DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Part 3500

[Docket No. FR–4114–N–01]

Office of the Assistant Secretary for Housing-Federal Housing Commissioner; Real Estate Settlement Procedures Act; Statement of Enforcement Standards: Title Insurance Practices in Florida; RESPA Statement of Policy 1996–4

AGENCY: Office of the Assistant Secretary for Housing-Federal Housing Commissioner, HUD.

ACTION: Statement of policy.

SUMMARY: This Statement advises the public of the enforcement standards HUD applies to determine whether certain practices involving title insurance companies and title insurance agents comply with the Real Estate Settlement Procedures Act (RESPA). Although this Statement specifically addresses issues and practices that HUD reviewed in the State of Florida, its general principles may apply by analogy to other geographic and settlement service areas.

This Statement discusses HUD's interpretation of two exceptions: Section 8(c)(1)(B) involving ''payments of a fee by a title company to its duly appointed agent for services actually performed in the issuance of a policy of title insurance;'' and Section 8(c)(2) involving the ''payment to any person of a *bona fide* salary or compensation or other payment for goods or facilities actually furnished or for services actually performed.'' HUD is publishing this Statement to inform the public of its interpretation of the law.

EFFECTIVE DATE: September 19, 1996.

FOR FURTHER INFORMATION CONTACT: David R. Williamson, Director, Office of Consumer and Regulatory Affairs, Room 5241, telephone: (202) 708–4560. For legal enforcement questions, contact Peter S. Race, Assistant General Counsel, Program Compliance Division, Room 9253, telephone: (202) 708–4184. (These are not toll free numbers.) For hearing and speech-impaired persons, this number may be accessed via TTY (text telephone) by calling the Federal Information Relay Service at 1–800–877–8339. (This number is toll free.) The address for the above listed persons is: Department of Housing and Urban Development, 451 Seventh Street, SW, Washington, DC 20410.

SUPPLEMENTARY INFORMATION:

General Background

Section 8(a) of the Real Estate Settlement Procedures Act (RESPA) prohibits any person from giving or accepting any fee, kickback, or thing of value for the referral of settlement service business involving a federally related mortgage loan. (See 12 U.S.C. 2607(a).) Section 8(b) of RESPA prohibits any person from giving or accepting any portion, split or percentage of any charge made or received for the rendering of a settlement service other than for services actually performed. (See 12 U.S.C. 2607(b).) Two exemptions to section 8's prohibitions against compensated referrals in RESPA covered transactions involve payments for title insurance services actually performed. Section 8(c)(1)(B) specifically exempts payments of a fee ''by a title company to its duly appointed agent for services actually performed in the issuance of a policy of title insurance.'' A more general provision, section 8(c)(2), exempts the ''payment to any person of a *bona fide* salary or compensation or other payment for goods or facilities actually furnished or for services actually performed.'' (See also 24 CFR 3500.14(g)(1).)

In enacting RESPA, Congress stated its intent that section 8 of RESPA did not prohibit payments by title insurance companies for ''goods furnished or services actually rendered, so long as the payment bears a reasonable relationship to the value of the goods or services received by the person or company making the payment.'' (H. Rep. No. 1177, 93d Cong., 2nd Sess. 1974 at 7–8 (hereafter ''the Report'').) The Report stated that ''to the extent the payment is in excess of the reasonable value of the goods provided or services performed, the excess may be considered a kickback or referral fee proscribed by Section [8].'' The legislative history of section 8(c)(1)(B) also noted that the ''value of the referral itself is not to be taken into account in determining whether the payment is reasonable.'' (Report at 8.) The Report specifically elaborated on the exemption for payments made by title insurance companies to duly appointed agents for services actually performed in the issuance of a policy of title insurance and stated:

> Such agents, who in many areas of the country may also be attorneys, typically perform substantial services for and on behalf of a title insurance company. These services may include a title search, an evaluation of the title search to determine the insurability of the title (title examination), the actual issuance of the policy on behalf of the title insurance company, and the maintenance of records relating to the policy and policy-holder. In essence, the agent does all of the work that a branch office of the title insurance company would otherwise have to perform.

