NATIONAL ASSOCIATION OF REALTORS®

The Voice For Real Estate®

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July 22, 2010

VIA ELECTRONIC SUBMISSION

Regulations Division
Office of General Counsel
U.S. Department of Housing and Urban Development
451 Seventh Street SW
Room 10276
Washington, DC 20410

Re: Real Estate Settlement Procedures Act (RESPA): Home Warranty Companies' Payments to Real Estate Brokers and Agents
Docket No. FR-5425-IA-01

Dear Sir or Madam:

The National Association of REALTORS® ("NAR" or "Association") thanks you for the opportunity to provide comments to the above-referenced interpretive rule under the Real Estate Settlement Procedures Act ("RESPA"). These comments are submitted on behalf of NAR and the Association's 1.1 million members. We recognize that the U.S. Department of Housing and Urban Development ("HUD" or "Department") is not required by law to seek public comments on the interpretive rule, and we are grateful for the opportunity to submit this letter.

I. BACKGROUND

The National Association of REALTORS® is America's largest trade association, including NAR's institutes, societies and councils. REALTORS® are involved in all aspects of the residential and commercial real estate industries and

belong to one or more of some 1,500 local associations or boards and 54 state and territory associations of REALTORS®.

No other association of professionals in the country has the focus and commitment to residential real estate transactions than that which NAR champions for our REALTOR® members. The Association, therefore, is especially qualified to comment on the range of actual and valuable services provided by real estate brokers and agents to consumers, other settlement service providers, and non-settlement service vendors in the course of a residential real estate transaction.

II. EXECUTIVE SUMMARY

NAR, as well as representatives from the home warranty industry, have had the opportunity to meet with HUD over the past few years to discuss the importance of service arrangements between home warranty companies and real estate brokers and agents to provide valuable home warranty protections to consumers. As part of these meetings, the Association appreciates HUD's willingness to consider the range of services that real estate brokers and agents provide both to home warranty companies and consumers. We also appreciate HUD's efforts to publish definitive RESPA guidance regarding these service arrangements. While we believe the interpretive rule is an important step in assisting the real estate and home warranty industries in structuring compliant service arrangements, NAR is concerned that the broad language used in the guidance has left our members questioning the intended scope of HUD's analysis. We ask HUD to consider the following:

A Real Estate Professional Provides Valuable Services. Home warranty products are optional in a real estate transaction. Consumers are often not familiar with the numerous home warranty products. Real estate brokers and agents do not merely flash a brochure concerning these products to individual buyers and sellers; these professionals devote valuable time educating consumers about the features, limitations, coverage, and pricing of home warranties. HUD should reconsider its characterization of direct-to-consumer marketing activities as mere referrals.

Home Warranties Should Not Qualify as "Settlement Services." Despite the definition of "settlement services" in RESPA's regulation, home warranties are optional products that have no effect on the closing of a real estate transaction or more specifically, the lien on the property that is subject to a federally related mortgage. These products are more akin to credit disability insurance, which RESPA considers a settlement service only if required by a lender in the course of a mortgage transaction. Home warranties, therefore, should not be considered

"settlement services," which makes Section 8 of RESPA inapplicable to service arrangements between home warranty companies and real estate brokers and agents.

Section 8 Applies Only to Transactions Involving Federally Related Mortgage Loans. The interpretive rule seems to assume that all compensation received by real estate brokers or agents from home warranty companies occurs in connection with a federally related mortgage loan. This, however, is not the case, as many home warranties are purchased when a seller lists a property for sale or as part of all-cash transactions. Without a federally related mortgage loan, Section 8 is inapplicable to the compensation received by real estate brokers and agents from home warranty companies.

Flat Fee Marketing Agreements are Not Covered by the Interpretive Rule. HUD should clarify that the interpretive rule only applies to service arrangements between home warranty companies and real estate brokers or agents predicated on transactionally-based compensation. Flat fee marketing agreements, therefore, fall outside HUD's interpretations.

The Interpretive Rule Could Result in Higher Home Warranty Prices. Home warranty companies rely on real estate brokers and agents to operate as a subcontracted sales force. Without the ability to compensate real estate brokers or agents for the time taken to explain the features of home warranty products to consumers, home warranty companies will have to find alternative means to educate the public. These new expenses will certainly result in an increase in the cost of obtaining a home warranty.

