of the purchase of and payment for the home warranty indicates that the purchase is so removed from the settlement that it is not provided "in connection with" a settlement within the meaning of RESPA and HUD's regulations. Items paid in connection with a RESPA-covered transaction, of course, may be paid and disclosed on the HUD–1/1A settlement statement as paid outside of closing (P.O.C.) or through the accounting at settlement.

7. *Question:* Does the interpretive rule apply to situations beyond home warranty company payments to real estate brokers and agents, for example to payments by other settlement service providers to real estate brokers and agents?

HUD Response: The interpretive rule is specifically directed to home warranty company payments to real estate brokers and agents. However, the analysis in the interpretive rule is based on an interpretation of the RESPA statute and HUD's existing regulations, which analysis may be applicable to payments made by other settlement service providers to real estate brokers or agents.

III. Confirmation of June 25, 2010, Interpretive Rule

Again, HUD appreciates the input and information provided by the members of the public and representatives of industry who responded to HUD's solicitation of public comment on the June 25, 2010, interpretive rule. After consideration of the comments, HUD confirms its June 25, 2010, interpretation of certain provisions of RESPA as applied to the payment of fees to real estate brokers and agents by home warranty companies. The interpretive rule therefore stands without change.

Finally, some commenters asked whether the interpretive rule has prospective or retroactive effect. An interpretive rule does not change existing law. As noted in the concluding paragraph of the rule, the interpretive rule represents HUD's interpretation of its existing regulations. This interpretive rule, therefore, does not constitute a change in HUD's interpretation of RESPA or the RESPA regulations, but is an articulation of HUD's interpretation of RESPA and the implementing regulations that specifically applies to home warranty company payments to real estate brokers and agents.

Authority: 12 U.S.C. 2601–2617; 42 U.S.C. 3535(d).

Dated: November 23, 2010.

Helen R. Kanovsky,

General Counsel.

[FR Doc. 2010–30243 Filed 11–30–10; 8:45 am]

BILLING CODE 4210–67–P

PENSION BENEFIT GUARANTY CORPORATION

29 CFR Part 4044

Allocation of Assets in Single-Employer Plans; Valuation of Benefits and Assets; Expected Retirement Age

AGENCY: Pension Benefit Guaranty Corporation.

ACTION: Final rule.

SUMMARY: This rule amends Pension Benefit Guaranty Corporation's regulation on Allocation of Assets in Single-Employer Plans by substituting a new table for determining expected retirement ages for participants in pension plans undergoing distress or involuntary termination with valuation dates falling in 2011. This table is needed in order to compute the value of early retirement benefits and, thus, the total value of benefits under a plan.

DATES: *Effective Date:* January 1, 2011.

FOR FURTHER INFORMATION CONTACT: Catherine B. Klion, Manager, Regulatory and Policy Division, Legislative and Regulatory Department, Pension Benefit Guaranty Corporation, 1200 K Street, NW., Washington, DC 20005, 202–326–4024. (TTY/TDD users may call the Federal relay service toll-free at 1–800–877–8339 and ask to be connected to 202–326–4024.)

SUPPLEMENTARY INFORMATION: Pension Benefit Guaranty Corporation (PBGC) administers the pension plan termination insurance program under Title IV of the Employee Retirement Income Security Act of 1974 (ERISA). PBGC's regulation on Allocation of Assets in Single-Employer Plans (29 CFR part 4044) sets forth (in subpart B) the methods for valuing plan benefits of terminating single-employer plans covered under Title IV. Guaranteed benefits and benefit liabilities under a plan that is undergoing a distress termination must be valued in accordance with subpart B of part 4044. In addition, when PBGC terminates an underfunded plan involuntarily pursuant to ERISA section 4042(a), it uses the subpart B valuation rules to determine the amount of the plan's underfunding.

