



9575 Katy Freeway, Suite 300

Houston, TX 77024

Phone: 713-871-0005

Fax: 713-871-1358

Thomas E. Black, Jr., P. C. \*

Calvin C. Mann, Jr., P. C.

Gregory S. Graham, P. C.

David F. Dulock

Diane M. Gleason

Benjamin R. Idziak \*\*

Shawn P. Black \*\*

Margaret A. Noles

Robert J. Brewer

Regina Uhl

Ali Hedayatifar

\* Also Licensed in New York, Washington,  
West Virginia and Iowa

\*\* Also Licensed in New York

June 25, 2010

**To:** Clients and Friends

**From:** David F. Dulock

**Subject:** Home Warranty Company Payment to Real Estate Broker or Agent Can Be a RESPA Section 8 Violation: HUD Interpretative Rule (75 FR 36271)

In today's *Federal Register*, HUD issued the following Interpretative Rule on compensation paid by a home warranty company (HWC) to a real estate broker or agent in connection with the sale of a homeowner warranty to a homebuyer or seller in a transaction involving a federally related mortgage loan:

- (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.

The rationale HUD used in issuing this Interpretative Rule is not limited to the specific compensation issue addressed by the Rule, as this rationale may easily be applied to any potential "compensated referral" situation involving a federally related mortgage loan.

For a complete explanation of the Interpretative Rule and HUD's reasoning, we have attached a copy of the *Federal Register* pages where they are published.

The Interpretative Rule represents HUD's interpretation of section 8 of RESPA and the applicable sections of Regulation X and is exempt from the public comment requirement. However, HUD is permitting public comments and if you wish to submit a written comment, you must do so by no later than July 26, 2010. The procedures are set out in the attached pages of today's *Federal Register*.

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Attach.: 75 FR 36271 - 36273

Dated: June 16, 2010.

Deborah S. Merkle,  
Chairman.

[FR Doc. 2010-15317 Filed 6-24-10; 8:45 am]

BILLING CODE P

## DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

### 24 CFR Part 3500

[Docket No. FR-5425-IA-01]

#### Real Estate Settlement Procedures Act (RESPA): Home Warranty Companies' Payments to Real Estate Brokers and Agents

**AGENCY:** Office of General Counsel,  
HUD.

**ACTION:** Interpretive rule.

**SUMMARY:** Under section 8 of RESPA and HUD's implementing RESPA regulations, services performed by real estate brokers and agents as additional settlement services in a real estate transaction are compensable if the services are actual, necessary and distinct from the primary services provided by the real estate broker or agent, the services are not nominal, and the payment is not a duplicative charge. A referral is not a compensable service for which a broker or agent may receive compensation. This rule interprets section 8 of RESPA and HUD's regulations as they apply to the compensation provided by home warranty companies to real estate brokers and agents. Although interpretive rules are exempt from public comment under the Administrative Procedure Act, HUD nevertheless welcomes public comment on this interpretation.

**DATES:** *Effective date:* June 25, 2010.  
*Comment Due Date:* July 26, 2010.

**ADDRESSES:** Interested persons are invited to submit comments regarding this interpretive rule to the Regulations Division, Office of General Counsel, 451 7th Street, SW., Room 10276, Department of Housing and Urban Development, Washington, DC 20410-0500. Communications must refer to the above docket number and title. There are two methods for submitting public comments. All submissions must refer to the above docket number and title.

1. *Submission of Comments by Mail.* Comments may be submitted by mail to the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 7th Street, SW., Room 10276, Washington, DC 20410-0500.

2. *Electronic Submission of Comments.* Interested persons may

submit comments electronically through the Federal eRulemaking Portal at [www.regulations.gov](http://www.regulations.gov). HUD strongly encourages commenters to submit comments electronically. Electronic submission of comments allows the commenter maximum time to prepare and submit a comment, ensures timely receipt by HUD, and enables HUD to make them immediately available to the public. Comments submitted electronically through the [www.regulations.gov](http://www.regulations.gov) Web site can be viewed by other commenters and interested members of the public. Commenters should follow the instructions provided on that site to submit comments electronically.