HUD Should Not Limit the Kinds of Actual Services that a Real Estate Professional Can Be Compensated for Performing. It is not clear from the language of the interpretive rule whether the four compensable services identified in the rule are the only compensable services a real estate broker or agent may perform under Section 8(c)(2) of RESPA. We ask that HUD clarify that these services are not all-inclusive.

A Legal Agency Relationship is Not Evidence of a RESPA-Compliant Service Arrangement. As a legal agency relationship allows the agent to step into the shoes of the principal, the agent is allowed to perform any and all services that a principal could perform on its own behalf. Accordingly, the suggestion that a legal agency relationship is further evidence of a RESPA-compliant service arrangement seems inconsistent with the Department's analysis and irrelevant to a determination of whether a real estate broker or agent performs compensable services.

Though Discussed in Meetings, the Absence of Guidance on Flat Fee Arrangements has Caused Uncertainty. It is one thing for NAR and other industry leadership to understand the interpretive rule to be focused only on arrangements where home warranty companies compensate real estate brokers or agents on a per-transaction basis for the performance of administrative and marketing services. We have the benefit of our meetings and discussions with HUD. But, without an explicit identification of the facts analyzed by HUD or a statement limiting the scope of the interpretive rule to per-transaction service arrangements, it will be difficult for our members to work through their own marketing and service arrangements and determine whether modifications are needed to comply with RESPA. NAR, therefore, asks HUD to clarify the intended scope of its interpretations in the interpretive rule.

II. NAR'S COMMENTS TO HUD'S INTERPRETIVE RULE

As stated above, NAR commends HUD for providing interpretive guidance on service arrangements between home warranty companies and real estate brokers and agents. Since HUD first addressed home warranty company service arrangements with real estate brokers and agents in a February 2008 informal letter, our members have had concerns about HUD's views of marketing and service arrangements. It, therefore, was and remains important for NAR to provide the Department with as much information as possible about the valuable services real estate brokers and agents perform on behalf of home warranty companies, and we appreciate HUD taking the time to meet with us, as well as representatives from the home warranty industry. That being said, NAR is concerned that the language of the interpretive rule is too broad in scope to provide definitive guidance about permissible and impermissible service arrangements. Moreover, the Department makes generalized statements about real estate brokers and agents to support the positions taken in the interpretive rule that we believe are unsubstantiated and do not reflect the valuable services performed by our members nor the daily activities of a real estate professional. As a result, NAR respectfully requests that HUD consider clarifying the scope of the interpretive rule and revisiting its characterization of certain services provided by real estate brokers and agents. Below we discuss NAR's concerns with the proposed rule.

A. Real Estate Brokers and Agents Perform Real and Valuable Marketing and Administrative Services for Home Warranty Companies.

NAR's comments above assume, for the sake of clarification, that HUD has reached a reasonable conclusion in outlawing per-transaction payments for direct-to-consumer marketing services, as these services qualify as referrals. However, the Association is concerned that HUD has not considered the full range of services and the time commitment provided by real estate brokers and agents in service arrangements with home warranty companies. Specifically, by declaring direct-to-consumer marketing activities as mere referrals, HUD incorrectly concludes that such activities are limited to the distribution of a brochure or flyer to the consumer and a verbal sales pitch designed only to sell the product. Home warranty products are optional in a real estate transaction, and consumers must be educated about these products. Real estate brokers and agents, therefore, devote valuable time to explaining home warranty products and assisting consumers in understanding the features, limitations, coverage, and pricing of home warranties. To the extent a consumer has a question about a home warranty that the agent cannot answer, the broker or agent also reaches out to the home warranty company on the consumer's behalf for more information. In addition, if a consumer decides to purchase a home warranty, he or she knows that the real estate broker or agent understands the details of the product, and the broker or agent often assists the consumer in working through coverage or claim issues.

As was noted in NAR's meetings with HUD, real estate brokers and agents are routinely the only people consumers interact with in a home warranty transaction. Real estate brokers and agents perform all the sales services and, in the vast majority of cases, all initial customer service functions when a potential claim arises. There is little about these activities that can be defined as a referral, as the real estate broker or agent submits a completed transaction and associated documentation to the home warranty company on behalf of the consumer. In fact, the only contact a consumer has with the home warranty company's staff is in the event of a post-closing claim. Even then, this contact typically occurs after the real estate broker or agent has explained the appropriate claims procedures to the consumer and provided additional guidance on the home warranty's coverage.

