

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.

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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.

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