**Note:** To receive consideration as public comments, comments must be submitted through one of the two methods specified above. Again, all submissions must refer to the docket number and title of the rule

*No Facsimile Comments.* Facsimile (FAX) comments are not acceptable.

**Public Inspection of Public Comments.** All properly submitted comments and communications submitted to HUD will be available for public inspection and copying between 8 a.m. and 5 p.m. weekdays at the above address. Due to security measures at the HUD Headquarters building, an advance appointment to review the public comments must be scheduled by calling the Regulations Division at 202-708-3055 (this is not a toll-free number). Individuals with speech or hearing impairments may access this number through TTY by calling the toll-free Federal Information Relay Service at 800-877-8339. Copies of all comments submitted are available for inspection and downloading at <http://www.regulations.gov>.

**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 this number via TTY by calling the toll-free Federal

Information Relay Service at 1-800-877-8339.

#### SUPPLEMENTARY INFORMATION:

##### I. Background

A homeowner's warranty is covered as a "settlement service" under HUD's RESPA regulations at 24 CFR 3500.2. Accordingly, the framework for compensation of real estate brokers and agents for services performed on behalf of home warranty companies (HWCs) is established in RESPA and HUD's regulations, as discussed in an unofficial staff interpretation letter dated February 21, 2008, issued by the Office of General Counsel. In brief, services performed by real estate brokers and agents on behalf of HWCs are compensable as additional settlement services if the services are actual, necessary and distinct from the primary services provided by the real estate broker or agent. (See 24 CFR 3500.14(g)(3).) 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. (See 24 CFR 3500.14(c).)

HUD has received inquiries regarding the application of this framework to the compensation provided by HWCs to real estate brokers and agents for the selling of home warranties in connection with the sale or purchase of a home. In particular, interested parties have inquired about the legality of the HWCs providing compensation to real estate brokers and agents on a per transaction basis and about the scope of services provided on behalf of the HWC for which real estate brokers and agents can be compensated by the HWC.

##### II. This Interpretive Rule

This interpretive rule clarifies the legality under section 8 of RESPA and HUD's implementing regulations of the compensation provided by HWCs to real estate brokers and agents, and it is provided in accordance with Secretary of HUD's delegation of authority to the General Counsel to interpret the authority of the Secretary. (See 74 FR 62801, at 62802.)

##### A. Unlawful Compensation for Referrals

RESPA does not prohibit a real estate broker or agent from referring business to an HWC. Rather, RESPA prohibits a real estate broker or agent from receiving a fee for such a referral, as a referral is not a compensable service. (See 24 CFR 3500.14(b).) HUD's regulations, at 24 CFR 3500.14(f), defines referral, in relevant part, as follows:

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. (Emphasis added.)

To evaluate whether a payment from an HWC is an unlawful kickback for a referral, HUD may look in the first instance to whether, among other things:

- The compensation for the HWC services provided by the real estate broker or agent is contingent on an arrangement that prohibits the real estate broker or agent from performing services for other HWC companies; *e.g.* if a real estate broker or agent is compensated for performing HWC services for only one company, this is evidence that the compensation may be contingent on such an arrangement; and

- Payments to real estate brokers or agents by the HWC are based on, or adjusted in future agreements according to, the number of transactions referred.

If it is subsequently determined, however, that the payment at issue is for only compensable services,<sup>1</sup> the existence of such arrangements and agreements would not be an indicator of an unlawful referral arrangement, and would be permissible. (See discussion in Sections C and D below.)

#### *B. Marketing by a Real Estate Broker or Agent Directed to Particular Homebuyers or Sellers*

In some circumstances, marketing services performed on behalf of an HWC are not compensable services. In particular, a real estate broker or agent is in a unique position to refer settlement service business and through marketing can affirmatively influence a homebuyer's or seller's selection of an HWC. As a real estate broker and agent hold positions of influence in the real estate transaction, a homebuyer or seller is more likely to accept the broker's or agent's promotion or recommendation of a settlement service provider. Therefore, marketing performed by a real estate broker or agent on behalf of an HWC to sell a homeowner warranty to particular homebuyers or sellers is a "referral" to a settlement service provider.

