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RESPA AND MARKETING ARRANGEMENTS

Over the past year our firm has been contacted frequently regarding the compliance of a variety of marketing arrangements with Real Estate Settlement and Procedures Act ("RESPA").

RESPA provides that,

"No person shall give and no person shall accept any fee, kickback, or thing of value pursuant to any agreement to or understanding oral or otherwise, that business incident to or part of a real estate settlement service involving a federally mortgage loan shall be referred to any person."

This may appear to be a rather simple concept but each term is subject to lengthy interpretation of one form or another. Because of this, any question of compliance with these provisions is complex.

We know of several attorneys experienced with representing clients vis a vis RESPA issues and enforcement actions, whose motto is, "If you have ask, it violates RESPA." This may be a misleading simplification but one which is a clear warning to all who venture into this somewhat confusing world.

So the question remains, is a marketing service arrangement between two parties a referral and compensation paid, an illegal referral fee? Sometimes the answer is yes.

An article in the recent California Department of Real Estate Winter Bulletin and a recent Settlement Agreement entered into by the Department of Housing and Urban Development (HUD) underscore this point.

The settlement resulted from a Department of Housing and Urban Development case alleging RESPA violations against Fidelity National Financial, Inc. This case is identified as RESPA Case # R-09-3169 and specifically deals with the issue of a type marketing arrangement.

Our firm has seen many variations and attempts to comply or circumvent the anti-referral RESPA rule. Sometimes these arrangements appear to be compliant. However, others are not. In some cases the marketing arrangement seems to rely for compliance on mathematical calculations which are truly interesting, to say nothing of unique. In other instances, the proposed arrangements provide structures or layers of structures which, through their sheer complexity attempt to hide RESPA noncompliance.

First Fidelity tried the following scenario:

- **A real estate broker contracts with a company to provide an internet application port provided by Fidelity.**

- **The real estate broker then uses that port to select real estate settlement service providers.**
- **The providers are subsidiaries of Fidelity.**
- **The brokers have agreements with the settlement service providers to be paid a fee for business directed to the service providers through the portal.**

HUD alleged that this constituted an illegal payment of fees for the referral of settlement service business in violation of RESPA.

Fidelity National responded that the payments were for the use of the transaction platform and not for the referral of settlement service orders and that the payments were for the purchase of goods and facilities actually furnished. Fidelity did not admit wrongdoing but agreed to settle the matter for 4.5 million dollars.

The lesson is clear. RESPA and its implementing Reg. X are complex. Understanding Section 8, which prohibits referral fees, can approach the metaphysical. We cannot emphasize enough the need to have competent counsel review the structure of any marketing arrangement as well as the agreement supporting it.

As the Fidelity matter suggests, enforcement may come from the federal side OR as the article in the DRE Bulletin instructs, it can also come from the state regulators who promise disciplinary action if they find a violation.

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ALT & ASSOCIATES provides regulatory, compliance, operational advice and transactional assistance, as well as litigation representation, to the financial services industry. Over the past two decades, members of the firm have represented Institutional Lenders and Mortgage Bankers and Brokers in all aspects of their operations.

If you have any questions please contact:

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