Report at 8.

On November 2, 1992, HUD issued regulations that, among other things, gave guidance concerning title agent services under RESPA. These regulations relied in part on the legislative history. Section 3500.14(g)(3)[1] of the regulations provides an example of the type of substantial or ''core'' title insurance agent services necessary for an attorney to receive multiple fees in a RESPA covered transaction. It states:

> For example, for an attorney of the buyer or seller to receive compensation as a title agent, the attorney must perform core title agent services (for which liability arises) separate from attorney services, including the evaluation of the title search to determine the insurability of the title, the clearance of underwriting objections, the actual issuance of the policy or policies on behalf of the title insurance company, and, where customary, the issuance of the title commitment, and the conducting of the title search and closing.

Appendix B to the regulations provides additional guidance on the meaning and coverage of RESPA. Illustration 4 provides a factual situation in which an attorney represented a client as an attorney and as a title insurance agent and received fees for each role in a residential real estate transaction. In its comments on Illustration 4, HUD stated that the attorney was double billing his clients because the work he performed as a ''title agent'' was work he was already performing for his clients as an attorney. The title insurance company was actually performing the title agent work and providing the attorney with an opportunity to collect a fee as a title agent in exchange for referrals of title insurance business. HUD also stated that for the attorney to receive a separate payment as a title insurance agent, the attorney must ''perform necessary core title work and may not contract out the work.''

To qualify for a section 8(c)(1)(B) exemption, the attorney title insurance agent must ''provide his client with core title agent services for which he assumes liability, and which includes, at a minimum, the evaluation of the title search to determine insurability of the title, and the issuance of a title

[1] All citations in this Statement of Policy refer to recently streamlined regulations published on March 26, 1996 (61 FR 13,232), in the Federal Register (to be codified at 24 C.F.R. 3500 *et seq.*).

commitment where customary, the clearance of underwriting objections, and the actual issuance of the policy or policies on behalf of the title company.'' (See 24 CFR part 3500, Appendix B, Illustration 4.)

In another example, Illustration 10 of Appendix B, a real estate broker refers title insurance business to its own affiliate title company. This company, in turn, refers or contracts out all of its business to another title company that performs all the title work and splits its fees with the affiliate. HUD stated that because the affiliate title company provided no substantive services for its portion of the fee, the arrangement between the two title companies would be in violation of section 8 of RESPA. This illustration showed that the controlled business arrangement exemption did not extend to ''shell'' entities that did not perform substantive services for the fees it collected from the transaction. (See 24 CFR part 3500, Appendix B, Illustration 10.)

Section 19(a) of RESPA authorizes the Secretary to interpret RESPA to achieve the purposes of the Act. Section 19(c) of RESPA authorizes HUD to investigate possible violations of RESPA. During the course of its RESPA investigations, HUD applies the facts revealed by the investigation to the statute and regulations in determining whether a violation exists.

After receiving complaints of possible RESPA violations, HUD, in 1993, initiated an investigation of practices by some title insurance companies and some title insurance agents in the State of Florida. On September 21, 1995, HUD sent a letter and document entitled ''Findings of HUD's Investigation of Florida Title Insurance Companies and Statement of Enforcement Standards'' to certain title insurance companies in Florida. In November 1995, HUD met with Florida title insurance companies and received input from them on the enforcement standards. On June 19, 1996, HUD sent additional guidance to the particular companies that received the September 21, 1995 letter.

Statement of Policy—1996–4

To give guidance to interested members of the public on the application of RESPA and its implementing regulations to these issues, the Secretary, pursuant to section 19(a) of RESPA and 24 CFR 3500.4(a)(1)(ii), hereby issues the following Statement of Policy.[2] In issuing this Statement, HUD is not dictating particular practices for title insurance companies and their agents but is setting forth HUD's enforcement position for qualification in Florida for exemptions from section 8 violations.