Given the time required by a broker or agent to explain the features of home warranties, answer questions and otherwise service the consumer's home warranty if purchased, there is no question that real estate brokers and agents perform valuable services for home warranty companies. None of these services is duplicative of an act performed by another settlement service provider. NAR, therefore, questions how such a commitment of time by a real estate broker or agent to educate the consumer can be characterized as a mere referral. NAR asks HUD

to reconsider this characterization of direct-to-consumer marketing services as mere referral activities.

Moreover, NAR takes strong exception to the interpretive rule's statement that somehow real estate brokers and agents occupy a special or unusual role in the settlement service process where home warranty sales are concerned. Real estate brokers and agents are not in a "unique position of influence" over consumers. Buyers interact with attorneys, loan officers, homebuilders' sales representatives, title agents and other providers throughout the course of a real estate transaction, all of whom have influence over their customers. Just because a real estate broker or agent may interact first with a consumer interested in the purchase of a home does not mean that the agent has a special kind of influence or that the buyer or seller is more likely to purchase a product because a real estate agent promotes it. Yet, HUD makes such a distinction in the interpretive rule to support its conclusion that a broker's or agent's direct-to-consumer marketing qualifies as a mere referral. NAR finds this language to be unsubstantiated and unrelated to a determination of whether a real estate broker or agent performs real, compensable services under RESPA, and we respectfully request that HUD remove it from the interpretive rule.

Finally, NAR asks HUD to consider the effects that the interpretive rule will have on the price of home warranties when real estate brokers and agents are prohibited from receiving compensation for direct-to-consumer marketing and/or sales. There is no question that home warranties provide valuable protections for consumers. In fact, the purchase of a home is often the biggest purchase in a consumer's life, and home warranties give buyers increased confidence in a real estate transaction because unforeseen problems will be covered after settlement. As noted, home warranty companies also rely on real estate brokers and agents as their subcontracted sales force. Without the ability to compensate real estate brokers and agents for direct-to-consumer marketing and sales, home warranty companies will be faced with the prospect of hiring sales representatives and developing marketing campaigns, which will be expensive new overhead for home warranty companies. These companies will have no choice but to raise the price of home warranties to cover these expenses, which is clearly detrimental to consumers. As RESPA was enacted to lower costs for the consumer in connection with the purchase of a home, we are concerned that the interpretive rule could have the opposite effect. The possibility of higher prices for home warranties is all the more reason to reconsider whether the interpretive rule too broadly prohibits compensation for a broker's or agent's valuable direct-to-consumer marketing services.

B. A Payment Does Not Violate Section 8 of RESPA Unless All Statutory Elements are Satisfied.

As you know, to violate Section 8(a) of RESPA, a person must give or receive a thing of value pursuant to an agreement or understanding to refer settlement service business in connection with a federally related mortgage loan. 12 U.S.C. § 2607(a). However, if a person gives or receives a payment in return for actual goods or services, the payment is permissible under an exception to Section 8. Id. § 2607(c)(2). Yet, before considering whether a payment qualifies for an exception to RESPA, it is first necessary to examine whether the statutory elements of Section 8(a) are satisfied.

Despite HUD's statement in the interpretive rule that a home warranty qualifies as a "settlement service," the nature of home warranty products should disqualify them from RESPA's coverage. Without a settlement service, any payment arrangements involving home warranties do not violate Section 8 of RESPA. Moreover, the interpretive rule seems to assume that home warranties are only purchased as part of the closing of a real estate transaction involving a federally related mortgage loan. This assumption is incorrect. To the extent that a transaction does not involve a federally related mortgage loan, any payments made by a home warranty company to a real estate broker or agent in connection with that transaction do not violate RESPA. We discuss each of these Section 8 elements in more detail below.

1. Settlement Service

The interpretive rule cites only to RESPA's regulations to support the notion that home warranties are settlement services. Notably, Section 3500.2 defines "settlement services" to include the "(11) provision of services involving hazard, flood or other casualty insurance or homeowner's warranties." 24 C.F.R. § 3500.2. However, 12 U.S.C. § 2602 defines "settlement services" to include any service provided in connection with a real estate settlement, and home warranties are not explicitly listed as part of the definition.