Under § 4044.51(b) of the asset allocation regulation, early retirement benefits are valued based on the annuity starting date, if a retirement date has been selected, or the expected retirement age, if the annuity starting date is not known on the valuation date. Sections 4044.55 through 4044.57 set forth rules for determining the expected retirement ages for plan participants entitled to early retirement benefits. Appendix D of part 4044 contains tables to be used in determining the expected early retirement ages.

Table I in appendix D (Selection of Retirement Rate Category) is used to determine whether a participant has a low, medium, or high probability of retiring early. The determination is based on the year a participant would reach "unreduced retirement age" (*i.e.*, the earlier of the normal retirement age or the age at which an unreduced benefit is first payable) and the participant's monthly benefit at unreduced retirement age. The table applies only to plans with valuation dates in the current year and is updated annually by the PBGC to reflect changes in the cost of living, etc.

Tables II–A, II–B, and II–C (Expected Retirement Ages for Individuals in the Low, Medium, and High Categories respectively) are used to determine the expected retirement age after the probability of early retirement has been determined using Table I. These tables establish, by probability category, the expected retirement age based on both the earliest age a participant could retire under the plan and the unreduced retirement age. This expected retirement age is used to compute the value of the early retirement benefit and, thus, the total value of benefits under the plan.

This document amends appendix D to replace Table I–10 with Table I–11 in order to provide an updated correlation, appropriate for calendar year 2011, between the amount of a participant's benefit and the probability that the participant will elect early retirement. Table I–11 will be used to value benefits in plans with valuation dates during calendar year 2011.

PBGC has determined that notice of and public comment on this rule are impracticable and contrary to the public interest. Plan administrators need to be able to estimate accurately the value of plan benefits as early as possible before initiating the termination process. For that purpose, if a plan has a valuation date in 2011, the plan administrator needs the updated table being promulgated in this rule. Accordingly, the public interest is best served by issuing this table expeditiously, without an opportunity for notice and comment, to allow as much time as possible to estimate the value of plan benefits with the proper table for plans with valuation dates in early 2011.

PBGC has determined that this action is not a "significant regulatory action" under the criteria set forth in Executive Order 12866.

Because no general notice of proposed rulemaking is required for this regulation, the Regulatory Flexibility Act of 1980 does not apply (5 U.S.C. 601(2)).

List of Subjects in 29 CFR Part 4044

Pension insurance, Pensions.

■ In consideration of the foregoing, 29 CFR part 4044 is amended as follows:

■ 1. The authority citation for part 4044 continues to read as follows:

Authority: 29 U.S.C. 1301(a), 1302(b)(3), 1341, 1344, 1362.

■ 2. Appendix D to part 4044 is amended by removing Table I–10 and adding in its place Table I–11 To read as follows:

Appendix D to Part 4044—Tables Used To Determine Expected Retirement Age

NAR Issue Summary

Conventional Residential Lending / Student Loan Debt

NAR Committee:

Conventional Financing and Policy Committee

What is the fundamental issue?

NAR has been monitoring the important discussion on the potential implications that rising student debt may have on consumer access to mortgage credit, and more broadly, homeownership. While there are various reasons that student debt is growing, several reports have indicated that the continued rise in student debt itself along with a weak labor market may have a long-term impact on the ability of first time homebuyers to qualify for mortgages in the future, particularly lower income consumers. Many of these potential borrowers may find a significant portion of their total monthly debt will be comprised of student loan payments.

I am a real estate professional. What does this mean for my business?

A current survey of home buyers and sellers conducted by NAR indicates that student debt liability is of particular concern to potential buyers trying to save for or meet down payment requirements. Should student loan burdens continue to impact the ability of responsible borrowers to save for a down payment, potential borrowers will be unable to access the most affordable mortgage options. Though a vast majority of borrowers have been responsible and diligent in making their student loan payments, the ability of borrowers to save for priorities such as emergency savings, medical expenses, and down payments may become more difficult and ultimately impact their future decisions to purchase a home.