<sup>1</sup> Compensable services are 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.

Accordingly, in a transaction involving a federally related mortgage loan, an HWC's compensation of a real estate broker or agent for marketing services that are directed to particular homebuyers or sellers would be a payment that violates section 8 of RESPA as an illegal kickback for a referral of settlement service business. For example, a real estate broker or agent actively promoting an HWC and its products to sellers or prospective homebuyers by providing HWC verbal "sales pitches" about the benefits of a particular HWC product or by distributing the HWC's promotional material at the broker's or agent's office or at an open house is considered to be a referral. Thus, compensating the real estate broker or agent for such promotion would result in a violation of section 8 of RESPA.

Nothing precludes a real estate broker or agent from performing services to aid the seller or buyer, or to increase the possibility that the real estate transaction will occur and thereby benefit the broker or agent. However, the broker or agent may not be compensated by the HWC for marketing services directed to particular homebuyers or sellers.

#### *C. Bona Fide Compensation for Services Performed*

Section 8(c) of RESPA and HUD's regulations allow payment of bona fide compensation for services actually performed. (See 24 CFR 3500.14(g)(1)(iv).) HUD's regulations also allow persons in a position to refer settlement service business to receive payments for providing additional compensable services as part of a transaction. (See 24 CFR 3500.14(g)(3).) Services performed by real estate brokers and agents on behalf of HWCs would be compensable as additional settlement services only if the services are actual, necessary and distinct from the primary services provided by the real estate broker or agent. Further, the real estate broker or agent may accept, and an HWC may pay to the broker or agent, a portion of the charge for the homeowner warranty only for services that are not nominal and for which there is not a duplicative charge. (See 24 CFR 3500.14(c).) HUD looks at the actual services provided to determine in a particular case whether compensable services have been performed by the real estate broker or agent.<sup>2</sup>

<sup>2</sup> 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

A determination that compensable services have been performed by the real estate broker or agent will be based on a review of the particular facts of each case. Evidence in support of such a determination may include:

- Services—other than referrals—to be performed are specified in a contract between the HWC and the real estate broker or agent, and the real estate broker or agent has documented the services provided to the HWC;
- The services actually performed are not duplicative of those typically provided by a real estate broker or agent;
- 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; and
- The real estate broker or agent has fully disclosed to the consumer the compensable services that will be provided and the compensation arrangement with the HWC, and has made clear that the consumer may purchase a home warranty from other vendors or may choose not to purchase any home warranty.

HUD will review evidence on a case-by-case basis to determine whether compensation provided was a kickback for a referral or a legal payment for the compensable services. 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.

#### *Reasonableness of Compensation*

As the final step in assessing the legality of the compensation for these services, HUD will also assess whether the value of the payment by the HWC is reasonably related to the value of the services actually performed by the real estate broker or agent. In the context of loan origination, for example, HUD has stated that the mere taking of an application is not sufficient work to justify a fee under RESPA. In its Statement of Policy 1999-1, entitled "Regarding Lender Payments to Mortgage Brokers" (64 FR 10080, March 1, 1999), HUD stated:

Although RESPA is not a rate-making statute, HUD is authorized to ensure that payments from lenders to mortgage brokers are reasonably related to the value of the goods or facilities actually furnished or services actually performed, and are not

to the HWC regarding inspections may be compensable services.

compensation for the referrals of business, splits of fees or unearned fees.

In analyzing whether a particular payment or fee bears a reasonable relationship to the value of the goods or facilities actually furnished or services actually performed, HUD believes that payments must be commensurate with that amount normally charged for similar services, goods or facilities \* \* \*. If the payment or a portion thereof bears no reasonable relationship to the market value of the goods, facilities or services provided, the excess over the market rate may be used as evidence of a compensated referral or an unearned fee in violation of Section 8(a) or (b) of RESPA. (See 24 CFR 3500.14(g)(2).) Moreover, HUD also believes that the market price used to determine whether a particular payment meets the reasonableness test may not include a referral fee or unearned fee, because such fees are prohibited by RESPA. 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.) 64 FR 10086.