Moreover, at least one court has found the list of "settlement services" in Section 3500.2 of the regulations to suggest that "settlement services" are those services "necessary for the closing" and limited to "costs payable at or before settlement." Bloom v. Martin, 77 F.3d 318, 321 (9th Cir. 1996). In other words, absent title searches and examinations, property surveys, pest and fungus inspections, loan origination, and other services listed in the regulatory definition of

"settlement service," a closing would not occur. See id. Other courts have applied a similarly-narrowed view of "settlement services." In Fitch v. Wells Fargo Bank, the U.S. District Court for the Eastern District of Louisiana cited Bloom v. Martin for the notion that "if Congress intended Section 2607 to apply to all real estate services regardless of when they occur, it would not have limited Section 2607 to only real estate settlement services." 2010 U.S. Dist. LEXIS 42210, *9 (Apr. 29, 2010) (emphasis added). In addition, the U.S. District Court for the Eastern District of Michigan stated that "RESPA simply does not apply to fees assessed after settlement," while a federal district court in Arkansas reasoned that "it is clear from the statute and its regulations that settlement services are those services provided to effectuate the purchase of a home." See Molosky v. Wash. Mut. Bank, 2008 U.S. Dist. LEXIS 3896, *16 (E.D. Mich. Jan 18, 2008); Watt v. GMAC Mortg. Corp., 2005 U.S. Dist. LEXIS 42398, *15 (W.D. Ark. Aug. 1, 2005). Home warranties, however, are not services that are necessary for closing or to effectuate the purchase of a home, and, as a result, should not be considered "settlement services.

In fact, home warranties are optional products that should have never been included in the list of settlement services in Section 3500.2. Just like the regulation's treatment of credit disability insurance, home warranties should only qualify as "settlement services" if a lender requires such a product as a condition of the loan. As it is unheard of for a buyer or seller to be required to purchase a home warranty, this product does not meet RESPA's statutory definition of "settlement services." Even if a home warranty company made a payment to a real estate agent in return for the referral of home warranty business, there should be no Section 8 violation.

2. Federally Related Mortgage Loan

As noted above, the interpretive rule also appears to assume that the "federally related mortgage loan" element of Section 8 is satisfied when a consumer purchases a home warranty. However, just because a buyer or seller often pays for a home warranty at closing does not mean that a Section 8 analysis is appropriate for all payments made by home warranty companies to real estate brokers or agents in connection with the sale of home warranties. In fact, as you know, if a federally related mortgage loan is not involved in a transaction, a home warranty company's payment to a real estate agent, regardless of the reason for the payment, is not a Section 8 violation.

For example, if a seller purchases a home warranty for a property at the time he or she signs a listing agreement, there is no way to know whether the eventual sale of the home will be accomplished with a federally related mortgage loan. As no

federally related mortgage loan is present at the time of purchase, a home warranty company should be unrestricted in the payments it makes to a real estate broker or agent in connection with the sale of that home warranty. Similarly, a home warranty product purchased and paid for at the time an all-cash transaction is settled does not involve a federally related mortgage loan. Any payment from a home warranty company to a real estate broker or agent in this case, even if for the referral of business, does not violate Section 8 of RESPA. Finally, if a buyer purchases a home warranty product after a transaction has closed, not only is the purchase not made in connection with a federally related mortgage loan, but the home warranty does not qualify as a settlement service. As discussed above, courts have confirmed that any services paid for after closing fall outside the definition of "settlement services." Again, any payment from a home warranty company to a real estate broker or agent that assisted in the sale of this home warranty is not governed by RESPA.

Thus, even if a home warranty is defined as a "settlement service," there are many instances where per-transaction payments by a home warranty company to a real estate broker or agent fall outside the scope of Section 8 of RESPA. Rather than assuming for purposes of the interpretive rule that all such payments must satisfy Section 8(c)(2) of RESPA to be compliant, NAR believes the interpretive rule should make clear that RESPA permits a home warranty company to pay a real estate broker or agent a portion of each home warranty fee collected in those transactions with no federally related mortgage loans or when sold before or after settlement.

C. Many Services, in addition to the Four Services Identified in the Interpretive Rule, Qualify as Compensable Services under RESPA.

