



**P.O. Box 1**  
**Navarre, Minnesota 55392**  
**612-435-8515**  
**952-842-9961 fax**  
[dmiller@caare.org](mailto:dmiller@caare.org)

July 25, 2010

Regulations Division  
Office of General Counsel  
Department of Housing and Urban Development  
451 Seventh Street, SW – Room 10276  
Washington, DC 20410-0001

**RE: FR-5425-IA-01 Real Estate Settlement Procedures Act (RESPA): Home  
Warranty Companies' Payments to Real Estate Brokers and Agents**

**Docket ID: HUD-2010-0050**

To Whom It May Concern:

We are Consumer Advocates in American Real Estate (“CAARE”) a non-profit 501(c)3 organization dedicated to safeguarding consumers and removing conflicts of interest from the residential real estate process. Today we address an inappropriate fee designed to influence the advice and counsel of the most relied upon consumer representative in the residential consumer industry, the Realtor. Although we applaud HUD for proposing this solution and identifying the problem of how Home Warranty Companies (here after referred to as “HWCs”) inappropriately influence consumers’ decision to purchase Home Owner Warranties (“HOW’s”), we don’t believe that this proposed interpretive rule goes far enough.

Although we have not been provided the same privilege that the National Association of Realtors (“NAR”) enjoyed of meetings with senior HUD officials, we believe that under NO circumstances should HWCs be permitted to pay any fees to a Realtor in the same transaction for which they are collecting a commission. We also believe that flat fee marketing arrangements are inappropriate as well as the selling of client mailing lists. We don’t believe that there are any disclosures that can make up for the loss of loyalty that occurs when a Realtor receives a bribe - at a minimum it has the appearance of influencing their advice.

Whether it be a flat fee or a per transaction fee, vendor payments to fiduciaries will likely negatively influence the advice and recommendations made to Realtor clients in the selection of HWC's.

## **BACKGROUND of CAARE**

CAARE's Board of Directors is comprised of four consumers and three industry experts (including two Realtor members). We examine residential industry relationships to determine whether or not they interfere with consumers' rights and best interests. Required use issues, dual agency, controlled business arrangements, contracts of adhesion and inappropriate payments designed to influence the impartial advice of counselors of real estate are just a few of our focus areas. It is our desire to become a resource for consumers and consumer organizations who desire to learn more about the conflicts of interest in residential real estate and who desire solutions.

The current issue is of particular interest and we are particularly well suited to address it because it is an area which we have investigated and found to be counter to the best interests of consumers. And unlike NAR, which is dedicated to protecting fees that directly benefit their membership, CAARE represents the interests of consumers.

## **HWC's FEES TO REALTORS ARE INAPPROPRIATE**

Realtors compete for business by offering expertise, advice and guidance to consumers. Residential real estate consumers are simply not adequately prepared to understand or deal with the ramifications to their representation when their trusted Realtor receives payments from vendors who want referrals. It doesn't matter if extra work is done – the payment creates a conflict. The top marketing points Realtors promote to consumers and the top reasons that consumers utilize the services of Realtors is for the advice and guidance that they provide to them on such things as negotiating price and terms of residential transactions. NAR's own studies confirm this<sup>1</sup>.

In another NAR survey, NAR identifies the top three things buyers want from their agents: "Buyers most frequently respond (46 percent) that they want their agent to help them find the right home to purchase. The second most cited service that buyers look for is help with negotiating the terms of sale (16 percent) and the third most cited service is help with the price negotiations (13 percent).<sup>2</sup>" In other words, Realtors solicit the trust of consumers and consumers justifiably rely upon their Realtors for impartial and trustworthy advice and guidance.

