

THE REAL ESTATE SETTLEMENT PROCEDURES ACT

Dos and Don'ts For Real Estate Brokers and Agents

March 23, 2005

Real estate brokers and agents must comply with the Real Estate Settlement Procedures Act, or RESPA. Violators of RESPA may receive harsh penalties, including triple damages, fines, and even imprisonment. While the enforcement of RESPA by the U.S. Department of Housing and Urban Development, or HUD, has been dormant in the past, HUD has stepped up its efforts in this area in the past 18 months. HUD hired new staff and entered into a contract with an investigation firm in Arlington, Virginia to conduct on-site reviews to monitor conformity with RESPA. Now, more than ever, real estate brokers and agents must ensure they are complying with RESPA.

1. Entities Subject to RESPA

Services that occur at or prior to the purchase of a home are typically considered settlement services. These services include title insurance, mortgage loans, appraisals, abstracts, and home inspections. Services that occur after closing generally are not considered settlement services.

- **RESPA covers, among others:**
 - Real Estate Brokers and Agents
 - Mortgage Bankers and Mortgage Brokers
 - Title Companies and Title Agents
 - Home Warranty Companies
 - Hazard Insurance Agents
 - Appraisers
 - Flood and Tax Service Providers
 - Home and Pest Inspectors

- **RESPA, however, does not apply to:**
 - Moving Companies
 - Gardeners
 - Painters
 - Decorating Companies
 - Home Improvement Contractors

2. RESPA Prohibitions

- RESPA prohibits a real estate broker or agent from receiving a "thing of value" for referring business to a settlement service provider, or SSP, such as a mortgage banker, mortgage broker, title company, or title agent.

- RESPA also prohibits SSPs from splitting fees received for settlement services, unless the fee is for a service actually performed.

3. Exceptions to RESPA's Prohibitions

Not all referral arrangements fall under RESPA's referral restriction. In fact, RESPA and its regulation feature a number of exceptions. Three examples are:

- **Promotional and Educational Activities**

- Settlement service providers, such as mortgage bankers, mortgage brokers, title insurance companies, and title agents, can provide normal promotional and educational activities under RESPA.
- These activities must not defray the expenses that the real estate broker/agent otherwise would have had to pay.
- The activity cannot be in exchange for or tied in any way to referrals.

- **Payments in Return for Goods Provided or Services Performed**

- A real estate broker or agent must provide goods, facilities, and services that are actual, necessary, and distinct from what they already provide.
- The amount paid to a real estate broker or agent must be commensurate with the value of those goods and services. If the payment exceeds market value, the excess will be considered a kickback and violates RESPA.
- The payments should not be "transactionally based." A payment for services rendered is transactionally based if the amount of the payment is determined by whether the real estate broker/agent's services resulted in a successful transaction. Payments may not be tied to the success of the real estate broker/agent's efforts, but must be a flat fee that represents fair market value.

- **Affiliated Business Arrangements**

- Real estate brokers and agents are permitted to own an interest in a settlement service company, such as a mortgage brokerage or title company, so long as the real estate broker/agent:
 - Discloses its relationship with the joint venture company when it refers a customer to the mortgage broker or title company;
 - Does not require the customer to use the joint venture mortgage broker or title company as a condition for the sale or purchase of a home; and

- Does not receive any payments from the joint venture company other than a return on its ownership interest in the company. These payments cannot vary based on the volume of referrals to the joint venture company.
- The joint venture mortgage broker or title company must be a bona fide, stand-alone business with sufficient capital, employees, and separate office space, and must perform core services associated with that industry.

4. Examples of Permissible Activities and Payments

- A title agent provides a food tray for an open house, posts a sign in a prominent location indicating that the event was sponsored by the title agent, and distributes brochures about its services.
- A mortgage lender sponsors an educational lunch for real estate agents where employees of the lender are invited to speak. If, however, the mortgage lender subsidizes the costs of continuing education credits, this activity may be seen as defraying costs the agent would otherwise incur, and may be characterized as an unallowable referral fee.
- A title company hosts an event that various individuals, including real estate agents, will attend and posts a sign identifying the title company's contribution to the event in a prominent location for all attending to see and distributes brochures regarding the title company's services.
- A hazard insurance company provides notepads, pens, or other office materials reflecting the hazard insurance company's name.
- A mortgage brokerage sponsors the hole-in-one contest at a golf tournament and prominently displays a sign reflecting the brokerage's name and involvement in the tournament.
- A real estate agent and mortgage broker jointly advertise their services in a real estate magazine, provided that each individual pays a share of the costs in proportion with his or her prominence in the advertisement.
- A lender pays a real estate agent fair market value to rent a desk, copy machine, and phone line in the real estate agent's office for a loan officer to prequalify applicants.
- A title agent pays for dinner for a real estate agent during which business is discussed, provided that such dinners are not a regular or expected occurrence.

5. Examples of Prohibited Activities and Payments

- A title company hosts a monthly dinner and reception for real estate agents.
- A mortgage broker pays for a lock-box without including any information identifying the mortgage broker on the lock-box.
- A mortgage lender provides lunch at an open house, but does not distribute brochures or display any marketing materials.
- A hazard insurance company hosts a “happy hour” and dinner outing for real estate agents.
- A home inspector pays for a real estate agent to go to dinner, but does not attend the dinner.
- A title company makes a lump-sum payment toward a function hosted by the real estate agent, but does not provide advertising materials or make a presentation at the function.
- A mortgage broker buys tickets to a sporting event for a real estate agent, or pays for the real estate agent to play a round of golf.
- A title company sponsors a “get away” in a tropical location, during which only an hour or two is dedicated to education and the remainder of the event is directed toward recreation.
- A mortgage lender only pays a real estate agent for taking the loan application and collecting credit documents if the activity results in a loan.



Before you undertake any activity with a SSP or accept any payments, goods, or services from a SSP, you should speak with an attorney familiar with RESPA and make sure the activity complies with state and local laws. Some of these laws prohibit activities that are otherwise permissible under RESPA.