As part of the Department's Section 8(c)(2) analysis in the interpretive rule, HUD states that it will look at "the actual services provided to determine in a particular case whether compensable services have been performed by the real estate broker or agent." 75 Fed. Reg. at 36272. Then, in a footnote, the interpretive rule provides: "For example, conducting actual inspections of the items to be covered by the warranty to identify pre-existing conditions that could affect home warranty coverage, recording serial numbers of the items to be covered, documenting the condition of the covered items by taking pictures and reporting to the [home warranty company] regarding inspections may be compensable services." Id. Again, NAR believes HUD intended to suggest that real estate brokers and agents may receive compensation for performing these services on a per-

transaction basis.[1] More importantly, however, we assume that HUD is suggesting that these four services are examples of a longer list of actual, necessary, and distinct services for which a broker or agent may be compensated at fair market value. If HUD, indeed, intended for the four services identified in the interpretive rule to be mere examples of compensable services, we respectfully request that HUD include an express statement in the interpretive rule that indicates the four services are not the only services for which a real estate broker or agent may be compensated.

In addition, as each of the services identified in the interpretive rule are services related to the coverage of a home warranty, NAR asks HUD to confirm that marketing services not directed to particular homebuyers or sellers are also compensable services as long as the elements of Section 8(c)(2) are satisfied. Notably, real estate brokers and agents often perform a variety of actual marketing and promotional services that do not require direct interaction with consumers and provide valuable opportunities for home warranty companies to advertise their products. For instance, real estate brokers and agents often include home warranty company advertisements in internal magazines or newsletters, include banner advertisements or a click-through link for the home warranty company on its website, or post signage advertising the home warranty company in the real estate broker's offices and open houses. These kinds of generalized marketing services that do not require direct consumer interaction in connection with a specifically contemplated transaction do not constitute a referral of a real estate settlement service.[2] Accordingly, we ask HUD to explicitly confirm in the interpretive rule that a home warranty company may compensate real estate brokers or agents at a reasonable rate for the performance of these actual, generalized marketing services, whether on a per-transaction basis or as part of a flat fee marketing agreement.

[1] It should be noted that state regulations differ on what a real estate professional can and cannot do with regard to things like inspections and in some cases are limited.

[2] As discussed above, we also believe that marketing services directed to particular consumers in the home warranty context require the real estate broker or agent to devote considerable time to explaining the home warranty and educating the consumer about features, limitations, and coverage of home warranty products, which are real and valuable services, not mere referrals.

D. <u>An Agency Relationship as Evidence of Compensable Services Seems Inconsistent with the Main Conclusions of the Interpretive Rule</u>.

Finally, HUD states in the interpretive rule that if the real estate broker or agent is, by contract, the legal agent of the home warranty company, and the home warranty company assumes responsibility for any representations made by the broker or agent about the warranty product, this agency relationship supports a determination that compensable services have been performed by the real estate broker or agent. Such an agency relationship essentially means that the home warranty company will assume all legal responsibility for the services performed and representations made by the real estate broker or agent in connection with the home warranty product. At the same time, the real estate broker/agent gains the authority to step into the shoes of the home warranty company and act on behalf of the home warranty company as principal. If HUD considers an agency relationship to be an important indicator of a RESPA-compliant services arrangement, NAR has to question why the Department would prohibit real estate brokers and agents from receiving compensation for marketing services directed to particular homebuyers or sellers. If a home warranty company can engage in these services on their own behalf, then a person or entity acting as an agent of the principal should be able to perform the same marketing services and receive compensation without violating RESPA. After all, one cannot make a referral to itself.

NAR, therefore, is unsure how a legal agency relationship makes a real estate broker's or agent's services more or less compensable under Section 8 of RESPA. This is particularly true when a real estate broker or agent provides general marketing and advertising services for a home warranty company. Home warranty companies must pay for advertisements regardless of whether those ads appear in the real estate section of a large city's newspaper or a real estate broker's nationwide real estate magazine. Yet, the newspaper does not enter into an agency relationship with the companies it advertises. It follows that an agency relationship between a home warranty company and a real estate broker or agent that generally promotes the home warranty company's products is irrelevant from a RESPA perspective.[3] NAR, therefore, respectfully requests that HUD reconsider whether an agency relationship, in fact, accomplishes the results intended in the interpretive rule. We believe HUD could remove this component of the interpretive rule without

[3] It should also be noted that duties and obligations under an agency relationship create a contradiction with the suggestion that the agent should provide names of other vendors to the consumer as a further means of compliance.

altering the overall analysis of the rule or the kinds of evidence that may justify a compensable service arrangement.

