




Best of RESPA Q&A: Broker Edition

A compilation of RESPA questions asked by
mortgage broker readers and answered by
our panel of expert attorneys



September 8, 2005

Can a mortgage company reimburse a borrower for costs not reflected on the GFE?

“At a loan closing, a borrower’s HUD-1 ended up being several hundred dollars more than the GFE because of the appraisal. Would it violate RESPA if the mortgage company cut a check reimbursing the borrower for that additional expense?”

Hank Shulruff, senior vice president of Attorney’s Title Guaranty Fund (ATGF), and past-president of the Illinois Real Estate Lawyers Association, responded, “There would be nothing wrong with making the payment to the borrower,” although he noted that “it’s a surprising high road for the lender to take, as reimbursing a borrower for underestimating the cost of the appraisal is rare.”

He added, “Credits back to the borrower are always fine but they should be reflected on the HUD-1. It might technically violate the HUD-1 requirements but it would be to cure a violation of the GFE requirements. Best case scenario: lender pays the borrower and the HUD-1 is changed to reflect the payment.

Peter Birnbaum, president of ATGF, concurred, saying, “Curative action in the form of a credit to the borrower is permitted, if it is reflected on the HUD-1.”

August 17, 2005


Are referral fees between licensed brokers permitted?

The answer, culled from HUD’s RESPA guidelines, is as follows:

RESPA’s Section 8 prohibition provides that “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.”

HOWEVER, it also states, “Nothing in this section shall be construed as prohibiting... (3) payments pursuant to cooperative brokerage and referral arrangements or agreements between real estate agents and brokers...”

That carve-out allows for the payment of referral fees between *real estate brokers*, but is not applicable to mortgage brokers.



August 10, 2005

If a borrower rescinds on a transaction, is the mortgage broker entitled to keep the associated fees?

Herman Thordsen, principal attorney with The Law Offices of Herman Thordsen, responded:

“RESPA has nothing to do with receiving fees to speak of, so that’s a TILA question. TILA provides that once the borrower legitimately rescinds, the creditor has to give back everything that the borrower has expended. So if the borrower pays the broker fees, the broker legally doesn’t have to give them back under federal law, but the lender would have to even though he didn’t do it. You know that the borrower pays for the appraisal report and the credit report and the title report, but if he cancels the transaction, he has to get his money back, and the person that has to pay him is the lender or the creditor, even though the borrower actually paid the money to the title company and to the credit reporting agency and to the appraiser.”

August 3, 2005

Can a builder with an affiliated mortgage company discourage buyers from using an outside lender?

A mortgage company asked:

“We have been seeing more builders that own their own mortgage companies steer buyers to that entity by telling them that the price would be higher if they went to another lender. They even put similar language into their contracts. Is this a RESPA violation?”

Rich Andreano, attorney with Weiner Brodsky Sidman Kider PC in Washington D.C. explains:

“A builder may offer discounts to home buyers to select the builder’s affiliated mortgage company. The discounts must be bona fide — they may not be offset by higher costs elsewhere in the transaction. However, HUD takes the position that a builder may not increase prices or costs to the buyer if the buyer elects to use a non-affiliated lender. In other words, while discounts below the standard price may be offered to buyers if they elect to use an affiliated mortgage company, a builder may not increase prices above the standard price when buyers select a non-affiliated mortgage company.”



July 19, 2005

Is it a RESPA violation for a mortgage company to sponsor a Board of Realtors luncheon?

A mortgage company asked:

"In a recent training for mortgage loan officers we were warned about practices regarding RESPA law. One topic of conversation was the "compensation" to Realtors issue. Our mortgage company is an affiliate member of the local Board of Realtors in the areas in which we have offices. One question that we have is in regard to sponsoring the Board of Realtors meetings. In the past our competitors have sponsored such events, however before we do the same we would like clarification on the practice in regard to the law."

Tawanna Matthews in HUD's Office of RESPA and Interstate Land Sales answered,

"You are asking if it is a violation of the Real Estate Settlement Procedures Act (RESPA) to sponsor your local Board of Realtors meeting. You stated that in the past years your competitors have sponsored this event, however, you would like clarification as to whether it violates RESPA.

"Section 8 of RESPA prohibits anyone from giving or accepting a fee, kickback or anything of value in exchange for referrals of settlement service business involving a federally related mortgage loan. Unfortunately, sponsoring an event, on behalf of an organization that provides services to federally related mortgage loans, may be considered a "thing of value", because it defrays that organization expense. Thus, members of the Board of Realtors are in a position to refer business to your company. "However, there is nothing under RESPA regulations to prevent joint advertising, as long as each party pays their share of the expense."

