

RESPA and Home Warranty Programs

Undoubtedly many REALTORS® have been told recently that there is a “new law” that prohibits real estate brokers and agents from receiving any compensation from a home warranty company. While there has been a recent development in connection with home warranties, it is certainly not true that there is a “new” law or that all payments from a home warranty company to a real estate licensee are now prohibited.

What has occurred is that HUD has provided its written understanding as to how Section 8 of RESPA applies to home warranty programs. As will be discussed, this interpretation has some surprising (and troubling) language, not just with regard to home warranty programs, but with regard to the RESPA anti-kickback regulations generally. Keep in mind, however, that the law has not changed. Rather, we now have an interpretive ruling as to what HUD believes that the law already is and has always been. NAR has responded to HUD’s invitation for comment and has asked HUD to reconsider its position. Keep in mind further that even if HUD does not change its position, courts are not required to accept HUD’s analysis.

At the heart of HUD’s interpretive ruling is Section 8(b) of RESPA that provides:

No person shall give and no person shall accept any portion, split, or percentage of any charge made or received for the rendering of a real estate settlement service in connection with a transaction involving a federally related mortgage loan other than for services actually performed.

What we have always understood is that settlement service providers (such as REALTORS®) cannot pay or receive referral fees from other settlement service providers. It has also been understood that where one settlement service provider pays a fee to another settlement service provider, the fee must be for “services actually performed.”

In its recent interpretation, HUD has opined that any payments from a home warranty company to a REALTOR® must be for services that are “actual, necessary and distinct from the primary services provided” by that REALTOR®. HUD has also indicated that a home warranty company cannot pay compensation to a REALTOR® for the “mere taking of an application.” HUD went on to opine that even where the REALTOR®’s services are “actual, necessary and distinct” from the usual services provided by the REALTOR®, HUD must be satisfied that the amount of the payment is “reasonably related” to the value of the services being provided by the REALTOR®.

But clearly the most troubling part of HUD’s interpretation is its position that a home warranty company cannot pay a REALTOR® on a per-transaction basis if the only services provided by that REALTOR® are marketing services directed to that REALTOR®’s own clients and customers. It is HUD’s apparent view that, regardless of the work involved, such activities constitute “referrals” rather than marketing services. HUD’s wholesale dismissal of the marketing process without regard to the nature and extent of the work involved is unprecedented and at odds with the prior understanding of the industry.

HUD has given the following examples of services that a REALTOR® can provide for (and receive payment from) a home warranty company:

- (i) conducting actual inspections of the items to be covered by the warranty to identify pre-existing conditions;
- (ii) recording serial numbers of the items to be covered;
- (iii) documenting the condition of the covered items by taking pictures; and/or
- (iv) reporting to the home warranty company regarding inspections.

Almost as an aside, HUD has indicated that it would look more favorably at a contractual relationship between a REALTOR® and a home warranty company if: (i) the contract makes the REALTOR® the legal agent of the home warranty company such that the home warranty company assumes responsibility for REALTOR®'s representations; and/or (ii) the REALTOR® discloses his/her compensation arrangement to his/her clients and makes clear to them that they can purchase home warranties from other companies (or not at all). HUD has also indicated that it would look less favorably at a contractual relationship with a warranty company that requires the REALTOR® to represent that home warranty company exclusively. These factors seem to be wholly unrelated to whether or not a fee is for actual services provided and HUD has made no effort to explain the relevance.

As stated previously, NAR has responded to HUD's request for comments by providing a detailed critique of many of the assumptions made, as well as the conclusions reached, by HUD in its recent interpretation. NAR has asked that HUD reconsider its position. Again, however, keep in mind that the HUD interpretation does not have the force of law, rather, it is that governmental agency's opinion on what the law means. If HUD does not change its position, and if courts accept HUD's analysis, there will be far-reaching consequences, not only for the home warranty business, but also for many other types of settlement service providers. In the meantime, REALTORS® working with home warranty companies from which they receive fees should work with those companies to minimize any RESPA concerns under their current relationship.