NAR Policy:

The recommendations of the NAR Student Loan Debt Work Group were approved at the November 2014 NAR Convention. Specifically, the Work Group recommended that NAR (1) continue to monitor student loan debt research, and (2) support legislative and regulatory efforts to educate and protect all student loan borrowers by helping them better understand loan programs, repayment rules, and responsibilities.

Opposition Arguments:

Some believe that stagnant wage and job growth is hindering housing market, not rising student loan debt.

Legislative/Regulatory Status/Outlook

Congress plans to hold ongoing hearings on college costs and federal loan and grant programs this year as it prepares to reauthorize the Higher Education Act (HEA).

Current Legislation/Regulation (bill number or regulation)

None at this time.

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NAR Issue Summary

Conventional Residential Lending / Student Loan Debt

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NATIONAL ASSOCIATION of REALTORS®

NAR Student Loan Debt Work Group Final Report
November 3, 2014

EXECUTIVE SUMMARY

Ongoing news coverage on rising student loan debt levels as well as Congressional intent to reauthorize the Higher Education Act has started the debate on the impact that student loan debt has on homeownership. Since NAR has no existing policy with respect to student loan debt, a formal Student Loan Debt Work Group (Work Group) was created to research and analyze the issue of increasing student loan debt and evaluate its potential impact on the housing market, and report any such recommendations for consideration by the Conventional Financing and Policy Committee at the November 2014 NAR Annual Convention.

The Work Group was comprised of members from the Conventional Financing and Policy Committee. The Work Group met four times, via webinar, on July 2, August 21, October 2, and November 3, 2014.

On November 3, 2014, the Student Loan Debt Work Group met to finalize its recommendation to the Conventional Financing and Policy Committee. Specifically, the Work Group recommends that NAR should (1) continue to monitor student loan debt research, (2) support legislative and regulatory efforts to educate and protect all student loan borrowers by helping them better understand loan programs, repayment rules, and responsibilities, and (3) keep the Student Loan Debt Work Group active into 2015.

FINAL STUDENT LOAN DEBT WORK GROUP RECOMMENDATIONS

1. **Research Recommendation**

   The Work Group reviewed several studies on student loan debt from the Federal Reserve, various trade groups, and media reports. The Work Group found that lagging job/wage growth has a direct impact on rising student loan debt, but it was unable to conclude that student loan debt is currently having a direct impact on the housing industry. At this time, the Work Group believes there is not enough data to substantiate a direct linkage between student loan debt and the housing market. Also, the Work Group questioned some of the assumptions and methodology used by various media reports regarding the student loan debt issue. Nevertheless, the Work Group believes there could be certain factors such as credit scores and default rates that may help identify a direct correlation between rising student loan debt and the housing market.

   Therefore, the Work Group recommends that NAR continue to review research, with an emphasis on data related to credit scores, default rates, and research released by other trade groups.

2. **Policy Recommendation**

   Furthermore, the Work Group believes that all student loan borrowers should have comprehensive access to loan information and a better understanding of debt and repayment options. Moreover, the Work Group supports increased disclosure requirements and protections for all student loan borrowers.

   Therefore, the Work Group recommends NAR be supportive of legislative and regulatory efforts aimed to educate and protect student loan borrowers.

3. **Continuation of Work Group Recommendation**

   Finally, the Work Group recommends that it remain active for at least one year in order to provide NAR with additional guidance as congressional discussion regarding the reauthorization of the Higher Education Act (HEA) evolves, further research into the linkage between student debt and housing market is published, and additional issues arise. The Work Group should provide periodic updates as needed to the Conventional Financing and Policy Committee.

NAR STUDENT LOAN DEBT WORK GROUP STRUCTURE

Purpose: To research and analyze the issue of increasing student loan debt and evaluate its potential impact on the housing market. All members are from the Conventional Financing and Policy Committee.

