

# **VIRGINIA ASSOCIATION OF MORTGAGE BROKERS**

**Annual Convention  
October 12, 2006**

## **LEGAL SEMINAR**

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This paper addresses certain requirements of Virginia and Federal law. The reader should not rely upon the information in this paper as legal advice. If you have questions about the law, seek advice from your lawyer.

## **DEWEY B. MORRIS**

Dewey B. Morris has represented creditors since 1967 in complying with federal and state consumer credit laws, including clients offering multi-state credit card, sales finance and mortgage lending programs. He currently represents two Virginia associations, and many of their members, consisting of brokers and lenders licensed under the Virginia Mortgage Lender and Broker Act, consumer finance companies, and sales finance entities. He regularly represents such clients before Virginia regulatory agencies, including the Virginia Bureau of Financial Institutions.

Mr. Morris is listed in *Best Lawyers in America*, *Virginia Business'* legal elite and *Virginia Super Lawyers*. He is also a Founding Fellow of The American College of Consumer Financial Services Lawyers. He is the only lawyer in private practice in Virginia that has been elected to membership in the College.

He is a permanent member of the Judicial Conference of the Fourth Circuit. He is also a member of the Consumer Financial Services Committee of the ABA Section on Business Law where he serves as a member of the Subcommittees on Truth in Lending, Equal Credit Opportunity, Interest Rate Regulation and Interstate Delivery of Consumer Financial Services.

## **THOMPSON & MCMULLAN**

Thompson & McMullan was formed in 1973 to serve the legal needs of growing businesses and their owners. The firm is located in the historic Shockoe Slip area of downtown Richmond, Virginia. Firm lawyers have been active and held leadership roles in legal, business and civic organization in the City and surrounding counties, as well as in local, Virginia, and American Bar Associations. The firm's clients expect and receive excellent, responsive and cost-effective service for virtually all of their legal needs. The firm strives to create and maintain long term relationships which can only be built upon the trust that comes from the consistent delivery of timely and quality service.

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## **RECENT DEVELOPMENTS**

### **I. Virginia Mortgage Lender and Broker Act**

New regulations effective September 1, 2006

- Misleading statements
- Preapproval letters
- Advertising
- Third party fees
- Notifications to Bureau
- 3-year record retention for advertisements

### **II. Ameritrust Settlement**

\$325,000,000 settlement affecting borrowers in every state except Virginia  
No violations of federal law  
New disclosures required pursuant to settlement

### **III. Truth in Lending**

Fed has proposed (October 11, 2005) revisions to open-end credit rules, including changes required by the Bankruptcy Abuse Prevention and Consumer Protection Act (the proposals are not yet final):

- Minimum payment disclosures
- Introductory rate disclosures
- Interest-based credit card solicitations
- Disclosures related to payment deadlines and late payment penalties
- Prohibition on terminating accounts for failure to incur finance charges
- Tax disclosures if credit exceeds value of dwelling – both closed-end and open-end credit
- Clear and conspicuous guidelines – reasonably understandable and call attention to the nature and significance of the information being disclosed

The fee-based trigger for HOEPA will increase to \$547 from \$528 effective January 1, 2007.

HOEPA hearings

Cases

- Settlement of TILA claim prevents future rescission
- Rescission is available even if loan is fully paid.

Consummation occurs when consumer is contractually obligated – even if funds never disbursed  
Disclosures not clear and conspicuous if inconsistency between rescission notice and lock-in agreement  
Statute of limitations for failure to respond to rescission notice begins on date creditor receives the notice – not loan date  
No statutory damages or attorney fees for failure to provide required TILA disclosures on a proper form in a timely manner  
Hundreds of cases dealing with numerous issues: points and fees on HOEPA trigger; rescission; whether a charge is a finance charge, etc.

**IV. Overtime lawsuits**

Mortgage lenders and brokers should be aware of the requirements under the Fair Labor Standards Act for not paying overtime or minimum wages.

**V. FCRA**

Federal agencies have issued (July 18, 2006) a proposed rule for identity theft red flags and address discrepancies.

**VI. Federal agencies have issued a final guidance for risk management and consumer protection regarding nontraditional mortgage products and home equity lending (September 29, 2006):**

Interest-only mortgages  
Payment option ARMS  
Higher loan-to-value and debt-to-income ratios  
Lower credit scores  
Increase in transactions generated through loan brokers  
Piggy-back second lien mortgages  
Reduced documentation regarding evaluation of creditworthiness

**Related Documents:**

Proposed Illustrations of Consumer Information for Nontraditional Mortgage Products (September 29, 2006) – These illustrations are models for implementing the consumer information recommendations of the Guidance.