With the knowledge garnered from their own studies, it is unthinkable that NAR would have any interest in impacting the impartiality of their member Realtors in any way. Yet, that is exactly what they are arguing today. When other trustees accept payments from interested third parties, they often go to jail. There is no amount of disclosures that can make such a

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<sup>1</sup> NAR's Profile of Home Buyers and Sellers, 2007 "...Most home buyers and sellers rely on real estate professionals to assist them with their transaction. Surveys of both buyers and sellers consistently reveal that consumers value the guidance and advice offered by real estate professionals."

<sup>2</sup> NAR's Profile of Home Buyers and Sellers, 2009.

payment impartial. As soon as the payment is made, the Realtor's impartiality is extinguished. Disclosing bad conduct such as the warnings that come with a Realtor receiving a "marketing fee" does not make the conflict go away and is not the answer. The answer is to eliminate the bad conduct that caused the disclosure in the first place.

NAR is aware that state fiduciary law is far stricter and far more reaching than RESPA is on the issue of receiving payments from unauthorized third parties. RESPA is nothing more than a starting place when examining the liability exposure of Realtors, because fiduciary law has far more severe penalties – some of them criminal. Yet NAR is here advocating for HUD to allow these secret fees that probably violate the law of every state in which its members reside. This disturbs us greatly and if anything comes from our suggestions today, it would be for HUD to consider recommending changes to RESPA that would treat Realtors and other fiduciaries differently and more severely when it comes to breaches of fiduciary duty.

In this risky residential marketplace can we really afford to have the most important and heavily relied upon residential consumer advocate's advice tainted by referral fees? In many states, the payer and payee of referral fees are considered to have violated criminal commercial bribery statutes if the recipient is acting in a fiduciary capacity.<sup>3</sup>

Which hat are Realtors wearing when they sell HOW's to consumers? The moment they start marketing and using sales pitches to their clients for which they receive financial remuneration, their advocate's hat comes off and their sales person's hat goes on. At that moment, they cease representing their client's best interests. Worse is if the Realtor actually represents the HWC and is construed to be part of their paid sales force, because in that scenario the Realtor actually becomes a fiduciary of the HWC and an undisclosed dual agency is created (considered to be fraud in every state). If the Realtor isn't clear as to their fiduciary or sales capacity (they are mutually exclusive), how can consumers be clear as to whether or not they are being subject to a "sales pitch" or being "advised" to purchase something? How will consumers know when they can or can't trust their Realtor? The disclosures and consents necessary to render this hat play possible are so complex that they cannot be done on a routine basis. Although there are select and unique circumstances that

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<sup>3</sup> **Excerpts from typical Commercial Bribery Statute: Minnesota 609.86 COMMERCIAL BRIBERY.**

Subd. 2. **Acts constituting.** Whoever does any of the following, when not consistent with usually accepted business practices, is guilty of commercial bribery and may be sentenced as provided in subdivision 3:

(1) corruptly offers, gives, or agrees to give, directly or indirectly, any benefit, consideration, compensation, or reward to any ... agent or fiduciary of a person with the intent to influence the person's performance of duties as an ... agent, or fiduciary in relation to the person's ... principal's business; or

(2) being an ... agent or fiduciary of a person, corruptly requests, receives or agrees to receive, directly or indirectly, from another person any benefit, consideration, compensation, or reward with the understanding or agreement to be influenced in the performance of duties as an ... agent, or fiduciary in relation to the ... principal's business.

provide for an advocate to receive compensation from an interested third party, this is not one of those situations<sup>4</sup>.

If a buyer wished, there is no impediment to buyers paying Realtors directly to fill out their HOW application (although it is ill advised). Our point is that if Realtors really want to argue that they are providing a separate and distinct service in filling out the address and square footage on a HOW application (that's how simple the applications are), then let them face the buyer and try to justify why they deserve this additional payment instead of indirectly receiving a secret fee from a third party. In fact, a HOW online application process was demonstrated for us and the entire application took less than 5 minutes and ended with an option of **deducting** the \$70 "marketing fee" from the HOW premium (resulting in a discounted premium to the consumer). The Realtor is actually presented with the option of collecting the fee or reducing the price of the HOW. In actuality, it is our position that filling out the HOW application comes with the territory of being a Realtor. Realtors often recommend home inspectors and lenders and often provide them with even more data at no additional cost to buyers.