Chair: Mabel Guzman (IL)
Liaison: Cynthia Shelton (FL)
Staff Executives: Vijay Yadlapati, Charlie Dawson, and Jessica Lautz (DC)

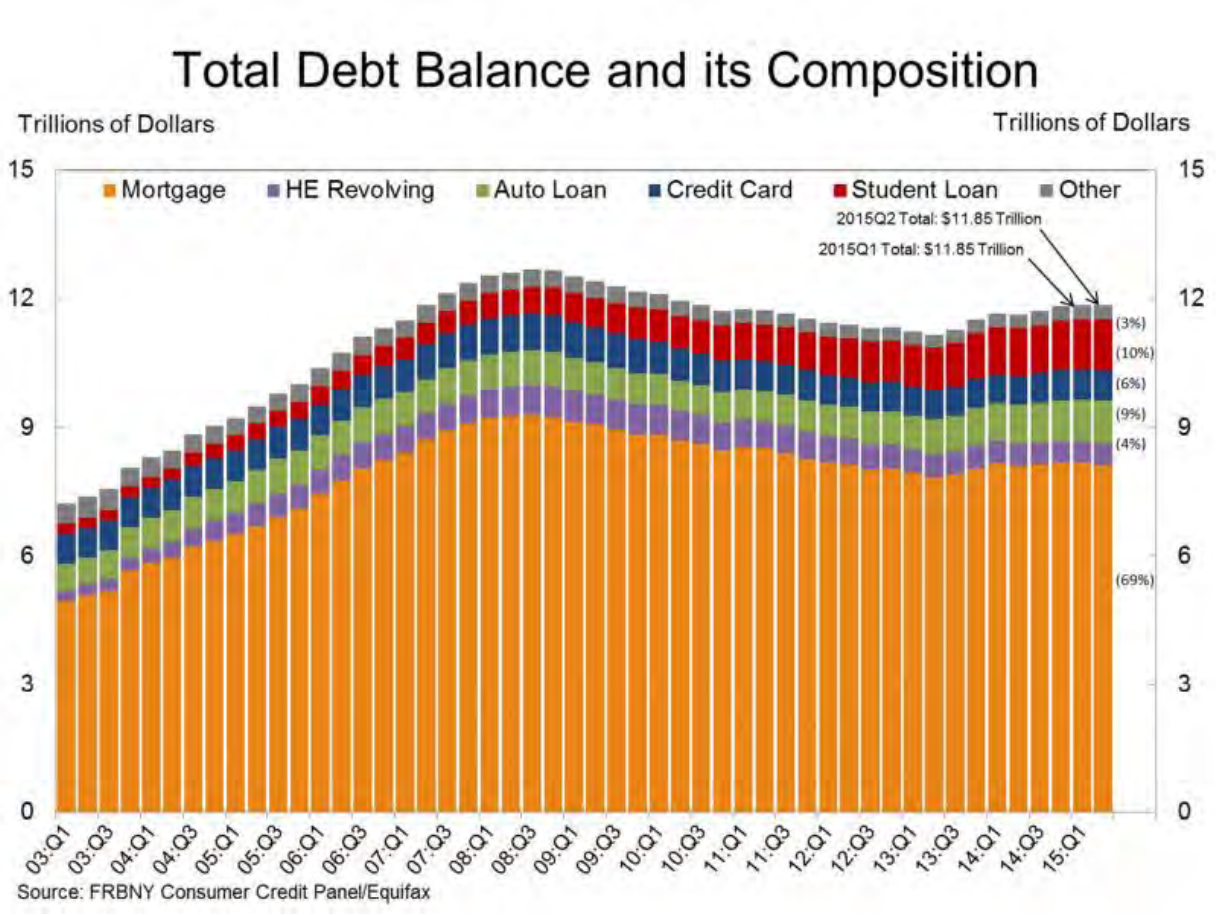
Members:
John Wong (CA)
Kevin Brown (CA)
Matt Farrell (IL)
Cindy Stanton (TN)
Terrie Suit (VA)
Jon Wolford (VA)
Ron Woods (NJ)

National Association of REALTORS® Research on Student Debt[1]

Size of Student Debt:

- Student loan debt was $1.19 trillion as of Q2 2015; about 10 percent of total household debt of $11.85 trillion[2]
- Comparisons: Mortgage debt is at $8.12 Trillion. Auto loans at $1 Trillion. Credit card at $0.703 Trillion. HELOC at $499 Billion.