Interagency Credit Risk Management Guidance for Home Equity Lending – These relate to HELOCs containing interest-only features.

## **VII. Other Actions of Federal Agencies**

Final Rule on Medical Information (November 17, 2005)  
Final rule amending Regulation E and the Commentary; effective February 9, 2006; compliance mandatory beginning January 1, 2007.  
Updates to frequently asked HMDA questions (April 3, 2006)  
Findings on how to improve privacy notices under Title V (March 31, 2006)  
Report on compliance with consumer dispute provisions (August 9, 2006)  
Requesting comment on issues related to the accuracy of consumer credit reports and the reinvestigation of disputes (March 22, 2006)

## **VIII. State Security Breach Laws**

32 states already have laws  
Bills introduced in 2006 Virginia session

## **IX. Fees on First Mortgage Loans**

The Bureau continues to expand the list of prohibited fees on first mortgage loans:

Clerk's fees for assignment of deed of trust  
MERS fees  
Escrow waiver fees  
Doc prep fees (unauthorized practice of law)  
Fees for debt cancellation contracts (voluntary and thus not necessary)

## **X. RESPA**

No word yet on new rules.

## **XI. Junk Faxes**

Junk Fax Prevention Act of 2005 ("JFPA") – Amended the Telephone Consumer Protection Act ("TCPA") to codify the business relationship exception to the prohibition against junk faxes. Left it up to the FCC to define and determine the appropriate length of time to qualify for the exception.

The FCC regulations were published on May 3, 2006 with an effective date of August 1, 2006. They provide:

- Unsolicited faxes are generally prohibited with the following exceptions:

Express consent of the recipient  
Implied consent to publication of a public fax number that does not limit unsolicited faxes  
The sender has an established business relationship with the recipient.  
The sender includes an opt-out procedure.

- A sender of unsolicited faxes must permit the recipient to opt out of receiving future faxes, even if the recipient has previously consented.

At least one means of the opt-out must be cost-free to the recipient.

The opt-out must be honored as soon as possible and not more than 30 days.

An opt-out rescinds a prior consent.

- An established business relationship is formed by a voluntary two-way communication.
- No time period is established for the length of time between the last contact and the time the fax is sent.

## **RESPA**

### **I. Coverage**

RESPA applies to federally related mortgage loans (as defined) secured by a lien on residential real property with a residential structure designed for occupancy by one to four families. [The status of the lien is not relevant, and the borrower does not have to occupy the property (e.g., rental property).] § 3 of RESPA.

Refinancings – Similar to Regulation Z definition – If an existing obligation is satisfied and replaced by a new obligation, the transaction is a refinancing under both TILA and RESPA.

RESPA contains a number of requirements; this paper focuses only on coverage, certain disclosures required of mortgage brokers (not lenders) and the § 8 prohibition on kickbacks and other prohibited payments.

### **II. Exemptions. § 3500.5 of Regulation X.**

- 25 or more acres

This exemption applies if the security is a parcel of at least 25 acres, even if there are two or more homes on the property. The exemption does not apply if there are multiple parcels that contain more than 25 acres in the aggregate.

- Business, commercial or agricultural credit – Rely upon Regulation Z in determining whether the exemption applies.

The purpose of the credit, not the purpose for which the property securing the credit is put, determines whether the exemption applies. For example, a loan with a business purpose is exempt from RESPA, even if secured by the borrower's home.

Credit to acquire, improve or maintain rental property is business purpose if the owner does not occupy the rental property for more than 14 days in the upcoming year. See Reg. Z Commentary at § 226.3(a)-4) for examples.

- Temporary financing – construction bridge loans

The exemption does not apply if (i) the loan may be converted to permanent financing by the same lender; (ii) a lender issues a commitment for

permanent financing; or (iii) a construction loan has a term of two years or more.

- Vacant land – Unless loan proceeds used to construct house or install a manufactured home on the land within two years.
- Assumptions – if lender approval is not required
- Loan conversions to different loan terms with the same note
- Secondary market

The following are not secondary mortgage transactions: (i) mortgage broker transactions that are table-funded; and (ii) dealer loans, installment sales contracts between a dealer and a buyer, and the first assignment of such loans or contracts.