#### D. Conclusion

Accordingly, HUD interprets section 8 of RESPA and HUD's regulations as these authorities apply to the compensation provided by home warranty companies to real estate brokers and agents as follows:

(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.

#### F. Solicitation of Comment

This interpretive rule represents HUD's interpretation of its existing regulations and is exempt from the notice and comment requirements of the Administrative Procedure Act. (See 5 USC 553(b)(3)(A)). Nevertheless, HUD is interested in receiving feedback from the public on this interpretation, specifically with respect to clarity and scope.

Dated: June 18, 2010.

Helen R. Kanovsky,  
General Counsel.

[FR Doc. 2010-15355 Filed 6-24-10; 8:45 am]  
BILLING CODE 4210-67-P

## DEPARTMENT OF HOMELAND SECURITY

### Coast Guard

**33 CFR Parts 1, 3, 8, 13, 19, 23, 25, 26, 27, 51, 67, 81, 84, 89, 96, 101, 104, 105, 110, 114, 116, 118, 120, 126, 127, 128, 135, 140, 141, 144, 148, 149, 150, 151, 153, 154, 155, 156, 157, 158, 159, 160, 164, 165, 167, 169, 174, 179, 181, and 183**

[Docket No. USCG-2010-0351]

RIN 1625-ZA25

### Navigation and Navigable Waters; Technical, Organizational, and Conforming Amendments

AGENCY: Coast Guard, DHS.

ACTION: Final rule.

**SUMMARY:** This rule makes non-substantive changes throughout Title 33 of the Code of Federal Regulations. The purpose of this rule is to make conforming amendments and technical corrections to Coast Guard navigation and navigable waters regulations. This rule will have no substantive effect on the regulated public. These changes are provided to coincide with the annual recodification of Title 33 on July 1.

**DATES:** This final rule is effective June 25, 2010.

**ADDRESSES:** Comments and material received from the public, as well as documents mentioned in this preamble as being available in the docket, are part of docket USCG-2010-0351 and are available for inspection or copying at the Docket Management Facility (M-30), U.S. Department of Transportation, West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. You may also find this docket on the Internet by going to <http://www.regulations.gov>, inserting USCG-2010-0351 in the "Keyword" box, and then clicking "Search."

**FOR FURTHER INFORMATION CONTACT:** If you have questions on this rule, call or e-mail Diane LaCumsky, Coast Guard; telephone 202-372-1025, e-mail [Diane.M.LaCumsky@uscg.mil](mailto:Diane.M.LaCumsky@uscg.mil). If you have questions on viewing the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202-366-9826.

## SUPPLEMENTARY INFORMATION:

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#### I. Regulatory History

We did not publish a notice of proposed rulemaking (NPRM) for this rule. Under 5 U.S.C. 553(b)(3)(A), the Coast Guard finds this rule is exempt from notice and comment rulemaking requirements because these changes involve rules of agency organization, procedure, or practice. In addition, the Coast Guard finds notice and comment procedure are unnecessary under 5 U.S.C. 553 (b)(3)(B) as this rule consists only of corrections and editorial, organizational, and conforming amendments and these changes will have no substantive effect on the public. This rulemaking also implements the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended by the Debt Collection Improvement Act of 1996, by revising the Penalty Adjustment Table published in 33 CFR 27.3. This revision reflects statutorily prescribed adjustments of civil monetary penalties (CMP) for 2010. These statutes do not allow for discretion in implementation, rendering prior notice and comment unnecessary and contrary to the public interest.

Under 5 U.S.C. 553(d)(3), the Coast Guard finds that, for the same reasons, good cause exists for making this rule effective upon publication in the **Federal Register**.

#### II. Background

Each year the printed edition of Title 33 of the Code of Federal Regulations is recodified on July 1. This rule, which becomes effective June 25, 2010, makes technical and editorial corrections throughout Title 33 in time to be reflected in the recodification. This rule does not create any substantive requirements.

#### III. Discussion of Rule

This rule amends 33 CFR Part 1 by adding a new paragraph to clarify the Coast Guard's District Commanders' authority to redelegate signature of