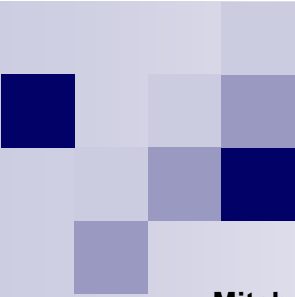
April 29, 2005

Can a broker charge a borrower an advance credit report and doc prep fee if the funds are deposited in a trust account and then paid to third-party service providers?

A RESPAnews.com member asked:

"Can a licensed broker charge a borrower an advance fee for a credit report and for creating required disclosure documents if the money is deposited into a trust account and then paid to third party service providers?"





Mitch Kider, managing partner of the Washington D.C. firm Weiner Brodsky Sidman Kider PC, responded:

"The permissibility of charging an advance fee for a credit report and for creating required disclosures will vary by state.

"With respect to a credit report fee, certain states do permit a mortgage broker to collect a credit report fee prior to closing as long as the broker places the fee in a trust account for later distribution to the third party service provider and the amount of the fee collected is the same as the charge imposed by the third party service provider. State laws typically permit a broker (or lender) to collect and retain certain enumerated fees and charges and to collect certain 'bona fide third party fees.' Typically, these third party fees are for services such as credit reports, appraisals, etc.

"With respect to charging a fee for creating required disclosure documents, note that federal law prohibits charging a fee for the preparation of the HUD-1 and disclosures required under the Truth in Lending Act. Similarly, in a number of states, a broker or lender may not charge and retain a fee for the preparation of certain legal documents or disclosures because it is considered the unauthorized practice of law. Also, as noted above, in certain states, brokers (and lenders) are permitted to collect only certain enumerated fees. The exact nature and purpose of the fee would need to be analyzed to determine if it is permissible.

"One also has to consider state law with respect to refunding fees. Many states require brokers (and lenders) to refund certain fees and/or to provide disclosures regarding the circumstances under which fees are not refundable.

"In order to determine the permissibility of imposing the advance fee, one would have to look at state law for each of these issues."

April 18, 2005

Can a mortgage advisor take a Realtor to lunch without violating RESPA?

A *RESPAnews.com* member and mortgage company advisor asked:

"Is it a kickback and violation of RESPA to invite a Realtor to lunch for the purpose of making a presentation explaining the services that your business provides, in order to encourage the Realtor to refer her clients to you who need those services?"

Rich Andreano, partner with the Washington D.C. firm of Weiner Brodsky Sidman Kider PC, responded:



“Engaging in normal promotional activities is permissible under RESPA, provided that the activity is not conditioned on the referral of business and does not involve the defraying of expenses that otherwise would be incurred by a person in a position to refer settlement service business. A loan officer may take a real estate agent to a simple lunch for the purpose of introducing the loan officer to the agent and allowing the loan officer to describe the services that he or she can provide to customers of the agent. The lunch may not be a reward for prior referrals or conditioned on there being future referrals.”

April 11, 2005

Can a mortgage company compensate a Realtor for doing work on the loan process?

A *RESPAnews.com* member from a mortgage company asked:

"If a Realtor does work on the loan process (i.e. order title or appraisal, take initial application) can I legally pay him as long as it is W2'd? I would not charge the borrower. I would pay the Realtor taxed income through my payroll."

Grant E. Mitchell, senior counsel with Lotstein Buckman LLP and former senior attorney for RESPA at HUD, said:


"HUD did issue guidance in 1995 regarding payments to third parties providing mortgage origination services (the so-called 'IBAA letter'). This letter indicated that at a minimum a person should take the loan application and perform at least 5 common settlement services which HUD identifies in the IBAA Letter. The letter differentiates between 'hard' services and 'soft,' or counseling, services.

"While the original IBAA Letter was only addressed to one entity, in 1999 HUD favorably referenced it in a Statement of Policy on mortgage broker fees, which effectively enhanced the status of the IBAA Letter. The payments for the services in the IBAA Letter were approximately \$200 in 1995.

"RESPA is a criminal and civil statute with substantial penalties as well as exposure to the class action bar, so no one should enter into such an arrangement without reviewing the details of the IBAA Letter with competent counsel. Also, performing these services may trigger the mortgage broker laws of many states, which is another potential exposure. In September 2003, HUD entered into a cease and desist [settlement agreement](#) with an Atlanta-based mortgage broker who was paying real estate agents \$400 per application. The mortgage broker also agreed to refund the payments amount and paid a fine to the U. S. Treasury. Be careful out there."

