

2009 NATIONAL SETTLEMENT SERVICES SUMMIT
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RESPA and the Parameters of Compliance

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I. The Final RESPA Rule

A. Background

1. November, 2008 – After six years of effort the Department of Housing and Urban Development issued a final rule amending its regulations to further the purposes of the Real Estate Settlement Procedures Act.
2. Basic principals of RESPA reform:
 - i. Help consumers shop for the best available loan – best for that particular consumer;
 - ii. Shopping leads to greater competition and lower prices;
 - iii. Key final terms of the loan have to be disclosed to the borrower at closing; and
 - iv. Preserve a competitive market for all settlement service providers.
3. The purposes of the amendments were stated to be to:
 - i. Improve and standardize the good faith estimate ("GFE") form to make it easier to use for shopping among settlement service providers;
 - ii. Ensure that page 1 of the GFE provides a clear summary of the loan terms and total settlement charges so that borrowers will be able to use the GFE to identify a particular loan product and comparison shop among loan originators;
 - iii. Provide a more accurate estimate of costs of settlement services shown on the GFE;
 - iv. Improve disclosure of yield spread premiums to help borrowers understand how yield spread premiums can affect borrowers settlement charges;
 - v. Facilitate comparison of the GFE and the HUD-1/HUD 1A settlement statements;
 - vi. Ensure that at settlement borrowers are aware of final costs as they relate to their particular mortgage loan and settlement transaction;
 - vii. Clarify the HUD-1 instructions;
 - viii. Expressly state that RESPA permits the listing of an average charge on the HUD-1/HUD-1A; and

- ix. Strengthen the prohibition against requiring the use of affiliated businesses (revise the definition of required use).
4. Changes from proposed rule:
- i. No closing script;
 - ii. Shorter GFE;
 - iii. Single application process (see attached Flow Chart);
 - iv. Removed volume based discounts;
 - v. Added thirty (30) day right to cure errors on the HUD-1; and
 - vi. Use the HUD-1 to disclose key terms and conditions.
5. Effective dates:
- i. January 16, 2009:
 - a. Servicing Disclosure Statement (Section 6);
 - b. Average cost pricing;
 - c. Technical changes;
 - d. Required use (except that has now been withdrawn and is the subject of further study);
 - ii. January 1, 2010 new GFE;
 - a. New HUD-1/HUD-1A;
 - b. Everything else;

Exception: If you choose to use the new HUD-1A (which you are permitted to do) before January 1, 2010, then you have to use the new GFE with it.

B. Good Faith Estimate and HUD1/1A Settlement Statement (See attachments)

- 1. The good faith estimate creates a standardized form for general use.
 - i. Contains key loan terms and costs;
 - ii. Contains consolidated charges;
 - iii. Establishes tolerances that have to be observed; and

- iv. Applies yield spread premiums in determining costs.
2. The HUD-1 Settlement Statement has also been revised for general use.
- i. The form has been revised to permit easy comparison with GFE;
 - ii. The form has been simplified to highlight key loan terms and categorized to eliminate third party fees; and
 - iii. Third party charges are listed outside buyer and seller columns.
 - iv. Inadvertent or technical errors are no longer a violation of RESPA Section 4 if a revised HUD-1 is provided within thirty (30) calendar days after settlement.
 - v. Note that any commission split between a title agent and a title underwriter must be identified.
 - vi. HUD-1 Comparison Chart compares charges listed on GFE and actual charges listed on the HUD-1/1A. It identifies tolerance compliance or violation.
 - vii. Categories of Charges:
 - a. Charges that cannot increase;
 - (i) Origination charge (line 801)
 - (ii) Borrowers credit or charge (points) for the specific interest rate chosen (line 802)
 - (iii) Adjusted origination charges (line 803); and
 - (iv) Transfer taxes (line 1203);
 - b. Charges the sum of which cannot increase by more than 10%;
 - (i) Appraisal (line 804);
 - (ii) Credit report (line 805);
 - (iii) Tax service (line 806);
 - (iv) Flood Certification (line 807); and
 - (v) Up Front Mortgage Insurance Premium (line 902);
 - c. Charges that can increase.