It may be a problem for the Realtor to justify \$70 for filling out a 5 minute application and it is for exactly that reason why the fee should not be allowed. Odds are, either the consumer will elect to save \$70 and fill out this simple form themselves or the Realtor, in an effort to keep up with the competition, will offer to do this as part of their service package. If market forces were truly at work, there would be no \$70 fee being paid at all.

In addition, the actual benefit of HOWs is already questionable at best in that they are responsible for a huge number of consumer complaints and if Realtors want to advise their clients to purchase one of these questionable warranties, then that advice needs to be impartial. It is our bet that market competition among Realtors will result in the chastising of competitors who charge a fee to fill out a HOW application and that the fee will quickly vanish from the market if the Realtor is required to collect such a fee directly from the consumer if allowed at all.

Secret fees that are paid to persons in a position to refer residential consumer business come with a presumption that they are being paid to inappropriately influence the referrer. Vendors that do business this way are exploiting consumers (by bribing their trustee) when

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<sup>4</sup> For example, Realtors representing consumers typically receive their compensation from the listing broker. There is a necessary and substantial reason for allowing a competing interest to pay that fee: lenders typically won't directly finance the buyer broker's fee and buyer's can't afford to pay a commission without losing their ability to qualify for a mortgage. As a result, the buyer broker's fee is paid through the listing broker resulting in un-negotiated and artificially high commission split determined at the sole discretion of Realtors. Although that circumstance is largely a self serving fiction that has been created by the industry, it has become an impediment to buyer's paying their own brokerage fees. In other words, the only way a buyer can afford to pay their broker is if it is paid by a commission split with the listing broker. This scenario does not come without costs to consumers either. Buyers don't negotiate their Realtor's fee and often have no idea how much their buyer broker has been paid and the MLS is routinely used as a conduit to pay secret bonus payments to Realtors on top of their normal fee.

they are most vulnerable in their lack of expertise and when they have the most at stake – their home.

### **HUD's REGULATORY AUTHORITY ON THIS MATTER**

We believe that HUD is the best regulatory authority to handle HOW referral fees. Most HWC's are national entities offering their services across state lines and are not well regulated or even recognized by most state government regulatory agencies. They offer a product that is quasi insurance by nature, but doesn't come under the regulation of the Insurance Commissioners of many states. Most HOW's are purchased incident to a transaction involving federally funded loans and often the payment for those HOW's occurs at the time of closing (*even when the seller purchased the HOW far in advance of closing*).

HOW's are not merely an optional service that has nothing to do with settlement services (NAR's and Realty's position), any more than a real estate commission, mortgage origination fee, home inspection, owner's title insurance policy is not incident to closing and a settlement service. HOW's are purchased to induce the buyer's commitment to purchase a home whether they are arranged for by the listing broker or the buyer's broker. HOW's are a tool utilized by Realtors to help sell properties and are an enticement for buyers because they become effective on the date of closing. They are often a minor negotiating point in the purchase of a property and are hence, part of the purchase experience that often artificially provide the consumer with confidence to buy a property they might not otherwise purchase. If it were not for the HOW, many consumers might feel a transaction to be too risky and it is for that reason why HOW's must be considered to be a settlement service or incident to a settlement service – they are assuming a risk at closing.

### **ANALYSIS OF NAR's POSITION**

We respectfully suggest that NAR is presenting inconsistent positions on this matter and that their logic is flawed.

#### Realtor's unique position of influence

In one part of NAR's argument they take issue with the description of brokers and agents as being in an "unique position of influence" over consumers. They claim that, "Buyers interact with attorneys, loan officers, homebuilders' sales representatives, title agents and other providers throughout the course of a real estate transaction, all of whom have influence over their customers. Just because a real estate broker or agent may interact first with a consumer interested in the purchase of a home does not mean that the agent has a special kind of influence or that the buyer or seller is more likely to purchase a product because a real estate agent promotes it."