### **III. Subordinate Mortgage Loans**

RESPA applies but delivery of the settlement cost booklet is generally not required.

If the loan is a HELOC, the creditor may substitute (i) the publication called “When Your Home Is on the Line: What You Should Know about Home Equity Lines of Credit” for the settlement cost booklet; (ii) substitute Regulation Z disclosures for the Good Faith Estimate. HUD-1 and HUD-1A statements are not required.

Mortgage Servicing Requirements – These disclosures and notices do not apply to subordinate lien loans or HELOCs, even if the HELOC is secured by a first lien.

### **IV. Good Faith Estimates. § 3500.7 of Regulation X.**

If a mortgage broker is the exclusive agent of the lender, either the lender or the broker must provide the Good Faith Estimate within three business days after the mortgage broker receives or prepares the application.

If the mortgage broker is not an exclusive agent of the lender, the broker must provide a Good Faith Estimate within three days of receiving a loan application based on his or her knowledge of the range of costs – See Appendix C to Regulation X.

If the broker provides the Good Faith Estimate, the lender is not required to provide an additional Good Faith Estimate, but the lender is responsible for ascertaining that the Good Faith Estimate was delivered.

If the application is denied before the end of the three-business day period, the broker need not provide the Good Faith Estimate.

The Good Faith Estimate must be delivered or placed in the mail not later than three business days after the application is received or prepared. Regulation X does not mention faxing the disclosure.

## **V. Disclosures**

### Application:

- Special information booklet (only for purchase money loans)
- Good Faith Estimate
- Mortgage Servicing Disclosure Statement

### Disclosures before settlement:

- Affiliated business arrangement disclosure
- Required settlement service providers
- HUD-1 settlement statement

### Disclosures at settlement:

- HUD-1
- Initial escrow statement

### Disclosures after settlement:

- Annual escrow statement
- Servicing transfer statement

## **VI. Section 8 of RESPA. § 8 and § 3500.14 of Regulation X.**

Section 8 prohibits a person from giving or accepting anything of value for referrals of settlement service business related to a federally related mortgage loan. A person may not give or accept any part of a charge for services that are not performed.

Violations of § 8 are subject to criminal and civil penalties. A person who violates § 8 may be fined up to \$10,000 and imprisoned up to one year. In a civil action, a person may be liable for an amount equal to three times the amount paid. The statute of limitations is one year, and federal district courts in the district where the property is located or where the violation is alleged to have occurred have jurisdiction.

Examples of Entities Subject to RESPA (§ 3500.2 of Regulation X):

- Mortgage lenders and mortgage brokers
- Title companies and title agents
- Attorneys
- Appraisers
- Home and pest inspectors
- Settlement agents
- Insurance agents – mortgage; hazard; flood
- Real estate brokers and agents

Section 8(a) of RESPA prohibits a person from giving or receiving any fee, kickback or anything of value for referring business to a settlement service provider. The payment must be pursuant to an agreement or understanding.

Section 8(b) of RESPA prohibits a settlement service provider from splitting fees for settlement services or giving or receiving any portion or split or percentage other than for a service actually performed.

The amount paid must be commensurate to the value of those goods and services. The payment cannot exceed market value. The referral itself cannot be part of the value.

Section 8(c) contains exceptions discussed below.

**VII. Affiliated Business Arrangements**

Section 8(c)(4) of RESPA provides that an affiliated business arrangement does not violate § 8 so long as the following three requirements are met:

- The owner of the affiliated business that refers business to an affiliate must provide, no later than the time of the referral, a written disclosure on a separate piece of paper to each consumer who was referred to the affiliate.
- The customer being referred must not be required to use the affiliate.
- No payments other than a return on ownership interests or payments otherwise permitted under RESPA may be received under the arrangement. RESPA permits payment for services rendered or must constitute a return on ownership interests.

As a result of increased enforcement activities, HUD has entered into a number of settlement agreements in recent years involving § 8 violations. The following pages summarize HUD Policy Statement 1996-2 (sham controlled business arrangements) and recent settlement agreements involving this subject.