- (i) Initial deposit for reserves or escrow (line 1001);
 - (ii) Daily interest charges (line 901); and
 - (iii) Homeowner's insurance (line 903);
- viii. The HUD-1 also describes and restates the loan terms.
 - a. This ensures borrowers that they receive the loan that they actually applied for; and
 - b. Highlights the actual key loan terms.
 - c. Closing Agent should go over this section with the borrower:
- C. Average cost pricing – using an average charge rather than the actual charge in a particular transaction. Average cost pricing may be used only subject to certain conditions:
 - i. Calculations are to be based on a specific class of transactions and consistency is required throughout;
 - ii. The calculation is required during a specific time period that may not be less than thirty (30) days nor more than six (6) months;
 - iii. The calculation should be done for a specific geographic area;
 - iv. The charge made may not exceed the average calculation;
 - v. The sum of all charges may not exceed the total price paid to any third party provider; and
 - vi. The originator must retain all documentation determining the accuracy of pricing for at least three (3) years.

Average cost pricing may not be used with respect to any charge based on the loan amount or property value, such as:

- a. Transfer taxes;
- b. Interest charges;
- c. Escrow reserves; and
- d. All insurance premiums including title insurance.

D. Required Use:

1. Required use exists in any "situation in which a person's access to some distinct service, property, discount, rebate or other economic incentive, or the person's ability to avoid an economic disincentive or penalty, is contingent upon the person using or failing to use a referred provider of settlement services.
2. Notwithstanding the foregoing, a settlement service provider "may offer a combination of bona fide settlement services at a total price (net of the value of the associated discount, rebate or other economic incentive) lower than the sum of the market prices of the individual settlement services.
3. Required use will not be found to have existed so long as the combination of services offered is optional and the lower price (or discount) is not made up in the price of other services.
4. New rule provided that this exemption is available only to settlement service providers – not "persons" in the broader abstract sense. This created considerable controversy – excluded builders who are not settlement service providers resulting in the delayed implementation of this portion of the rule.
5. Litigation was commenced to prevent the implementation of the new definition of required use. See National Association of Home Builders, et. al. v. Steve Preston, et. al. pending in the United States District Court for the Eastern District of Virginia, Civil Action No. 1-08 CV 1324, filed December 22, 2008. On May 11, 2009, HUD announced that it was deleting the new definition of required use and is considering alternatives.

E. Miscellaneous.

1. Eliminated 1% cap on FHA origination fees and 2.5% cap on new construction;
2. Updated reserves/escrow accounting language; and
3. Allowed for application of ESIGN.

II. Affiliated Business Arrangements

A. Preliminary Questions

1. Question: Are affiliated business arrangements and joint ventures still a viable alternative for maintaining a strategic relationship with a partner?

Answer: Unequivocally, yes.

2. Question: Are affiliated business arrangements as easy to establish, maintain and operate as they were in the past?

Answer: Unequivocally, no.

3. Question: Are affiliated business arrangements still worth doing (as opposed to other forms of strategic alliance relationships such as marketing agreements, work share agreements, preferred provider agreements, etc.)?

Answer: Unequivocally, maybe.

It all depends on the facts and circumstances of the particular situation.

4. Question: Are there any general principles or propositions that apply to affiliated businesses and joint ventures?

Answer: Yes. These general principles include:

- i. Size does matter – bigger is better.
 - ii. Operational separation from the participating partners is a necessity.
 - iii. Any joint venture should look, feel and act like a real business. It will be in competition with any other similar businesses. It should do all the things that any other entity engaged in that business would do.
 - iv. Ultimately, the joint venture, if successful, becomes or should become a competitor of its parent, competing for the same business.
5. Question: How can this be done? What is the framework for doing it?
 - i. External framework:
 - a. Statute: RESPA Section 8(c).
 - b. Regulations: Regulation X, Section 3500.15 and 3500.14.
 - c. HUD Policy Statement 1996-2 (Sham Entity Test).

d. HUD interpretative rulings

These authorities provide the basic framework for establishing a joint venture.

ii. Second level framework-state and federal restrictions and limitations.

a. HUD Policy Statement 1996-4, Core Title Services.

b. Specific state controlled business and anti rebate statutes, regulations and interpretations.

iii. Narrow framework – created by enforcement proceedings and settlements. Creates nuances that otherwise don't have any apparent statutory or regulatory basis.

a. Results of regulatory enforcement or settlements.

b. Private settlements.

c. State level settlements.