E. HUD Should Clarify that the Interpretive Rule Applies Only to Per-Transaction Payment Arrangements.

The interpretive rule, as currently written, could be broadly applied to a variety of marketing and service arrangements between home warranty companies and real estate brokers or agents when we believe that is not the Department's intent. Because NAR was a part of the discussions that HUD had with industry representatives on this issue, we believe the interpretive rule is intended to address arrangements whereby home warranty companies compensate real estate brokers or agents on a per-transaction basis to market home warranty products to consumers, take the home warranty application, and perform other administrative services. In fact, certain statements in the interpretive rule seem to support our understanding that HUD only addresses per-transaction arrangements in the interpretive rule.

For instance, HUD states that "interested parties have inquired about the legality of the [home warranty companies] providing compensation to real estate brokers and agents on a per transaction basis. . ." and emphasizes that "the real estate broker or agent may accept a portion of the charge for the homeowner warranty only if the broker or agent provides services that are not nominal and for which there is not a duplicative charge." 75 Fed. Reg. 36271 (Jun. 25, 2010) (emphasis added). Moreover, HUD reasons that "if it is factually determined that only actual compensable services have been performed by a real estate broker or agent in a transaction, it follows that transaction-based compensation of that broker or agent that is reasonable would not be an indicator of an unlawful referral arrangement and would be permissible." Id. at 36272 (emphasis added).

In addition, NAR and other industry partners attended numerous meetings with senior HUD officials regarding home warranties. It was made abundantly clear to all present during these meetings that HUD had little or no concern about flat fee arrangements, unless payments were adjusted to reflect contracts sold. We, therefore, believe that HUD's views regarding flat fee arrangements were well-settled early in our discussions, which is reflected in the specific mention of payment adjustments according to the number of transactions in the interpretive rule.

Yet, despite these statements, the interpretive rule fails to specifically identify the facts upon which the Department relies in analyzing home warranty company

payments to real estate brokers and agents, and the public cannot be sure that HUD's interpretations do not extend to other marketing and services arrangements where real estate brokers or agents are traditionally paid through a flat monthly fee. This is particularly concerning as the interpretive rule prohibits real estate brokers or agents from receiving compensation for performing certain marketing acts directed to particular homebuyers or sellers and does not use language in this section to make clear that HUD's interpretation applies only to per-transaction fee arrangements. NAR, therefore, asks that HUD revise the interpretive rule to clarify that HUD's interpretations apply only to the facts of a per-transaction compensation arrangement.

We emphasize that no changes are required to HUD's basic analysis in the interpretive rule to make this clarification. HUD states in the interpretive rule that RESPA does not prohibit a real estate broker or agent from referring business to a home warranty company. Rather, RESPA prohibits a real estate broker or agent from receiving a fee for such referral. Thus, if HUD believes that real estate brokers and agents that perform marketing services directed at particular homebuyers or sellers are engaged in referral activities and are prohibited by RESPA from receiving a fee in return for these services, HUD must be assuming that the broker or agent receives a payment on a per-transaction basis each time the marketing services are performed and a home warranty is sold. Otherwise, if a broker or agent performs a variety of marketing services directed to the consumer and is paid a flat fee for these services regardless of whether a consumer purchases home warranty products, this payment cannot be construed as a payment in return for the referral of business. In fact, even if the broker or agent is deemed to refer the consumer to a home warranty company, the payment is not based on the success of these services, which means the broker or agent is paid only for the actual marketing services performed. HUD has confirmed this analysis in past informal advisory opinions.

Notably, in the context of customer lists, HUD has permitted the sale of such lists under Section 8(c)(2) of RESPA so long as the purchase price is not paid on a "per hit" basis, is not conditioned on any consideration, and is reasonable.[4] The

[4] See, e.g., HUD Advisory Letter from Grant E. Mitchell, dated January 26, 1989 (stating that the sale of lists of names of prospective borrowers for $15-$20 does not violate RESPA); HUD Advisory Letter from Grant E. Mitchell, dated March 24, 1994 (stating that "our answer historically has been that there is no objection to such payment [for a customer list], so long as the payment is for the use of the list and is not further conditioned upon the number of closed transactions resulting from the list . . . ."); HUD Advisory Letter from Grant E. Mitchell, dated May 31, 1985 (stating that a builder may not receive commissions generated by title policies written to persons on a list provided by the builder to an insurer).