### **HUD Policy Statement 1996-2 – Sham Controlled Business Arrangements**

HUD says it will consider the following factors and weigh them in light of specific facts in determining whether an entity is a bona fide provider of settlement services and not a sham entity:

- Does the new entity have sufficient initial capital and net worth typical in the industry, to conduct the settlement service business for which it was created? Or is it undercapitalized to do the work it purports to provide?
- Is the new entity staffed with its own employees to perform the services it provides? Or does the new entity have “loaned” employees of one of the parent providers?
- Does the new entity manage its own business affairs? Or is an entity that helped create the new entity running the new entity for the parent provider making the referrals?
- Does the new entity have an office for business which is separate from one of the parent providers? If the new entity is located at the same business address as one of the parent providers, does the new entity pay a general market value rent for the facilities actually furnished?
- Is the new entity providing substantial services, i.e., the essential functions of the real estate settlement service, for which the entity receives a fee? Does it incur the risks and receive the rewards of any comparable enterprise operating in the market place?

- Does the new entity perform all of the substantial services itself? Or does it contract out part of the work? If so, how much of the work is contracted out?
- If the new entity contracts out some of its essential functions, does it contract services from an independent third party? Or are the services contracted from a parent, affiliated provider or an entity that helped create the controlled entity? If the new entity contracts out work to a parent, affiliated provider or an entity that helped create it, does the new entity provide any functions that are of value to the settlement process?
- If the new entity contracts out work to another party, is the party performing any contracted services receiving a payment for services or facilities provided that bears a reasonable relationship to the value of the services or goods received? Or is the contractor providing services or goods at a charge such that the new entity is receiving a “thing of value” for referring settlement service business to the party performing the service?
- Is the new entity actively competing in the market place for business? Does the new entity receive or attempt to obtain business from settlement service providers other than one of the settlement service providers that created the new entity?
- Is the new entity sending business exclusively to one of the settlement service providers that created it (such as the title application for a title policy to a title insurance underwriter or a loan package to a lender)? Or does the new entity send business to a number of entities, which may include one of the providers that created it?

Even if an entity is a bona fide provider of settlement services, HUD says questions remain.

Did the consumer receive the written disclosure required by HUD’s Regulation X?

Did the referring party require the consumer to use the entity?

Is the only thing of value that comes from the arrangement (other than permissible payments for services rendered) a return on ownership interests?

HUD’s Regulation X provides at § 3500.15(b)(3)(ii) that a return on ownership interests does not include payments that vary by the amount of actual, estimated or anticipated referrals of payments based on ownership shares that have been adjusted on the basis of previous referrals. When considering whether a payment is a return on an ownership interest or a payment for referrals of settlement service business, HUD will consider the following:

- Has each owner or participant in the new entity made an investment of its own capital, as compared to a “loan” from an entity that receives the benefits of referrals?
- Have the owners or participants of the new entity received an ownership or participant’s interest based on a fair value contribution? Or is it based on the expected referrals to be provided by the referring owner or participant to a particular cell or division within the entity?
- Are the dividends, partnership distributions, or other payments made in proportion to the ownership interest (proportional to the investment in the entity as a whole)? Or does the payment vary to reflect the amount of business referred to the new entity or a unit of the new entity?
- Are the ownership interests in the new entity free from tie-ins to referrals of business? Or have there been any adjustments to the ownership interests in the new entity based on the amount of business referred? Responses to these questions may be determinative of whether an entity meets the conditions of the CBA exception. If an entity does not meet the conditions of the CBA exception, then any payments given or accepted in the arrangement may be subject to further analysis under Section 8(a) and (b). 12 U.S.C. Sec. 2607(a) and (b).

The Policy Statement concludes by discussing five examples of how HUD will use the foregoing factors in an analysis of whether § 8 has been violated.

### **Upcharges/Mark-ups**

HUD and three U.S. appellate courts of appeal say that mark-ups are prohibited by RESPA. “Mark-up” means, for example, a customer is charged \$50 for a service that costs only \$10.

The 4<sup>th</sup> Circuit and two other appellate courts have ruled that RESPA prohibits fee splitting between two parties but not mark-ups by a single party.

The more recent opinions hold that mark-ups, but not overcharges, are illegal. An overcharge results when a provider charges more than the service is worth. HUD believes this also violates RESPA, but the federal appellate courts have not yet agreed with this position.

With HUD and the circuits in disarray, the United States Supreme Court will undoubtedly resolve this issue.