This may involve specific limitations that only apply to the specific entity, to its partners, to its vendors and suppliers or to its operations.

If you can get an entity to comply with all of these requirements, is it possible (and financially viable) to have a joint venture?

The business proposition is whether it is worth it to go through the effort to create this entity.

How does that happen? The creation of a business plan and proforma financial statement.

B. Application of the HUD Sham Entity Test.

HUD sham entity test – articulated in Policy Statement on Sham Controlled Business Arrangements – HUD Statement of Policy 1996-2, June 7, 1996.

The following ten factors are considered in determining if the entity is real or a sham:

1. Does the AfBA 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?
2. Is the AfBA staffed with its own employees to perform the services it provides? Or does the AfBA have “loaned” employees of one of the parent providers?
3. Does the AfBA manage its own business affairs? Or is an entity that helped create the AfBA running the new entity for the parent provider making the referrals?
4. Does the AfBA have an office for business which is separate from one of the parent providers? If the AfBA is located at the same business address as one of the parent providers, does the AfBA pay a general market value rent for the facilities actually furnished?
5. Is the AfBA providing substantial services, i.e., the essential functions of the real estate settlement service, for which the AfBA receives a fee? Does it incur the risks and receive the rewards of any comparable enterprise operating in the market place?
6. Does the AfBA 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?
7. If the AfBA 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 AfBA? If the AfBA contracts out work to a parent, affiliated provider or an entity that helped create it, does the AfBA provide any functions that are of value to the settlement process?
8. If the AfBA 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 AfBA is receiving a “thing of value” for referring settlement service business to the party performing the service?
9. Is the AfBA actively competing in the market place for business? Does the AfBA receive or attempt to obtain business from settlement service providers other than one of the settlement service providers that created the AfBA?
10. Is the AfBA 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 AfBA send business to a number of entities, which may include one of the providers that created it?

How many are necessary to pass regulatory scrutiny? I believe that if you can get to 7 1/2 or 8 it will substantiate a "real" entity and not a "sham."

Within these parameters the goal is to establish a free-standing, independent business that is performing necessary and non-duplicative services on a basis that is financially justifiable. This means that the enterprise should be able to produce a return to the joint venture partners that is consistent with the other investments of those partners.

C. What operations issues have to be addressed?

1. Organization. Who is organizing the joint venture entity? Who is bearing the cost of organization?
2. Capital. Has the venture been adequately capitalized? Is there a pro forma for use in evaluating the initial structure, organization and anticipated operations?

Who approves the financial analysis and is responsible for its implementation?

How much is enough? Three to six months' expenses, assuming no income.

3. Office Space. Is there a separate office for the joint venture? Leased space? Has it been built out? Who is responsible? Usually not an issue.
4. Licenses. Is the joint venture licensed to perform the functions for which it is being formed? The joint venture has to have its own licenses and may not rely on the licenses of one of the partners.

However, under certain circumstances, the joint venture may be able to take advantage of certain exemptions possibly available to one of the partners (e.g., National Bank)

5. Technology. Whose technology is being used by the joint venture?

Is the joint venture paying for the technology or is the technology being furnished by a partner?

Is there a real technology license in place?

Are payments being made consistent with market value?

Has an adequate information security program been established and implemented?

Do the partners of the joint venture have access into the joint venture's information technology system?

6. Employees. Does the joint venture have its own employees?

Are they paid through a partner's payroll system?

Is there a separate payroll and benefits agreement? Has the joint venture established a relationship with an independent payroll management company?