NAR's statements literally dumbfounded us as we found them to be so incongruous with the consumers' "real life" real estate experience. For starters, most consumers whom we have met live in fear that if they upset their Realtor that they will somehow put their entire real estate transaction in jeopardy. Consumers typically know little about the real estate

transaction process and put all their reliance and trust in their Realtor. Real estate consumers are typically vulnerable and scared and easily taken advantage of. Consumers will often give up checks and balances and spend hundreds of dollars more on mortgages and title insurance at a mortgage and title company controlled by their broker (and HOW's), simply because they don't want to rock the boat by not following their Realtor's advice.

Realtors are at the very top of the hierarchy of the residential service providers' pyramid and typically control and influence through referrals every service provider below them. In fact, their ability to refer business provides them with so much market power that most service providers who receive those referrals refuse to report Realtors who engage in malfeasance, let alone provide advice that conflicts with a Realtor recommendation. To suggest that a downstream service provider would intentionally contradict the advice of their Realtor referrer is to ignore what happens in every day real estate. No one may want it to be true, including NAR or their membership, but the fact is that referral recipients typically live in fear of Realtors and do everything they can do to please Realtors – even if that means not always acting in the best interests of the Realtors' clients – because to do otherwise is often perceived as committing professional suicide.

We've even interviewed attorneys who are reluctant and often refuse to provide their referred clients advice that counters that of the Realtor. If Realtors have that much power over attorneys and their clients, then the answer we believe to be true is that YES consumers will often purchase a HOW just because their Realtor advises them to.

We believe that this position of influence is inappropriate and needs to change. It is bad for NAR members (as it puts them in a position of extreme liability) and it is bad for consumers because they are not receiving impartial advice and guidance. Nevertheless, NAR's members are typically directly or indirectly responsible for every real estate related service provider referral that takes place all the way from the attorney to the home warranty company. And whether Realtors are aware of it or not, many referees will compromise their work product to make sure those transactions close and Realtors get paid. A Realtor who goes unpaid is perceived by many to be a Realtor who isn't going to send any more referrals. Most providers whom we have interviewed serve to please their referrers, not the consumer. When those settlement services provide key legal, appraisal, title exam and other safeguard and auditing functions, the ramifications of that "position of influence" is more than troubling and impacts the market far more than the issue at hand.

Our point is that Realtors are in the MOST powerful position of influence in residential real estate and that the advent of other professionals onto the scene isn't likely to alter the information that the consumer receives. And that is also true when it comes to recommending HOWs.

It is a logical error to allow commissioned based providers whose fee is success based to be in a position to influence or even control the selection of ANY safeguard providers. Yet, that is how the residential real estate industry is set up. Make no mistake, we are not appointing blame for this situation, we are only pointing out the undesirable result of the current hierarchal system and that these other service providers will have little or no impact as NAR

suggests. In fact, we believe that the current system is so severely hampered by the desire to please Realtor referrers that **the effectiveness of the built-in safeguards to residential real estate has been almost completely negated.**

In our opinion, the solution to the current mortgage crisis lies in separating downstream referrers as much as possible from Realtors and other referrers and concentrating on ways to re-install impartiality and independence to every stage of the transaction.

NAR's membership is indeed in a unique position of influence and their clients rely upon them heavily for their impartial advice in determining whether or not to purchase a HOW.

#### Effect on the Price of HOW's

NAR's position that Realtors are the "subcontracted sales force" of HWC's and that the loss of this "sales force" would cause HOW prices to increase is unfathomable, inaccurate and self-serving. When artificial fees are removed and competition is re-introduced the end result according to every market theory we've encountered indicates that prices go down and the product improves.