## HUD Settlement Agreements

1. CitiMortgage, Inc., et al (July 18, 2006). HUD announced settlements totaling \$1.6 million with a national mortgage lender and two major homebuilders involving captive title reinsurance. The settlements included a **\$650,000** settlement with CitiMortgage and its captive reinsurance company, Chesapeake Reinsurance; a **\$675,000** settlement with M.D.C. Holdings, Inc., certain of its homebuilding subsidiaries and AHT Reinsurance; and a **\$305,000** settlement with WL Homes, a homebuilder. HUD took the position that any captive title reinsurance arrangements in which payments are not bona fide and exceed the value of the reinsurance violates § 8 of RESPA. HUD believes these arrangements are designed to generate referral fees when there is a history of few or no claims paid. HUD said there is almost never a legitimate need or business purpose for title reinsurance on a single-family residence.

2. Oak Tree Homes, LLC, et al (December 15, 2005). This settlement agreement is among HUD and eight Tennessee builders (the "Title Group Builders") regarding alleged violations of § 8(a) of RESPA. First American Title Insurance Company d/b/a Memphis Title Company ("First American") formed and had an ownership interest in three title agencies. All of the builders owned one of the title agencies; the other two title agencies were owned by First American and one of the builders. The builders referred customers to the title agencies, but the work was provided by First American, not the title agencies. HUD asserted that the title agencies were not independent business entities but rather sham corporations. The Title Group Builders paid HUD **\$225,000** to settle and agreed that, in the future, any title entities in which any of the Title Group Builders has an interest must comply with HUD's Statement of Policy 1996-2, including but not limited to:

- Each title entity must have sufficient initial capital and net worth to conduct the settlement service business for which it was created;
- Each title entity will be staffed with employees who will work exclusively for that entity;
- Each title entity will have its own equipment and other resources;
- Each title entity will provide core settlement services; and
- Each title entity will actively compete in the marketplace for title insurance business by seeking business from parties other than the builders, realtors, mortgage brokers or other settlement service providers that created the entity.

3. 1-800 East-West Mortgage Company ("East-West") (November 15, 2005). HUD claimed that East-West, a bank subsidiary, received, requested and/or was reimbursed by settlement providers for the referral of business. This included tickets and

premium seating to Boston Red Sox baseball games and New England Patriots football games, payment for charitable galas and other special events with the Patriots, luxury suites at musical concerts and restaurant gift certificates.

East-West denied any violation of § 8(a) of RESPA but paid **\$150,000** to settle the matter.

4. Re/Max Masters, Inc. (October 20, 2005). This settlement resulted from HUD's investigation of real estate brokers in the Detroit area that received conference room rental fees from title companies in excess of the general market rate, thereby allegedly violating § 8(a) of RESPA. Re/Max paid **\$8,000** to settle and agreed that it would not suggest or require the rental of its office space by title companies or other settlement service providers in return for the referral of settlement service business.

5. Prudential Locations LLC (August 22, 2005). HUD determined that Prudential paid kickbacks to realtors who referred at least \$1,000,000 worth of business to Wells Fargo Home Mortgage Hawaii, LLC ("Wells Fargo"). In particular,

- Prudential organized, promoted and actually paid for the "First Annual Wells Fargo Friends Party" in January 2003, and only real estate agents who referred over \$1,000,000 worth of business to Wells Fargo were invited to attend the party.
- Prudential paid for and gave a real estate agent a three-year lease of a Mercedes Benz when he won a drawing that was only open to agents who referred business to Wells Fargo;
- Prudential paid for and gave real estate agents trips to Thailand, Las Vegas and San Francisco for their referrals of business to Wells Fargo;
- Prudential paid for and gave real estate agents the chance to win a three-year lease on a Mercedes Benz, trips and other prizes at the first annual Wells Fargo Friends Party in return for their referrals of business to Wells Fargo;
- Prudential paid for and gave real estate agents gift certificates in return for their referrals of business to Wells Fargo; and
- Prudential paid for and gave realtors the opportunity to win restaurant gift certificates for their referrals of business to Wells Fargo.

In settlement, Prudential agreed to pay **\$48,000**, to comply with RESPA; and not to organize or pay for parties, trips, automobile leases, gift certificates or other things of value in return for the referral of settlement services.

6. Coldwell Banker Residential Real Estate, Inc. ("CBRRE") (August 25, 2005). CBRRE is affiliated with a title insurance agency and a mortgage lender. HUD alleged that CBRRE gave things of value to its sales agents for referrals to settlement service providers, including (1) giving higher sales commission splits to agents who referred business to the title agency, (2) requiring agents to refer business to the title agency in order to receive referrals and relocation business, (3) allowing only those agents who referred business to the title agency to be paid by commissions at settlement, and (4) giving prizes and other benefits to those agents which referred business to the title agency. In settlement, CBRRE agreed to pay **\$250,000** and to stop such practices.