7. Management. Who is managing the business of the joint venture? Is the responsible person or persons employed by the joint venture or by one of the partners of the joint venture? To what organization is the managing employee responsible?

8. Competition. Is the joint venture actually competing for business from sources other than the partners? What advertising and related efforts have been undertaken? What is in the business plan?

To what extent are state controlled business and anti-affiliation statutes applicable? More than 30 states have laws or regulations that apply to the relationship between the joint venture and the partners and limit the amount of business the joint venture obtains from a single source. Does the joint venture comply with them?

Is there a benefit to multiple party joint ventures?

9. Disclosure. Are the referring parties making the appropriate affiliated business disclosures when required? What controls are put in place to ensure compliance?

10. Services. Is the venture providing necessary and non-duplicative services?

If in the title insurance business, is the agency providing "core title services"? HUD Policy Statement 1996-4.

- i. Examination and evaluation of title evidence.
- ii. Issuance of the commitment.
- iii. Clearance of underwriting objections.
- iv. Preparation and issuance of the title policy.
- v. Handling of closing when it is customary for the title agent to do so in the geographic area.

Note:

1. To the extent the joint venture is obtaining the title evidence from a third party, it must pay market value for the search package.
 2. The joint venture can contract with third parties for some of these services but must retain responsibility for the work.
 3. The third party should not be affiliated with a partner in the joint venture.
 4. The third party should be paid at market value for the services provided.
11. Return on Investment. Are all payments to the partners based on their ownership interest in the joint venture?

To the extent other exemptions from Section 8 may be available, they can be applied to particular items – payments for services rendered or goods actually received, etc. However, these should be kept to a minimum and should be capable of justification on an economic basis by reference to the market for those goods or services.

D. Documentation:

1. Organizational documents for entity
2. Any required licenses
3. Business Plan/Pro Forma
4. LLC Operating Agreement, Partnership Agreement or Shareholder Agreement, depending on form of entity
5. Administrative Services Agreement
6. Lease/Sublease
7. Issuing Agency Agreement
8. Technology/Licensing Agreement
9. Employee Benefits/Payroll Agreement
10. AfBA Disclosure Statement

E. Conclusion.

AfBA's and joint ventures will continue to exist and should be permitted by regulators. However, how they are viewed will be dependent upon the way they are structured, implemented and operated. All of these ventures will be viewed with 20/20 hindsight so it is important to start them off correctly and regularly to review or audit their operations.

III. MARKETING, WORK SHARE AND OTHER ALLIANCE AGREEMENTS

A. Payment for Leads Agreement

1. The simplest alliance arrangement. Not really an alliance; you just pay per lead.
2. Determination of "reasonable market value" relatively easy.
3. Fairly clear authority to pay
4. May not pay only for leads that "pan out."
5. May not pay more for leads that "pan out."
6. If lead is coupled with an endorsement by provider of leads, may be viewed as payment for a referral rather than simply for a lead.

B. Workshare Agreements

1. General Principles

- i. Definition: An agreement between persons (typically alliance partners) in which one of the partners (typically a referrer of business) performs services for, and is compensated by, the other alliance partner (typically, the settlement service provider).
- ii. All services provided must be ordinary, necessary and non duplicative.
- iii. All payments must be reasonably related to the market value of the services performed not counting the value of any referrals.

2. These agreements involve payments for goods or facilities provided or services actually rendered:

- i. Payments specifically reflect value received - the more work the Alliance Partner performs and the more valuable the goods or facilities it provides, the more it can be paid.
- ii. No need to give AfBA disclosure form- although disclosure of relationship may be recommended.
- iii. Simple to implement. No need to create new structure with attendant overhead and other organizational issues – basically, this is a contractual agreement.
- iv. Payment may not exceed "reasonable market value" of goods, facilities or services actually provided, not counting the value of any referrals.

Maximum payment under this standard often insufficient to justify the effort or the risk.