Generally, it is beneficial for title insurance companies and their agents to qualify under the section 8(c)(1)(B) exemption since HUD does not normally scrutinize the payments as long as they are ''for services actually performed in the issuance of a policy of title insurance.'' (HUD will, however, continue to examine payments to agents that are merely for the referral of business such as gifts or trips based on the volume of business referred.) If the practices of a title insurance company or its agent do not qualify under the section 8(c)(1)(B) exemption, the company and the agent may still qualify under section 8(c)(2). Under a section 8(c)(2) standard, HUD will examine the amount of the payments to or retentions by the title insurance agent to see if they are reasonably related to services actually performed by the agent.

A. Definitions

For purposes of this statement, the terms listed below are defined as follows:

1. ''*Title Insurance Agent*'' means a person who has entered into an agreement with a title insurance company to act as an agent in connection with the issuance of title insurance policies, and includes title agents, title agencies, attorneys, and law firms.

2. ''*Core title services*'' are those basic services that a title insurance agent must actually perform for the payments from or retention of the title insurance premium to qualify for RESPA's section 8(c)(1)(B) exemption for ''payments by a title company to its duly appointed agent for services actually performed in the issuance of a policy of title insurance.''

In performing core title services, the title insurance agent must be liable to his/her title insurance company for any negligence in performing the services. In considering liability, HUD will examine the following type of indicia: the provisions of the agency contract, whether the agent has errors and omissions insurance or malpractice insurance, whether a contract provision regarding an agent's liability for a loss is ever enforced, whether an agent is financially viable to pay a claim, and other factors the Secretary may consider relevant.

''*Core title services*'' mean the following in Florida:

a. The examination and evaluation, based on relevant law and title insurance underwriting principles and guidelines, of the title evidence (as defined below) to determine the insurability of the title being examined, and what items to include and/or exclude in any title commitment and policy to be issued.

b. The preparation and issuance of the title commitment, or other document, that discloses the status of the title as it is proposed to be insured, identifies the conditions that must be met before the policy will be issued, and obligates the insurer to issue a policy of title insurance if such conditions are met.

c. The clearance of underwriting objections and the taking of those steps that are needed to satisfy any conditions to the issuance of the policies.

d. The preparation and issuance of the policy or policies of title insurance.

e. The handling of the closing or settlement, when it is customary for title insurance agents to provide such services and when the agent's compensation for such services is customarily part of the payment or retention from the insurer.

3. A ''*pro forma commitment*'' is a document that contains a determination of the insurability of the title upon which a title insurance commitment or policy may be based and that contains essentially the information stated in Schedule A and B of a title insurance commitment (and may legally constitute a commitment when countersigned by an authorized representative). A pro forma commitment is a document that contains determinations or conclusions that are the product of legal or underwriting judgment regarding the operation or effect of the various documents or instruments or how they affect the title, or what matters constitute defects in title, or how the defects can be removed, or instructions concerning what items to include and/or to exclude in any title commitment or policy to be issued on behalf of the underwriter.

4. ''*Title evidence*'' means a written or computer generated document that identifies and either describes or compiles those documents, records, judgments, liens, and other information from the public records relevant to the history and current condition of the title to be insured. Title evidence does not, however, include a pro forma commitment.

B. Qualification Under Section 8(c)(1)(B)

To qualify for an exemption as an agent in Florida under section 8(c)(1)(B), the payments to (or retentions by) a title insurance agent must be ''for services actually performed in the issuance of a

[2] This Statement provides additional guidance to the 1995 standards issued to the particular companies and, to the extent there are any inconsistencies, supersedes those standards.

policy of title insurance.'' HUD interprets this language as requiring a title insurance agent to perform core title services, as defined above, in order for title insurance company payments to the title insurance agent to qualify for this exemption. These ''core title services'' describe the type of services that Congress stated would come within this exemption, that is, the type of work that a branch office of the title insurance company would otherwise have to perform in the issuance of a title insurance policy. Thus, as applied to practices in Florida, for a title insurance agent to be able to retain the maximum agency portion of the risk premium payment allowed under Florida law, the title insurance agent must actually perform ''core title services,'' and generally may not contract out those services.