7. Closings of Tulsa, L.L.C. ("COT") (March 18, 2005). This matter, according to HUD, involved an affiliated business arrangement whereby McGraw, a real estate broker, encouraged its realtors to refer consumers to COT. At least one McGraw office maintained a policy that all transactions would be closed by COT. RSA, whose membership was comprised primarily of realtors associated with McGraw, was formed for the purpose of acquiring a 20% membership interest in COT and distributing funds from COT to RSA's members. RSA actively encouraged its associates to become members of RSA and refer business to COT. RSA acquired its membership interest in COT for less than full market value. In exchange, RSA's members referred settlement service business to COT. RSA received allocations and periodic distributions from COT equal to 20% of COT's net profits. RSA's members received an allocation and distribution from RSA based on the total sales prices of the real estate contracts that each member referred to COT. In some cases, COT marked up charges to consumers for recording fees and abstract services provided by third party settlement service providers or failed to provide accurate HUD-1 settlement statements.

The matter was settled for **\$325,000**. It was also agreed that no member shall receive, directly or indirectly, any thing of value in exchange for the referral of business to COT unless in compliance with RESPA. RSA will not make allocations or distributions based on the number of referrals, dollar value of referrals, profit arising from referrals, sales price of referrals, volume of sales or any other method that attempts to compensate individual members for referring business to COT. Neither RSA nor COT will admit any member for any amount less than the fair market value of the interest as determined by a CPA.

8. Chicago Title Insurance Company (February 25, 2005) – Chicago Title was accused of engaging in a pattern of violating RESPA by providing inaccurate HUD-1 settlement statements as part of an agreement or understanding for the referral of business in violation of § 8. The settlement amount was **\$5,000,000**.

9. Integrity Home Funding, LLC (February 29, 2004) – The defendant allegedly violated § 8 through its "refer a friend" program. Under this program, former clients that sent referrals to a branch manager of Integrity were entered into a raffle to receive tickets to sporting events, theater productions and other prizes. One winner per month was announced in a newsletter distributed by the branch manager. HUD believes

that this program violated § 8 in two ways: (1) the manager gave the monthly raffle winners things of value for referring business; and (2) the manager gave non-winners the chance of winning through the opportunity to participate in a contest that awarded things of value, which, in itself, is a thing of value.

The manager also violated § 8 by selling materials through his website entitled “How to Close More Loans, Make Money and Have a Life”. These materials instructed loan officers to pay referral fees for the referral of settlement service business. The respondents paid **\$1,500** to settle the case. They also agreed, if they failed to honor the cease and desist provisions in the agreement, to pay an additional \$20,000.

10. Allied Home Mortgage Capital Corp. (September 17, 2003) – HUD claimed that Allied violated § 8(b) by “upcharging” its customers more for credit reports than Allied paid to obtain such reports. Allied denied that an upcharge violated RESPA but settled the case by paying **\$370,000** and agreeing to eliminate future upcharges.

11. Znet Financial (September 17, 2003) – This settlement involved an allegation by HUD relating to the employee compensation for Re/Max agents that referred business to Znet Financial, LLC (“Znet”). Apparently, Znet paid Re/Max agents as “employees” \$400 for each consumer referred to Znet. HUD claimed that such agents were not bona fide employees receiving bona fide compensation; such agents performed little or no origination work and merely filled out or partially filled out an application form; and that, by engaging in these practices, a violation occurred of both §§ 8(a) and 8(b) of RESPA. As part of the settlement, Znet paid **\$15,000** and each agent of Re/Max of Atlanta agreed to make refunds of \$400 to each consumer referred to Znet.

12. Coldwell Banker United, Realtors (“CB United”) (July 22, 2003) – This settlement involved practices of CB United, other real estate brokers and real estate agents relating to their acceptance of “virtual tours” for free or below cost from various title companies for residential real property that was offered for sale in Texas. HUD believed that, by accepting virtual tours, CB United accepted a thing of value in the exchange for the referral of settlement services in violation of § 8(a). In settlement, CB United paid HUD **\$5,200** and agreed that, before accepting a virtual tour from a settlement service provider, CB United would pay a reasonable fee that equals or exceeds the actual cost of the virtual tour.