- v. Parties must determine and document what is "reasonable market value."
- vi. No payment for "duplicative services."
- vii. No payment for goods, facilities or services that are not of value to the person paying for them.
- viii. Consistency across multiple recipients of the same or similar services.
- ix. Possible licensing issues – is a license required under state law to perform and get paid for the services.
- x. Monitoring issues – actually have to do what you say you are doing.
- xi. General skepticism of regulators that referral partner is actually providing valuable goods, facilities or services for the benefit of the partner receiving the referrals.

C. Marketing Agreements

1. General Principles

- i. Definition: An agreement under which a person who is a referral source ("Marketing Partner") will perform services, to affirmatively market the products and services of its Alliance Partner, and receive compensation for those services, not counting the value of any referral.
- ii. Marketing services should be of a type that could be provided by an advertising or marketing company or other person or company that is not a source of referrals.
- iii. The payment should be consistent in both form and amount with the typical payment for similar services to an independent advertising agency, marketing company or other person or company that is not a source of referrals.
- iv. Any payment must be reasonable in relation to the market value of the services and may not take into account the value of any referral.

2. Examples of Types of Services - provided by Marketing Partner

- i. Design or aid in design of promotional materials for Alliance Partner targeted to specific needs of Marketing Partner's customers.

- ii. Include advertisements of Alliance Partner in Marketing Partner's own advertisements, publications, and other promotional materials.
- iii. Include on Marketing Partner's website information about and/or banner advertisements for Alliance Partner's products and services.
- iv. Display to Marketing Partner's customers promotional materials of Alliance Partner.
- v. Provide sales representatives of Alliance Partner with access to Marketing Partner's customers, employees and/or agents.
- vi. Include promotional message of Alliance Partner on Marketing Partner's telephone answering system.
- vii. Encourage Marketing Partner's employees or agents to recommend products and services offered by Alliance Partner to their customers who express a desire for such products and services.
- viii. Endorse Alliance Partner as a "Preferred [Settlement Service Provider]."
- ix. Grant to Alliance Partner a license to use the Marketing Partner's trademark to identify itself as the Marketing Partner's "Preferred [Settlement Service Provider]."
- x. Conduct direct mail campaigns to its customers concerning its Alliance Partner's promotional materials.
- xi. Maintain a link on Marketing Partner's website or an 800 number which can be used to contact the Alliance Partner or its sales representatives.
- xii. Conduct surveys on behalf of the Alliance Partner.
- xiii. Analyze its marketing efforts on behalf of the Alliance Partner, and develop and make recommendations on ways to increase the effectiveness of those efforts.

3. Compensation

- i. Fees directly linked to success of marketing efforts are problematic. Likely to be viewed by HUD as payment for a referral.
- ii. Flat monthly fee for general marketing services probably OK. Flat fee per item probably OK.
 - a. Fee per piece of direct mail sent out by Marketing Partner.

- b. Fee per "click thru" from Marketing Partner's website to Alliance Partner's website.
- iii. Monthly rental for office space, display case and/or other facilities made available for use of Alliance Partner probably OK.
- iv. Per use or flat monthly license fee for use of trademark probably OK.
- v. Flat fee for advertising space in publications based on circulation probably OK.
- vi. Amount of compensation may not exceed "reasonable market value of goods, facilities or services actually provided," not counting the value of any referral.
- vii. Need to document market value; want it available if HUD investigates or there is some other challenge.
- viii. Be careful of using as proof of market value amounts paid for similar services performed outside of settlement service industry. May include "value of referrals."
- ix. analyze cost to perform similar services in-house. May provide support for paying that much and more (i.e. profit margin add on).
- x. Consider obtaining expert valuation – recommended.
- xi. Adjustments to compensation create concerns and you need to exercise caution.
- xii. Adjustments made at regular intervals based on results of marketing program to date are troublesome.
- xiii. Results of marketing program can be a factor, but certainly not the only or even the primary factor, in deciding upon the proper adjustment. Other factors should be considered; e.g., increase/decrease in amount of work involved, increase/decrease in cost of materials and labor to perform the work, increase/decrease in advertising publication circulation, change in demographics, etc.