Figure 1

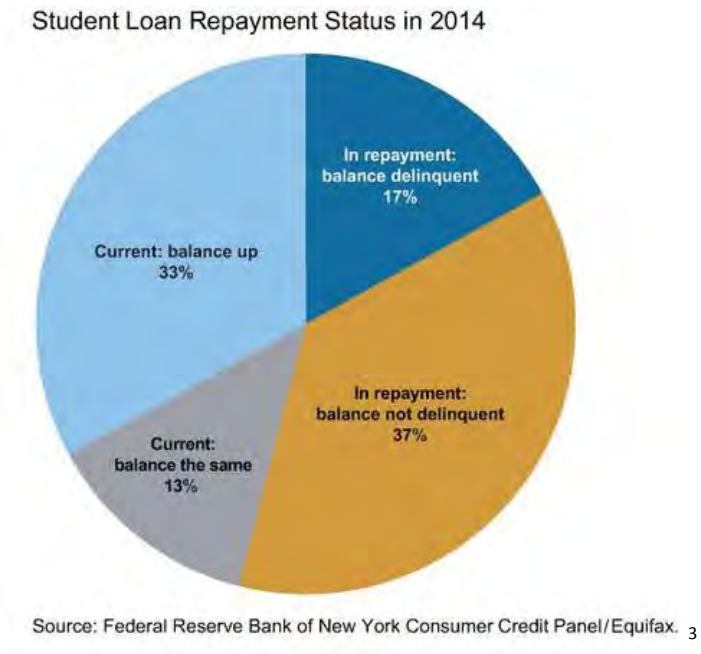


[1] Prepared by the Research Division, National Association of REALTORS®. This Facts Sheet reports on data that is available as of November 4, 2015.

[2] FRBNY, Household Debt and Credit Report, Second Quarter 2015. http://www.newyorkfed.org/householdcredit/2015-q2/data/pdf/HHDC_2015Q2.pdf

- 37% of student loan borrowers are in repayment and not delinquent
- 17% are in repayment and delinquent
- 33% are current on their balance, it is not in repayment and the balance is increasing
- 13% the balance is current, and it is staying the same, and not increasing.