In addition to that, **Marx David Sterbcow**, managing partner of the Sterbcow Law





Group LLC, noted,

"Any agent that acts as a real estate mortgage broker in any capacity and as a real estate agent in the same transaction is barred from receiving any compensation when an FHA loan is involved -- even if all the RESPA requirements have been met."

March 25, 2005

If a mortgage company adds a Realtor's name to a For Sale sign already in place in front of a home, does the Realtor then need to pay for that advertisement?

A *RESPAnews.com* subscriber recently described a situation and posed the following question:

Situation: A mortgage company offers a For Sale By Owner service to sellers, which includes qualifying prospective homebuyers for mortgages and placing the mortgage company's sign in front of the seller's home. Now, after 2-3 months, if the home doesn't sell and the seller decides to switch to a Realtor, the mortgage company would recommend one and put the Realtor's information on their sign

Question: Since the mortgage company would then in effect be advertising for the Realtor, would the Realtor then need to pay fair market value for the sign?

Phil Schulman, partner with Kirkpatrick & Lockhart LLP in Washington D.C. responded:

"If the Realtor's name is going on the sign, they should pay their fair share of the costs associated with placing the sign there. However, if most of that cost was already borne by the mortgage company 3 months ago, maybe the Realtor could pay the cost of removing the sign. Short answer, Realtor should pay something for the advertisement."

March 9, 2005


Under RESPA, can a mortgage company provide clock hour classes for RE agents?

A *RESPAnews.com* subscriber asked:

"Can our mortgage company provide clock hour classes in our office for real estate agents without violating RESPA? We would offer them to agents that do not currently work with us. Although we would not sell it as an enticement to do business with us, that could possibly happen if they appreciated our efforts to keep the industry informed."

Herman Thordsen, principal attorney with
The Law Offices of Herman Thordsen,





responded:

"This is a close call. However, I believe HUD would consider it a violation of RESPA Section 8. In particular: 'No person shall give and no person shall accept any...thing of value [in this case free classes] pursuant to any agreement or understanding, oral OR OTHERWISE [emphasis added], that business incident to or a part of real estate settlement service involving a federally related mortgage loan shall be referred to any person [the mortgage company conducting the classes.]" Title 12 United States Code Annotated, Section 2607(a).

"While you are doing it for no charge to all real estate sales people, no one else is admitted or allowed. The main problem is the 'understanding' people may have. If you were to send a disclaimer stating there is no condition and no one is under any obligation to send business for any reason it would probably pass muster as long as the 'actions' follow the words. Before doing it I would recommend your attorney see the entire plan spelled out in DETAIL, which is what is missing here."

January 24, 2005

Under RESPA, can lender fees be charged on 2nd trusts?

A *RESPAnews.com* subscriber asked:

"In regards to the collection of lender fees (i.e. underwriting, admin, processing fees), is there a rule in RESPA that states that these fees cannot be charged on 2nd trusts? The 2nds could be either closed end loans or HELOCs."

Herman Thordsen, principal attorney with The Law Offices of Herman Thordsen, responded:

"There is no RESPA rule that prevents collection of fees reasonably earned for second deeds of trust. However, there may be such a rule in the state law that issues the license to the lender."

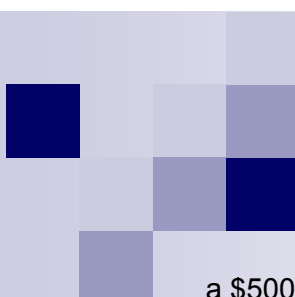
October 11, 2004

Can lenders legally give gifts to Realtors or clients under RESPA?

A *RESPAnews.com* reader sent us this question:

"Hi, I am a new loan officer and I have a question. I've asked many other loan officers about rules regarding gifts we give to clients and realtors. Is it okay for me to give clients





a \$500 Home Depot card when our deals close? Also, is it okay to offer realtors \$200 gift for referrals? I've been told that we can offer gifts. I just want to be legal. Can you please tell me if what I'm offering is okay?"

Grant Mitchell, senior counsel with Lotstein & Buckman LLP in Washington D.C., responds:

"There is no recent HUD guidance regarding gifts to borrowers. During the 1980's when I was senior counsel for RESPA at HUD I wrote one or more letters (now withdrawn) which indicated that a gift at closing from a lender to a borrower would be permissible (as a form or discounting). A gift to anyone else in the process would likely be viewed as a prohibited payment for the referral of business under Section 8 (a). While I and most practitioners believe these continue to be HUD's positions on this issue (and I have heard HUD officials say this orally at conferences), there is no official HUD issuance (such as a Q and A on the RESPA website) of which I am aware that makes this interpretation."