

## **HUD Gives Guidance on Compliant Real Estate Commissions under RESPA**

By: Phillip L. Schulman, Esq.

Following the 2009 decision of the U.S. District Court for the Northern District of Alabama in Busby v. RealtySouth,<sup>1</sup> real estate broker administrative fees generated new and controversial discussion under the Real Estate Settlement Procedures Act (“RESPA”). Notably, questions arose as to whether real estate brokers and agents must perform separate and distinct services under Section 8(b) of RESPA in return for administrative fees. In the Busby case, RealtySouth charged a \$149 “administrative brokerage commission” that was disclosed separately from the real estate commission on the HUD-1 Settlement Statement (“HUD-1”). Despite evidence of an “array of services” performed by RealtySouth, the court held that the real estate broker did not perform separate services to justify the fee under RESPA. This left the real estate industry scrambling to ensure their commissions and administrative fees are defensible under Section 8(b) of RESPA.

As a result of the Busby decision, many real estate brokers restructured their compensation structures to make flat administrative fees a part of overall real estate commissions. In fact, unless a real estate broker could be certain that its administrative services were separate and apart from its overall real estate business services, many real estate brokers rewrote their contracts to make clear that flat administrative charges are part of the overall brokerage commission. Brokers and agents began to advertise their commissions as 3% plus \$250, for example, which covers all typical real estate services, and disclose a single commission figure on the HUD-1. The NATIONAL ASSOCIATION OF REALTORS® (“NAR”) believed that such an approach raised fewer questions under Section 8(b) of RESPA than separate brokerage fees.

Now, the U.S. Department of Housing and Urban Development (“HUD”) has given credence to this restructured approach to real estate fees. In January 2010, HUD issued an informal letter (“Letter”)<sup>2</sup> in response to a request for guidance from NAR and attorney Jay Varon. In addition to noting that all charges by real estate brokers and agents must be disclosed as dollar amounts on Line 700 of the HUD-1, the Letter makes clear that RESPA does not regulate how a real estate broker determines the charge for its services. “The commission may be determined using a flat fee, a percentage of the sales price, or a combination of these methods.” However, to the extent that a broker’s charges exceed the amount of the real estate commission agreed to in the listing or selling agreement, the Letter warns that the excess amount could be reviewed under Section 8(b) of RESPA to determine whether additional services are performed to justify the excess fee. “Charges by a real estate broker or agent that are in addition to the commission may be found to be a violation of RESPA if those charges are for no or nominal services or are duplicative.” Finally, the Letter acknowledges that RESPA does not govern how commission fees are to be divided between real estate brokers and agents. Real estate agents, therefore, are free to negotiate their internal commission splits with their real estate brokers.

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<sup>1</sup> Busby v. JRHBW Realty, Inc. d/b/a RealtySouth, Case No.: 2:04-CV-2799-VEH (N.D. Ala. Apr. 20, 2009).

<sup>2</sup> See “RESPA Disclosure of Commission Fees,” Legal Guidance C-01222010, available at [http://portal.hud.gov/portal/page/portal/HUD/program\\_offices/administration/hudclips/lops](http://portal.hud.gov/portal/page/portal/HUD/program_offices/administration/hudclips/lops).

Based on the Letter's guidance, it is important to emphasize HUD's acknowledgement that a real estate broker could agree with its customers as part of the listing agreement or the buyer's agreement to charge a real estate commission represented by a certain percentage of the sales price plus a flat fee and disclose this amount as a single dollar amount in Line 700 of the HUD-1. Such a compensation structure should avoid the need to justify the flat fee portion of the commission under Section 8(b) of RESPA. However, if a broker continues to charge a separate flat fee in addition to its real estate commission, the Letter makes clear that the broker may be required to demonstrate that it performs separate and distinct services in exchange for the fee. If HUD or a court were to determine that the broker's services are duplicative of the services it already performs to earn a commission, the broker could face penalties under RESPA. Brokers, therefore, should 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. Such a compensation structure is more likely to avoid unwanted scrutiny of the broker's charges and services under RESPA.

If you have any questions about HUD's Letter or the Busby decision, or whether your real estate fees comply with RESPA, we encourage you to seek additional resources and legal advice.

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