13. World Savings Bank (July 7, 2003) – World had a “for services rendered” program under which World would solicit and compensate realtors for assisting prospective borrowers in the completion and submission of mortgage loan applications through World’s “speediloan.com” website. HUD took the position that the program violated § 8(a) of RESPA. As part of the settlement, World paid **\$7,557** to HUD and discontinued operation of the program. It also agreed that, if it reinstated a similar program, not to compensate agents for referring potential loan applicants.

14. TitleVentures.com (July 1, 2003) – HUD alleged that the respondents violated § 8(b) of RESPA by forming limited partnership arrangements with mortgage brokers and real estate brokers in several states to perform title work; that the title work was performed by TitleVentures as an independent contractor with the affiliated partnership; and that the mortgage and real estate brokers, through the affiliated partnerships, received a large percentage of the title premiums for performing little or no title work. HUD also determined that the respondents and their affiliates created “preferred attorney” lists, that real estate closing work would be referred only to attorneys on the list, and that an attorney would be placed on the preferred list only by agreeing to place title work generated by the referral with TitleVentures.com. The respondents agreed to terminate all preferred attorney lists and to cease referral of real estate closing business to particular attorneys in return for an agreement by those attorneys to refer title business to respondents. They also agreed that, for a period of three years, they would hold an interest in no more than 12 title agencies and that each title agency formed or operated by respondents would be operated in accordance with the following terms:

- Each agency will have sufficient initial and operating capital net worth to conduct the settlement service for which it was created;
- The percentage interest of each party and the profits of a particular agency will be proportional to that party’s contribution to the capital of the agency;
- Return on ownership interests to each owner shall be proportional to the percentage of that party’s capital contribution;
- Each agency will be staffed with employees who work only for it and who are not employed simultaneously by any other agency, real estate agent or mortgage broker;
- Each agency will manage its own business affairs and will not be managed or controlled by any other entity or person;
- Each agency will have an office for its use in conducting business that is separate and apart from that of any other business partner or other provider of services;
- Each agency will pay fair market value for the facilities that it occupies and uses in its business;
- Each agency, through its own employees, will provide “core title services” as defined in HUD Policy Statement 1996-4;
- Each agency will actively compete in the marketplace for title insurance business and will receive at least 40% of its gross revenues from referrals received from parties other than the real estate brokers or agents, mortgage

brokers or other settlement service providers with which it has an affiliate relationship;

- No agency partner will send business to one or more “preferred” attorneys, nor will any agency partner require that attorneys or other settlement service providers refer business to that agency partner as a condition of doing business with him;
- Each agency will refrain from business practices that provide to it a fee, kickback or other thing of value in return for the referral of settlement service business; and
- Each agency will ensure there is a full disclosure to borrowers of all affiliated business relationships.

The respondents paid **\$7,500** to settle the matter.

15. Covenant Abstract Company, Inc. (May 2, 2003) – Covenant paid **\$200,000** to settle HUD’s claim that Covenant and its owners entered into business arrangements whereby the owners referred business to Covenant and Covenant later compensated the owners for such referral activities in violation of § 8(a). The settlement agreement did not contain any further details.

16. Chicago Title Insurance Company (September 6, 2002) – This case involved virtual tours that Chicago Title was providing to realtors at no cost. HUD said this violated § 8(a). Chicago Title paid **\$33,930** to settle. Chicago Title agreed that, in the future, it would charge for any virtual tour it provided a fee that would be not less than its actual cost of providing the tour; the fee would be uniform for all purchasers; would be available to in uniform form for all purchasers; Chicago Title would notify every realtor with whom it does business that there is no agreement, understanding or requirement to refer business if it provides a virtual tour to that realtor; and it agreed that it would not refuse to provide a tour to any person because the person does not refer title insurance business to Chicago Title.

17. TransAmerica Flood Hazard Certification Inc. and TransAmerica Real Estate Tax Service, Inc. (November 14, 2001). This case also involved transactions whereby TransAmerica had entered into contracts with lender to provide flood and tax realty settlement services. TransAmerica agreed not to engage in any portfolio review services for free or below cost when there is an express or implied link between the providing of such services and the future referral of business. TransAmerica agreed to make contributions to non-profit organizations designated by HUD totaling **\$500,000** to settle the case.

18. Central Pacific Mortgage Corporation (October 29, 2001). HUD investigated 21 offices of Central Pacific to determine whether overcharges occurred with

regard to credit reports whereby Central Pacific charged a consumer more than the cost that had been charged by the provider of the credit report. HUD determined that \$92,900 in credit report overcharges had occurred, of which a portion had already been refunded. Central Pacific paid **\$50,000** to settle and agreed to stop charging borrowers more for settlement services provided by third parties than the amount charged by the third parties.