Department also has indicated that sign-up fees paid by lenders or real estate brokers for participation in a computerized mortgage brokerage arrangement "are principally compensation for fixed costs . . . They are not transaction-based and therefore are not compensation for 'referrals'." See Letters of April 11 and 24, 1986 from John J. Knapp (emphasis added). Similarly, HUD has concluded that the payment of marketing costs "in a manner that does not bear on the amount of loan business referred" is consistent with the requirement, in an affiliated business arrangement, that payments other than returns on ownership interest be permissible under Section 8. See Letter of December 11, 1986 from Grant E. Mitchell. In other words, as long as the payment is reasonably related to the value of those marketing services, the arrangement does not violate RESPA. Thus, as the interpretive rule's current analysis supports the distinction between payments made for referral activities and payments made for marketing services, NAR sees no harm in clarifying that the interpretive rule applies only to transactionally-based compensation arrangements.

Furthermore, by explicitly defining the scope of the interpretive rule to apply to per-transaction compensation/service arrangements, HUD would provide welcome confirmation that marketing agreements between home warranty companies and real estate brokers for the performance of marketing services in return for a flat fee are not covered by HUD's interpretation. As noted above, while sales pitches and distribution of marketing materials to consumers may qualify as referral activities in HUD's opinion, as long as the real estate broker is not paid for these referrals, Section 8 is not violated. In contrast, by paying a flat fee to a real estate broker regardless of whether the sales pitches and brochures result in the sale of home warranties, the broker is paid only for the actual marketing services performed. Most flat fee marketing arrangements also are entered into between a home warranty company and a real estate brokerage entity that does not perform the direct-to-consumer marketing. Instead, the broker's real estate agents interact with the consumer, but the persons making the referrals do not get paid under the agreement. This lends further support to the position that a flat fee payment by a home warranty company to a real estate broker is in return for actual services provided and not the referral of business.

Ultimately, NAR believes that HUD's intent with the interpretive rule is to address Section 8 of RESPA in the context of per-transaction compensation arrangements between home warranty companies and real estate brokers or agents. However, the language of the interpretive rule, and in particular, the language discussing direct-to-consumer marketing services, does not clearly communicate this intent. The Association, therefore, respectfully requests HUD to make two

clarifications in the interpretive rule. First, we ask that HUD identify the facts upon which it relies to support its analysis of Section 8 of RESPA as applied to service arrangements predicated on transactionally-based compensation. Second, as real estate brokers often perform many forms of direct-to-consumer marketing services under bona fide, flat fee marketing and service agreements, we ask HUD to clarify that the interpretive rule's prohibition on the compensation of a real estate broker or agent for marketing settlement services that are directed to particular consumers is limited to instances where the real estate broker or agent is paid on a per-transaction basis. In other words, please clarify that this activity violates RESPA only because the real estate broker or agent receives a fee each time a home warranty is pitched and sold by the broker or agent.

III. CONCLUSION

NAR appreciates HUD's consideration of these comments. As we have discussed, home warranties are beneficial products for homebuyers, sellers, and homeowners, and home warranty companies do not employ independent sales representatives to acquaint consumers with these products. They are not required for a settlement to be successfully concluded and are often not paid for or sold in conjunction with settlement. Real estate brokers and agents perform important services on behalf of home warranty companies to educate consumers about home warranty products and service customer questions and claims after these products are purchased. These services are actual, necessary, and distinct services from those typically performed by real estate brokers and agents, and Section 8(c)(2) of RESPA permits the real estate broker or agent to receive compensation for these services. We respectfully request the Department to reconsider its characterization of real estate broker or agent direct-to-consumer marketing services as mere referrals and consider clarifying that general marketing services may be compensable services under Section 8(c)(2) of RESPA.

NAR also appreciates HUD's willingness to provide written guidance to the home warranty and real estate brokerage industries in response to past meetings with NAR and other industry representatives. While the Association understands from these meetings that HUD is concerned about payments to real estate brokers and agents by home warranty companies on a per-transaction basis, the scope of HUD's analysis is not clear in the interpretive rule. As a result, we are concerned that our members do not have clear guidance to assist them in creating RESPA-compliant service arrangements. NAR asks HUD to consider clarifying the facts underlying HUD's analysis in the interpretive rule, as well as the application of the rule to per-transaction compensation arrangements. It is important for NAR's

members to understand that flat fee marketing and service arrangements that comply with Section 8(c)(2) of RESPA are not covered by the interpretive rule.

If we can provide any further information or clarification of the views expressed herein, please do not hesitate to contact our Director of Real Estate Services, Ken Trepeta at (202) 383-1294 or ktrepeta@realtors.org.

Sincerely,

Vicki Cox Golder, CRB
2010 President
National Association of REALTORS®