



Are you on the Attorney General's Radar? Do you charge an administrative brokerage fee?

At IAR's upcoming Fall Conference September 8, 2010 from 9-11 a.m., find out how you and/or your business may be affected by state regulations regarding foreclosure consultants (which we have discussed in the past) and **administrative brokerage fees**, the new hot topic.

Ensure you are protected from violating any state regulations by attending this session next week with Gabrielle Owens, Section Chief of the Professional Licensing & Homeowner Protection Unit of the Indiana Office of the Attorney General. After explaining issues impacting our members, Gabrielle will be on hand to answer all of your questions.

The new issue on the Attorney General's radar is the administrative brokerage fee and its legality via RESPA. Following the 2009 decision of the U.S. District Court for the Northern District of Alabama in Busby v. RealtySouth, Case No.:2:04-CV-2799-VEH, real estate administrative brokerage fees or transaction fees generated new and controversial discussion under Section 8(b) of RESPA as to whether real estate brokers and agents must perform separate and distinct services in return for these fees. Despite evidence of an "array of services" performed by RealtySouth, the court found that the administrative brokerage fee of \$149 paid by a home buyer to the brokerage firm that represented her was not sufficiently related to any specific settlement service performed for her benefit, rendering it an unearned fee in violation of RESPA.

This left the real estate industry scrambling to make sure their commissions and administrative fees were defensible under Section 8(b) of RESPA. As a result of this decision, many real estate brokers restructured their compensation structures to make flat administrative fees a part of overall real estate commissions. Unless a real estate broker can be certain that its administrative services are separate and apart from its real estate business services, and the separate fee is reasonable in connection with the service being provided, then it should be made clear that the flat administrative charge is part of the overall brokerage commission. NAR believes that such a "bundling" approach to compensation raises fewer questions under RESPA than separate brokerage fees.

HUD has placed its stamp of approval on this "bundling" approach in an informal letter this year from HUD to NAR. This Letter makes clear that RESPA does not regulate how a real estate broker determines the charge for its services. "The (real estate) commission may be determined using a flat fee, a percentage of the sales price, or a combination of these methods."

Based on the Letter's guidance, a Broker's compensation language in a Listing Contract or Buyer's Agreement should clearly indicate that both the commission-based component and any flat fee

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component represent payment for services provided by the Broker. This amount should be disclosed as a single dollar

amount in Line 700 of the HUD-1. This should avoid the need to justify the flat fee portion of the commission under RESPA. However, if a Broker continues to charge a separate flat fee in addition to its real estate commission, the Broker may be required to demonstrate that it performs separate and distinct services in exchange for the flat fee. If HUD determines that the services are duplicative of the services it already performs to earn a commission, the Broker could face penalties under RESPA. Therefore, it is NAR's suggestion for Brokers to consider making their flat fees a part of their overall real estate commissions and disclose the commission amount as a single dollar amount on the HUD-1.

Obviously the safest course of action is to avoid charging administrative brokerage fees at all. If you do charge this fee, then determine whether it is part of the commission or separate and apart from the commission fee. If it is part of the overall real estate commission, make sure it is disclosed in the listing contract or buyer's agreement as such and disclosed as part of the overall real estate commission on Line 700 of the HUD-1. If the administrative brokerage fee is stated separately from the real estate broker commission, the Broker needs to ensure that the fee is disclosed, that real services are being provided to the client in exchange for the fee, that the services are documented and, again, that the fees are reasonable in relation to the services being provided to avoid any RESPA violation.

As mentioned above, the Indiana Attorney General's office has this "fee" on their **RADAR** and may be investigating our members as to whether they charge administrative brokerage fees, whether a separate service is provided for this fee, and whether the fee is "reasonable" per RESPA. To avoid any RESPA inquiry, the "bundling" of any flat fee as part of the overall real estate commission is suggested. The commission amount would be seen as a single dollar amount on the HUD-1, Line 700.

Please contact the IAR Legal Hotline if you have any questions in regard to the above issues at 1-800-444-5472, Monday-Friday, 9am-5pm, for principal and managing broker members. 