19. The First American Corporation (October 8, 2001). This matter also involved flood determinations and tax realty settlement services. Respondent paid **\$250,000** to settle and basically agreed to the same provisions to which the respondents in the above cases agreed.

20. ARVIDA/JMB Partners (September 17, 2001). HUD determined that ARVIDA charged home buyers a fee of 1½% calculated on the total purchase price of a home for certain identified and unidentified charges, all of which were characterized as closing costs, without regard to whether ARVIDA's actual closing costs totaled 1½% of the purchase price. HUD also determined that ARVIDA imposed an additional charge on buyers who opted to use independent title insurance providers rather than ARVIDA's affiliated title insurance company. In settlement, ARVIDA agreed to stop charging buyers of any of its houses a closing fee calculated as a percentage of the total purchase price and to itemize all applicable closing costs. ARVIDA also agreed not to impose extra charges on buyers who opted not to use ARVIDA's affiliate title insurer and to make refunds to the buyers who had paid the percentage closing costs.

21. CONSECCO Finance Corp. (formerly Greentree Financial Corporation) (dated August 13, 2001). HUD investigated certain practices of CONSECCO relating to the reduction of interest rates charged on commercial loans that financed inventory of manufactured home dealers (floor plan financing). Rate reductions on floor plan financing allegedly arose when CONSECCO provided retail financing to buyers who purchased manufactured homes that had been floor plan financed by CONSECCO and used residential real property as collateral to secure the repayment of the retail financing. HUD determined that CONSECCO entered into business arrangements with manufactured home dealers that promoted lower commercial floor plan inventory costs to dealers in exchange for the referral of new retail loans. CONSECCO later compensated dealers for performing certain settlement services at a rate of 1½% (up to \$1,850) per loan without providing separate and distinct services other than those primary services already being conducted by dealers as retail sellers. CONSECCO agreed to stop such practices and paid **\$190,000** to settle.

22. United States of America v. Delta Funding Corporation (E.D. New York 2000). This case involved a number of allegations by the United States against Delta practices when making subprime home mortgage loans. Among other charges, the United States claimed that Delta violated § 8 of RESPA because, in certain cases, the fees received by mortgage brokers were not for services actually performed or were higher than an amount reasonably related to the value of goods and facilities provided

and services performed. Among other things, Delta agreed to establish a \$7,250,000 “Remediation Fund” and an “Amelioration Fund” consisting of 525,000 shares of common stock of Delta Financial Corporation.

### **VIII. Employee Exemptions**

Section 3500.14(g)(1)(vii) of Regulation X permits an employer to pay his own employee for referral activities.

This does not permit payment by one company to employees of another company.

HUD says that this exemption applies to employees, not independent contractors.

### **IX. Promotional and Educational Activities**

Section 3500.14(g)(1)(vi) of Regulation X says that § 8 permits normal promotional and educational activities.

Such activities cannot be conditioned on the referral of business.

Such activities may not involve the defraying of expenses that otherwise would be incurred by persons in a position to refer settlement services.

### **X. Miscellaneous.**

Section 3500.14(g)(2) of Regulation X says that the value of a referral is not to be taken into account in determining whether the payment exceeds the reasonable value of any goods, facilities or services.

This same section says that the fact that the transfer of the thing of value does not result in an increase in any charge made by the person giving the thing of value is irrelevant in determining whether the act is prohibited.

Section 8 permits:

- Payment to an attorney at law for services actually rendered
- Payment by a title company to its duly appointed agent for services actually performed in the issuance of a title insurance policy
- Payment by a lender to its duly appointed agent for services actually performed in the origination, processing or funding of a loan
- 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

- Payment pursuant to a cooperative brokerage and referral arrangements or agreements between real estate agents and brokers

## **XI. Virginia Law**

Section 6.1-422(c) of the Mortgage Lender and Broker Act prohibits a mortgage broker or anyone affiliated with a mortgage broker from also receiving compensation as a realtor.

The Act contains an exception for real estate brokers (not realtors) who are paid dividends based on their ownership interest in a mortgage company.

The dividend cannot be based on referrals but solely on earnings of the mortgage company. Subsection (c) also has an exception for payment for services actually rendered, but the referral itself cannot be compensated, and the realtor would have to be licensed as a mortgage broker in order to render sufficient services to justify a fee under this provision.