But first let us address the concept introduced by NAR that Realtors are HWC's subcontracted sales force. By definition, if you hire yourself out as a subcontractor, then you owe important duties to the person hiring you. You actually become a fiduciary of the HWC in this situation. Try to imagine the impossible and offensive situation it would create if Realtors simultaneously represented HWC's and consumers, as Ms. Cox Golder suggests.

If what Ms. Cox Golder said were true and NAR members were agents of HWC's, then that would translate into the impossible situation where their agents and brokers would be agents of the consumer and the HWC's in the same transaction. **An agent would be required to advise the consumer as to the problems with an HOW and at the same time would be prohibited from doing so (an impossible situation).** As is true in all dual agencies, the Realtor would be prohibited from doing anything to the benefit or detriment of either party and a full and timely disclosure of the ramifications of that dual agency would have to be made to their clients as well as obtaining their clients' informed consent.

When NAR's own President misses the significance of the fiduciary dilemma created by her argument to save HOW referral fees, it should come as no surprise that many Realtors and consumers also struggle with the concept of dual agency. What Ms. Cox Golder suggests is that their membership represents both the interests of their clients and the interests of the HWC's. Such a dual agency, if it were true would defeat one of the main reasons consumers hire Realtors – for their impartial advice and counsel.

However, I doubt and sincerely hope that NAR members are not simultaneously acting in the dual capacity as agents of HWC's and consumers. If she is wrong, then it eliminates her argument that Realtors are the HWC's sales force. If she is right and is accurately describing the situation, then she has just laid the groundwork for an undisclosed dual agency cause of action for an enormous class action lawsuit.

HUD lists as one exception where they might consider the payment of a fee to a Realtor to be acceptable is where the Realtor is the legal representative of the HWC - A paid sales person for the HWC. HUD does not endorse this situation nor does it even address the plausibility of that situation – it is merely thrown out there as a hypothetical situation that might justify the payment of a fee. From our perspective a Realtor could not be both a paid salesperson of an HWC and the salesperson of a real estate broker for the same client for reasons stated above. And we also don't believe that both business models could practically be run simultaneously without running into substantial conflicts and creating high liability situations. However, we will reserve judgment until we better understand how such a dual business model might work.

Ms. Cox Golder goes on to say that if HWC's were to lose their NAR Realtor "sales force," that HWC's would then be forced to hire a replacement sales force and that would drive prices up. It sounds to us like Ms. Cox Golder has very little faith in her membership. Plus, it sounds like Ms. Cox Golder does not understand the marketplace as it exists today with HWC sales people already on the payroll in every major marketplace.

We know Realtors who are dedicated to properly representing their clients and who have no interest in receiving what they perceive to be a blatant kickback from HWC's. Yet those same NAR members will from time to time recommend the use of a HOW to their clients in appropriate circumstances that serve their clients' interests. These Realtors have lists of HWC's to choose from, just like they have lists of attorneys, home inspectors, lenders and title companies. For Ms. Cox Golder to state that Realtors will only recommend a HOW if they are getting paid a fee is to confirm HUD's concerns that the fee is truly a referral fee and that consumers are receiving tainted advice. We also don't believe that her remark properly represents the position of her membership.

Realtors are NOT and should not be considered the paid sales force of HWC's. In fact, we're sure that many Realtors would argue exactly the opposite. If they were and HOW's are to be construed as an insurance product, that would mean that Realtors would need to get a separate insurance license to sell HOW's for a fee in at least several jurisdictions. Take away the Realtor incentives to recommend a particular HWC or HOW and what you end up with are HWC's honestly competing for referrals from Realtors who are in a position to advise their clients conflict-free when the need arises for a HOW. And in our opinion, most Realtors would prefer it to be that way.