4. Exclusivity

- i. Regulators: Say that exclusivity is "troubling".
- ii. Statute: Has no prohibition of exclusivity.
- iii. HUD: Says exclusivity is bad; it is a red flag.

- iv. Reality: Exclusivity adds value to the relationship so most people want it.
- v. Advice: Consider how much are you willing to bet on this particular deal? If HUD comes after you, will you litigate to a conclusion (and maybe win) or will you settle (and pay)?

IV. Miscellaneous Sound Bites – Items of interest to Settlement Service Providers that relate to RESPA, other relevant statutes and the world of closings or settlements of real estate transactions

A. Appraisals – Adoption of the Home Valuation Code of Conduct

1. Effective May 1, 2009
2. FHLMC will no longer purchase mortgages from Sellers that do not adopt the Code with respect to single family mortgages that are delivered to FreddyMac.
3. FHLMC seller servicers must represent and warrant the appraisal report prepared in connection with a mortgage to be sold to FHLMC is obtained in a manner consistent with the Code.
4. The appraiser providing the appraisal must be independent of the lender. This means that in underwriting a loan the lender may not use any appraisal report that is:
 - i. prepared by an appraiser employed by the lender, an affiliate of the lender, an entity that is owned in whole or in part by the lender or an entity that owns in whole or in part the lender or
 - ii. prepared by an appraiser employed, engaged as an independent contractor or otherwise retained by any appraisal company or any appraisal management company affiliated with or that owns or is owned in whole or in part by the lender or an affiliate of the lender.
5. Violations of the Code are treated as violations of the seller's representations and warranties.

B. Truth in Lending Act

1. Requires cost disclosures in consumer transactions involving closed end loans secured by a consumer's principal dwelling (mortgages).
2. July 30, 2008 amendments to Regulation Z implementing the Truth in Lending Act and the Home Ownership and Equity Protection Act.
3. Adoption of the Mortgage Disclosure Improvement Act of 2008 and enactment of the Emergency Economic Stabilization Act of 2008.
4. The MDIA requires early, transaction specific disclosures for mortgage loans secured by dwellings other than the consumer's principal dwelling and requires waiting period between the time when disclosures are given and consummation of the transaction. These requirements become effective July 30, 2009.
5. Amendment of regulation Z would require creditors to deliver a Good Faith Estimate of the required mortgage disclosures or place them in the mail no later than three (3) business days after receiving a consumer's application for a dwelling secured closed end loan. These requirements become effective October 1, 2009.
6. The delivery or mailing of these disclosures would have to occur at least seven (7) business days before consummation of the transaction.
7. If the annual percentage rate contained in the Good Faith Estimate changes beyond a stated tolerance, creditors must provide corrected disclosures which the consumer must receive at least three (3) business days before the transaction is closed.
8. Time share transactions are exempted from the waiting periods.
9. Business day means "all calendar days except Sundays and specified federal legal public holidays." This is different from the old definition of business day which was defined to mean a day on which the creditors offices are open to the public for carrying on substantially all of its business functions.
10. A notice must be contained on the disclosure to the effect that "you are not required to complete this agreement merely because you have received these disclosures or signed a loan application."

C. Real Estate Brokers – Administrative Fees – Busby v JRHBW Realty, Inc. d/b/a Realty South, Case No. 2:04-CV-2799-VEH United States District Court for the Northern District of Alabama, April 20, 2009