HUD recognizes, however, that there may be a legitimate temporary need (such as surges in business) for the title insurance agent to contract out some part of the core title services to an independent third party, not affiliated with the title insurance company. In such cases, payments to these agents still qualify under section 8(c)(1)(B). However, there is no qualification for the exemption if such contracting out of core title services is done on a regular basis.

HUD also will not consider a title insurance agent to be an agent for purposes of section 8(c)(1)(B) and to have actually performed (or incurred liability for) core title services when the service is undertaken in whole or in part by the agent's insurance company (or an affiliate of the insurance company). For example, if the title insurance company provides its title insurance agent with a pro forma commitment, typing, or other document preparation services, the title insurance agent is not ''actually performing'' these services. As such, the title insurance agent would not be providing ''core title services'' for the payments to come within the section 8(c)(1)(B) exemption. HUD acknowledges, however, that title insurance companies often provide their own title insurance agents with general advice and assistance on a particular unusual question or concern on an individual case by case basis, and this type of assistance would not affect the scrutiny of the payments to the title insurance agent under this exemption.

Within the section 8(c)(1)(B) context, moreover, title insurance companies may provide their title insurance agents with title evidence, as defined above. HUD acknowledges that title insurance companies have invested in title plants and may sell title evidence to their title insurance agents. In doing so, however, title insurance companies should not charge fees that reflect a payment for the referral of the title insurance order. (See 24 CFR 3500.14(b).) By this, HUD interprets the section 8 requirements to mean that the title insurance company must charge its title insurance agents a fee for title evidence that is not a disguised referral fee given in exchange for the referral of title business. It is evidence of a thing of value given for referrals if the title insurance company is not charging fees for title evidence that cover its costs of producing the title evidence or if the title insurance company charges less for title evidence to be used for a commitment or policy issued on behalf of the title insurance company than on another company's behalf.

In performing core title services, a title insurance agent is likely to use employees. If a title insurance company supplies employees or has control over or directs the work of employees of the title insurance agent, then the title insurance agent is not actually performing the core title services. In such a case, HUD will review the services provided by the insurance company to the agent for sufficiency under section 8(c)(2).

C. Qualification Under Section 8(c)(2)

If a title insurance agent does not perform ''core title services'' to qualify for the exemption under section 8(c)(1)(B) of RESPA, that agent may receive payment for services actually performed pursuant to section 8(c)(2), so long as the payment is reasonably commensurate with the reduced level of responsibilities assumed by the agent.

With respect to practices under Florida's title insurance statute, it is HUD's enforcement position that it is difficult to justify the payment (or retention) of a significant portion of the title insurance risk premium to a title insurance agent who fails to perform and assume responsibility for the title examination function. Likewise, if the title insurance company provides other services, or carries out the title insurance agent functions, or provides or controls ''part time examiners,'' HUD may scrutinize the net level of retention realized by the agent to determine whether the agent's compensation from the insurer reflects a meaningful reduction from the compensation generally paid to agents in the area who perform all core title services. The level of such reduction in compensation must be reasonably commensurate with the reduced level of responsibilities assumed by such person for the services provided and the underwriting risks taken. The value of a referral, however, is not to be taken into account in determining whether the payment bears a reasonable relationship to the services rendered. (See 24 CFR 3500.14(g)(2).)

D. Unearned Fees

Under the RESPA regulations, when a person in a position to refer title insurance business, such as an attorney, real estate broker or agent, mortgage lender, or developer or builder, receives a payment for providing title insurance agent services, such payment must be for services that are actual, necessary, and distinct from the primary services provided by such person. (See 24 CFR 3500.14(g)(3).) Thus, if an attorney is representing a consumer in a home purchase and also acting as a title insurance agent, he or she may not receive duplicate fees for the same work.

If a title insurance agent obtains third party services, such as the provision of title evidence, and does not add any additional value to the service provided by the third party, but increases the charge to the consumer for that service and retains the difference, then HUD views the amount that the person retains as an unearned fee in violation of section 8(b) of RESPA. (See 24 CFR 3500.14(c).)

Dated: September 6, 1996.

Nicolas P. Retsinas,

Assistant Secretary for Housing—Federal Housing Commissioner.

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