We find it incredulous that NAR would even suggest that prices would go up if HWC's were forced to compete for business sans referral fees. HWC's already employ **local** sales people who send out weekly e-mails to NAR members about the benefits of their product so that Realtors might attempt to compare and shop these products. And there is no mention of "marketing fees" in any of their materials until you login as a Realtor and get deep into their site (if you even find it there). These fees are intentionally hidden from consumers and stuffed away where no one can find them. Yet these fees are well known in the industry that secretly receives them. And if you were to interview Realtors who actively sell these HOW's it is our bet that most would have little knowledge of the pitfalls that come with them or how the product that they're recommending compares to other HOWs.



Remove the secret fees that HWC's pay to Realtors and you lower the price of the HOWs by at least the amount of the "marketing fee" (that is evident from the application page of a prominent HWC attached). No longer will Realtors blindly refer one HWC over another and leave suspect that they may be selecting the HWC with the highest "marketing fee." Realtors will once again become impartial and will be motivated to comparatively shop HWC's for the best price and product which should lead to competition on price and product with the not too surprising result of lower prices and better products.

#### Whose Job is it to Educate Consumers About HOW's?

NAR contends that one justification for allowing a HOW "marketing fee" to be paid to Realtors is that Realtors spend a significant amount of time educating consumers about HOW's. We are not aware of ANY state that allows Realtors to advise consumers on the legal ramifications of anything except, in some states and only then on a limited basis, real estate matters. HOW's are quasi insurance products and contain many contractual legal pitfalls, almost none of which Realtors are licensed to advise. Realtors neither are licensed attorneys nor are they licensed insurance agents.

We have reviewed a HOW policy and found it to be plagued with onerous anti-consumer clauses for which we do not believe that a Realtor is trained or licensed to advise. We believe that if NAR members are engaged in the conduct that Ms. Cox Golder says they are, then we have an epidemic of unauthorized practice of law and insurance sales in the residential real estate industry.

We will concede the fact that the advice on whether or not to buy an HOW is not purely legal. However, without the legal component, the Realtor advice is incomplete and certainly abbreviated and limited to the topic as to whether or not there may be some marketing advantages to offering a HOW with a listing. Such a discussion goes to the advice of buying or selling a house and has no value in "educating consumers" on the viability of a HOW.

#### Are Realtors Qualified to Represent Consumers in Making HOW claims?

If Realtors choose to be the contact person for their clients on HOW claims, then that is their choice. It is also contrary to the HWC instructions as to how to file HOW claims. HOW contracts instruct consumers to contact the HWC, not the Realtor. However, from the perspective of an unauthorized practice of law claim, it may not be a wise service to represent clients when they make a claim against an HOW. What if the HOW denies the claim? What if the Realtor believes that the HWC is being unreasonable in its processing of a claim? Will the Realtor engage in legal negotiations on behalf of their client? If the Realtor is engaging in lengthy discussions on behalf of their client, we find it difficult to believe that they would be doing anything for which their license would authorize them to do. It is for that reason that we dismiss NAR's position that Realtors are providing a valuable service to consumers by helping them process claims because if they are, then they are likely doing so illegally.

### Flat Fee Arrangements

We find it disturbing to read how NAR has received preferential treatment from HUD in analyzing this issue but at the same time we applaud HUD for standing up to NAR and prohibiting flat fees to Realtors who market HOW's. We haven't heard of title companies or mortgage companies paying Realtors a flat fee to market their products and we hope we never do. The same goes for HOW's.

To us a flat fee marketing agreement is little distinguishable from giving Realtors tickets to expensive shows or free dinners at expensive restaurants. The end result is a bribe. The dollars are being paid for one primary reason – to buy referrals and inappropriately influence the advice that is being provided to consumers.

To us a flat fee marketing arrangement communicates the existence of an employment or subcontractor agreement with the HWC. Such an arrangement would also create dual agency situations as stated earlier and prevent Realtors from advising their own clients to purchase from the HWC with which they have the marketing arrangement. In addition, we believe that most such flat fee arrangements would be nothing more than a sham devised to circumvent RESPA.