Figure 2



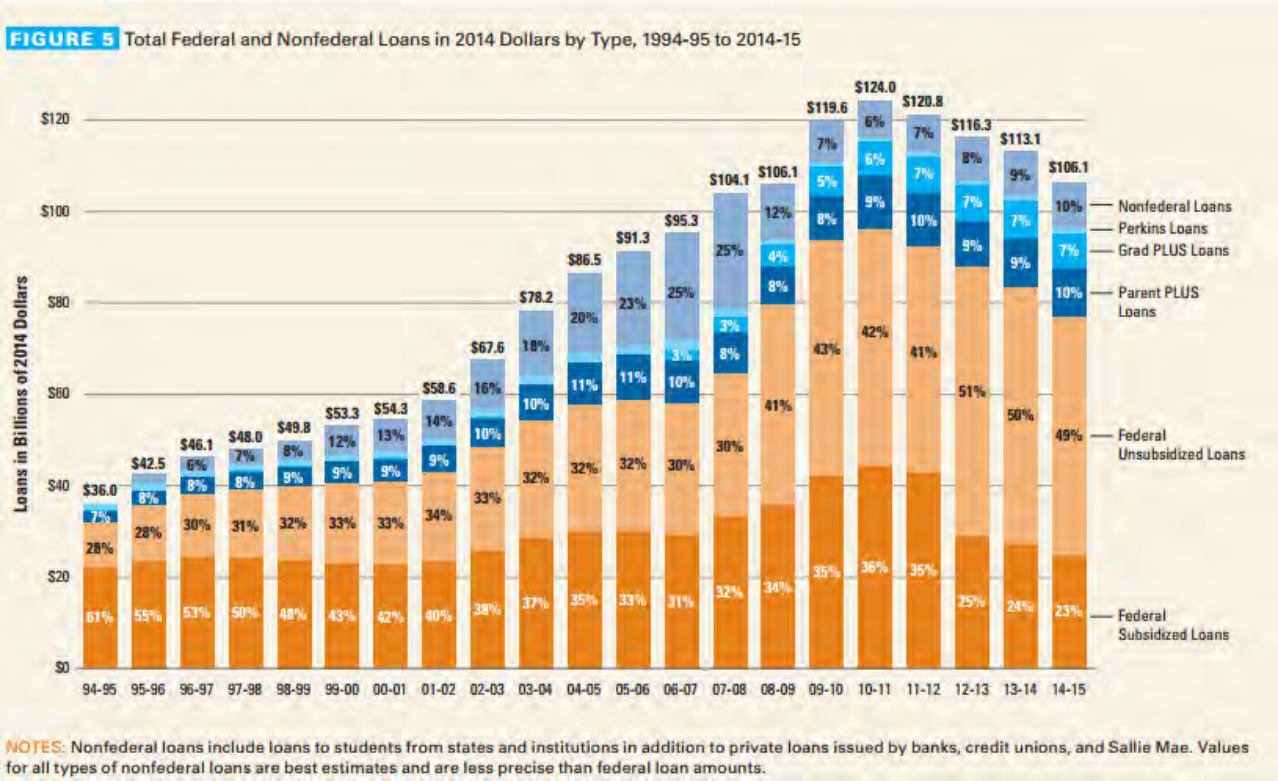
[3]

- Since 1994-95 the overall dollars of student loan debt has increased from $36.0 billion to $106.1 billion in 2014-15.
- In 1994-95 the share of federal subsidized loans was 61%. In 2014-15 federal subsidized loans dropped to 23%.
- Conversely the share of federal unsubsidized loans in 1994-95 was 28% and they have risen to 49% in 2014-15.

[3] *Payback Time? Measuring Progress on Student Debt Repayment.* Liberty Street Economics. Federal Reserve Bank of New York. http://libertystreeteconomics.newyorkfed.org/2015/02/payback_time_measuring_progress_on_student_debt_repayment.html#.VSv1PfnF_OE

Figure 3

Federal and Nonfederal Loan Dollars in 2014 Dollars, 1994-95 to 2014-15[4]



How Much Debt and to Whom:

- 20% of Americans have student loan debt[5]
- While the debt load is concentrated among those under 39, it has grown for those over 40 years of age at higher rates.[6]
- Two-thirds of student loan balanced are held by borrowers not in their 20s[7]
- Between 2004 and 2014 there is an increase of 89% in the number of borrowers and a 77% increase in the average balance. [8]
- Between 2005 and 2010 there was an increase of 20% in college enrollment.[9]
- Most borrowers have a current outstanding balance below $25k—about 40% owe less than $10K. Mean outstanding balance is $26k; median balance is $15k.[10]
- Borrowers in their 30's and 40's have the highest mean and median balances, at about $31k and $17k respectively[11]

[4] Trends in Higher Education. The College Board. http://trends.collegeboard.org/sites/default/files/2015-trends-student-aid-final-508.pdf
[5] Forever in Your Debt: Who Has Student Loan Debt, and Who's Worried? Urban Institute. http://www.urban.org/sites/default/files/alfresco/publication-pdfs/412849-Forever-in-Your-Debt-Who-Has-Student-Loan-Debt-and-Who-s-Worried-.PDF
[6] New York Fed to Host Press Briefing on Student Loans. http://www.newyorkfed.org/newsevents/mediaadvisory/2015/0410_2015.html
[7] Ibid
[8] Ibid
[9] Ibid
[10] Ibid