1. Decision rendered in the Busby case to the effect that the administrative fee charged by Realty South violated RESPA as a fee for which no service was performed.
2. Realty South charged a brokerage commission of 5% and, in addition charged an "administrative brokerage commission" in the amount of \$149.00.
 - i. The administrative brokerage commission was separated out from the broker commission in order to be able to apply it to overhead and other costs without sharing it with sales agents.
 - ii. Officers of Realty South testified to the effect that the ABC fee "is simply an increase in the price or fee that Realty South charges for all its brokerage services rendered to most buyers and sellers".
 - iii. The ABC fee "is not intended to cover a specific service (for example, a flat fee for record storage or for attendance at the closing), it covers a whole variety of services provided to both buyers and sellers and helps defray significant increases in overhead that Realty South had incurred for many years and continues to incur."
3. After extensive analysis the court determined that the administrative brokerage fee could not be identified as applying to a particular service and, accordingly, "the ABC fee is unearned because as defined by Realty South it really represents a price and/or cost allocation measure as opposed to a RESPA – compensable settlement service. Alternatively, the court holds that the law of the case doctrine mandates a rejection of Realty South's array of services defense as a matter of law."
4. This decision appears to be based on the specific manner in which Realty South identified the fee and portrayed it in its own documentation. Appears consistent with existing split between the circuits on application of RESPA Section 8(b).
5. It seems to me that this decision should be regarded as very case and fact specific and by appropriate disclosure and documentation, a real estate broker can avoid its application to its operations.

D. Unauthorized practice of law

1. Real Estate Bar Association For Massachusetts v. National Real Estate Information Services and National Real Estate Information Services, Inc., Civil Action No. 07-10224-JLT, April 13, 2009, United States District Court for the District of Massachusetts
 - i. Plaintiff claimed that real estate conveyancing and the issuance of title insurance constitute the practice of law in Massachusetts and that Defendants, non lawyers who conduct such services, have engaged in

the unauthorized practice of law. Plaintiff also claims that Defendants have engaged in the unauthorized practice of law by conducting "notary closings".

- ii. The Court held that the Defendants' activities did not constitute the practice of law in Massachusetts. Conducting a simple title search, completing forms in preparation for a closing, and other steps that may be required in connection with a real estate conveyance do not necessarily constitute the practice of law. An attorney is not required to direct an activity that by itself, does not qualify as the practice of law.
 - iii. The Court declined to follow a previous Massachusetts case *Massachusetts Conveyancers Association, Inc. v. Colonial Title and Escrow, Inc.*, in which it was held that various real estate related activities constituted the practice of law.
 - iv. The Court stated that the Plaintiff (REBA) had merely stated conclusory allegations that the attorneys that are sent to settlement are more signing agent than attorney and that the attorney simply is there to witness the closing. Accordingly, the Court held that there was not sufficient factual evidence to establish that NREIS is engaged in the unauthorized practice of law by conducting notary closings.
 - v. The Court held that under Massachusetts law it is clear that the issuance of title insurance need not be performed or directed by an attorney.
 - vi. Accordingly, as a whole, the activities of NREIS did not amount to the practice of law and NREIS is not required to be enjoined from engaging in its activities.
2. New York State Attorney General investigation of title agents – do the services of title agencies which offer settlement services, including the preparation of a HUD-1, constitute the unauthorized practice of law because there is some exercise of legal discretion to make sure the form is filled out correctly.

E. Breach of Fiduciary Duty

1. Are all affiliated businesses per se conflicts of interest or breaches of fiduciary duty.
2. Does a conflict of interest exist per se when a fiduciary stands to receive an incentive or other consideration to steer business in order to receive profit.
3. Some contend that the referral of business to an affiliate breaches the fiduciary duty that the referrer owes to its principals unless the fiduciary first obtains the principal's informed consent to the conflicts.
4. When such a breach occurs, the principal has an absolute right to recover from the fiduciary without further proof of any actual out of profit loss and the fiduciary forfeits its right to retain any commissions, fees and profits received in the scope of the relationship.

F. State issues. Issues in particular states that have an impact on settlement services.

1. California – adoption of SB-133 which prohibits inducements in connection with the issuance of title insurance. Adopted pursuant to Section 12404 of the California Statutes. Also provides for licensing of title insurance salespeople.
2. Florida title insurance rate reviews and data calls.
3. New Mexico – title insurance rate reviews and data calls – potential for new fee structures.
4. Colorado - review of marketing agreements. Review of relationships between real estate brokers and title providers.
5. New York – Continued review of potential licensing of title agencies. Presently title agents are not licensed in New York.