Even shared marketing agreements where each vendor is paying their fair share of advertising costs are suspect when they involve fiduciaries. In a sense, the fiduciary is advertising to the world that they are not interested in conducting the due diligence required by state fiduciary law prior to recommending that vendor. It communicates that they are not interested in comparatively shopping on behalf of their client for ancillary services because their decision has already been made.

We can't dictate ethics to Realtors, but we can certainly advise consumers about how to select ethical Realtors. One of the criteria we will definitely employ will be to avoid Realtors who are being paid to market HOW's.

### **REFERRAL FEES ALREADY PLAGUE THE BROKERAGE INDUSTRY**

NAR's membership enjoys the power and benefits of being at the top of the referral hierarchy for almost all underlying real estate related services. NAR is extremely good at what they do and their power over the residential real estate transaction is immense. You can't sell real estate without the MLS and you can't join the MLS without becoming a member of NAR. Combine that with the extraordinary low entry standards to the industry and the special tax advantages carved out for the brokerage industry in regards to employment law and you have a recipe for creating the largest lobbying group in America. That position has resulted in a brokerage industry that thrives on undisclosed referral incentives that regularly tempts both the referee and the referrer - Some legal, some not.

Every industry has its problems. Here however, the problem lies in the logic of having a commissioned based provider in a position to influence the safeguard service providers who control whether or not the Realtor gets paid. Good Realtors will tell you all day long that they would never consider recommending a service provider for self-serving purposes that put their clients at risk. But that doesn't change the fact that they possess a legal conflict of interest in making such referrals and that they have NO control if their referees perceive their role to be to protect the commission, not the transaction.

Some investment level lenders are already refusing to provide a source of funding to mortgage companies that own their own title companies because of the conflicts of interest it creates. If the mortgage company owns a title company and that title company is responsible for examining title and disbursing funds, then why bother with a title company as a safeguard? How can someone with a large commission riding on a transaction be expected to provide an impartial examination of title and disburse funds as an auditing function of the transaction? Lenders are starting to realize that increased conflicts of interest translate into increased risk.

NAR's members have somehow been the beneficiary of exceptions carved out of RESPA and have gotten used to being paid referral fees (at least indirectly). In the Bush administration an exception was carved out of RESPA allowing real estate brokers to pay bonuses to office managers based on their capture rate of mortgage and title work. Managers have a huge influence over the individual Realtors' ability to make a living because they often set the commission splits, dole out office referrals and otherwise substantially influence the agents' financial well being. **This small RESPA loophole has created an end run which has essentially legalized referral fees for real estate brokers and has resulted in enormous capture rates and higher prices that are largely understated by the industry.**

Large national builders regularly offer enormous secret bonuses through the MLS to buyer brokers who convince their clients to purchase their new construction homes. Listing brokers often utilize the same strategy of offering these referral fees that are often in excess of \$5000. Yet none of these secret fees appear to be addressed by RESPA or HUD.

We even reported to the Minnesota Commerce Department (our home state) an instance where a real estate continuing education provider (who also happened to be a large home inspection firm) was giving away free credits in exchange for four inspection referrals. The Commerce Department official in the Education Division told us the matter had been dealt with and the matter was closed. When we performed a Data Practices Request to see the outcome of that investigation we discovered that no investigation was ever even opened.

Referral fees exist and are still part of the everyday business for Realtors whether they endorse them or not. And it is our position that these unsavory relationships have a substantial impact on the real estate experience of consumers. You have identified one small piece of the problem - an attempt to hide HWC referral fees being paid to Realtors. And we agree with you that it is an enormous problem as the intended purpose of these referral fees is to alter the advice Realtors provide to their clients in favor of recommending a HOW that the

consumer may not desire or need. It is our hope that you will continue with your efforts to eliminate this problem of referral fees in real estate.

### **INTERPRETIVE RULE DOES NOT GO FAR ENOUGH**

We cannot imagine a situation where it would be appropriate for an HWC to pay a Realtor any sort of fee without negatively affecting the Realtor's client. The relationship between a Realtor and his or her client is a special one of trust and reliance that should not be tampered with lightly. We would like to see all such HOW Realtor paid fees eliminated and made illegal for the reasons stated above.

In addition, there are other more expansive RESPA provisions we would like to see changed including, but not limited to:

1. A six year statute of limitations for RESPA violations;
2. A liquidated damages provision that has some "teeth;"
3. An elimination of bonuses for office managers who attain high "capture rates" for their affiliated businesses;
4. More expansive RESPA jurisdiction including residential consumer transactions that are not tied to federally funded loans;
5. Stricter provisions for regulated persons who are also fiduciaries.

Perhaps even a national licensing system of HWC's could be created to address some of the problems with HOW's which are also one of the largest sources of consumer complaints.

### **CONCLUSION**

We are pleased to see HUD taking a strong position on a topic that protects consumers. Referral fees and inappropriate relationships in real estate are an enormous consumer problem that continues to cost Americans billions of dollars and likely contributed to the collapse of the mortgage industry. When you take away the checks and balances to a residential real estate transaction even the bad transactions will close. And we believe that's what happened in the last financial crisis and unfortunately may lead to the next one as the conduct continues to persist.

Respectfully submitted on behalf of American residential real estate consumers.

Sincerely,

*Douglas R. Miller*

Douglas R. Miller  
Executive Director,  
Attorney,  
Real Property Law Specialist, Certified by the Minnesota Bar Association

## Exhibit A

Order Warranty Wizard: Optional Coverage Selection

*Your Selected Program:*

**Diamond Program NA7**

**1/08 - \$399.00**

**Service Fee: \$100.00**

Air Conditioning  
 Heating  
 Water Heater  
 Electrical System  
 Plumbing  
 Dishwasher  
 Garbage Disposal  
 Built-In Microwave  
 Trash Compactor  
 Ductwork  
 Range, Oven, Cooktop  
 Door Bells  
 Garage Door System  
 Ceiling Fans  
 Central Vacuum  
 Burglar & Fire Alarm Systems  
 Exhaust Fans  
 Whirl Pool Bath  
 Sump Pump  
 Roof Leak Repair  
 Premium Coverage  
 Washer  
 Dryer  
 13 Seer Equipment Upgrade  
 Kitchen Refrigerator w/ Ice Maker

Please select your desired add-on coverages:

Additional Optional Coverages	Cost
<input type="checkbox"/> Pool/Spa	\$150.00
<input type="checkbox"/> OrangePlus	\$75.00
<input type="checkbox"/> Additional Pool or Spa	\$150.00
<input type="checkbox"/> Well Pump	\$85.00
<input type="checkbox"/> GreenPlus	\$75.00
<input type="checkbox"/> Septic Tank Pumping	\$30.00
<input type="checkbox"/> Septic System/Sewage Ejector Pump	\$50.00
<input type="checkbox"/> Stand Alone Freezer	\$35.00
<input type="checkbox"/> Duplex	\$319.20
<input type="checkbox"/> Triplex	\$638.40
<input type="checkbox"/> Two Flat	\$319.20
<input type="checkbox"/> Three Flat	\$638.40
<input type="checkbox"/> Four Flat	\$957.60
<input type="checkbox"/> 13 SEER Modifications	\$50.00

The gross contract price, based on the coverage options you have selected is:  
**\$399.00**

[Recalculate Price](#)

**THIS SERVICE CONTRACT DOES NOT COVER EXISTING DEFECTS**

All covered items must be in good working order on the contract start date.

Please list excluded items:

Based on your marketing agreement, you are entitled to a \$70.00 marketing reimbursement. Do you want to use your Marketing Reimbursement to discount the warranty?  Yes  No

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