



September 25, 2013

The Honorable Carol Galante  
Assistant Secretary for Housing - Federal Housing Commissioner  
US Department of Housing and Urban Development  
Washington, DC 20410

Re: CAARE supports HUD's "arms-length" requirements in PFS transactions

Dear Commissioner Galante:

I am writing on behalf of the tens of millions of real estate consumers who depend upon Realtors for their impartial and expert advice. Consumer Advocates in American Real Estate (CAARE) is the only non-profit public charity (501(c)3) dedicated to issues that concern the representation consumers receive from real estate licensees. We are appreciative of HUD's insistence that distressed property owners not be subjected to the insurmountable conflicts of interests and financial risks associated with dual agency. Although dual agency may be legal in most states in one form or another (i.e., designated agency), it severely interferes with the ability of consumers to make informed investment decisions. Consumers across America depend upon Realtors for their advice in making informed real estate decisions and that could not be truer than for distressed property owners. We ask that HUD also consider adding affiliated title companies to the list of service providers that interfere with the arms-length transaction.

Dual agency (and the legal fiction called "designated agency") is a form of "representation" that disclaims all representation (it is really no representation at all). Dual agency is illegal in every other profession. It involves conflicts of interest that usually devolve into undisclosed dual agency. As soon as one of the agents or brokers engage in any form of negotiation (most do), undisclosed dual agency results. Undisclosed dual agency is common-law fraud.

The "disclosure" forms that exist in most states are designed to protect Realtors from consumer class action lawsuits and do not come close to satisfying the common-law disclosure and consent requirements that protect consumers in every other professional relationship. The state dual agency laws are designed to strip consumers of legal protections and expose them to unreasonable risks. Instead of an arms-length transaction, you end up with a transaction stripped of consumer safeguards that incentivizes the broker with payment of a double commission. Dual agency brokers get paid twice as much for providing a fraction of the service.

Designated agency is a legal fiction and a form of dual agency that is even worse than ordinary dual agency. While it purports to provide consumers with representation, it really is legalized undisclosed dual agency. In designated agency, the supervising broker is a dual agent. The supervising broker has the contract with the consumer (agents do not contract with consumers). This dual agent broker then somehow extends negotiating powers to his agents that he does not possess. Somehow, this broker who is incentivized by the prospect of a double commission and who is prohibited from engaging in negotiations is supposed to supervise these renegade agents who can engage in negotiations. If the



broker provides negotiating advice to his agents, he will have engaged in undisclosed dual agency.. In designated agency the consumer almost always ends up exposed to undisclosed dual agency.

We fail to understand why the National Association of Realtors (NAR) would object to HUD's requirement that consumers receive meaningful representation from their members. Does the prospect of collecting a double commission outweigh the importance of client representation? As support for its position, NAR's Gary Thomas states that some of its members choose to be in brokerage firms that have hundreds of agents across multiple offices and that those firms would be unable to effectively list short sales. Those firms thrive on double commissions and members who choose to work at those firms understand that their clients will receive substandard representation (dual agency) on a large percentage of the transactions. What Mr. Thomas fails to state is that according to his own statistics from Realtor.org's website (2013 member profile highlights), 56 percent of Realtors are affiliated with an independent company and that the typical Realtor works at a firm that employs 23 agents and brokers. Most of those brokers could easily accommodate HUD's requirements. In addition, Mr. Thomas fails to mention a form of agency called Single Agency that allows mid-size and smaller firms to make sure that clients always receive full representation on all transactions. In Single Agency, if a dual agency situation arises, one of the clients is referred to another brokerage thereby mostly eliminating the conflicts of interest. This type of representation exists and is practiced today, but it does not pay a double commission.

Dual agency is a divisive issue for NAR's membership and we do not believe that Mr. Thomas is accurately representing the best interests of all their members. Midsize and smaller brokers typically market themselves against the mega brokerages and one of their value propositions is that they can often avoid dual agency. It is a market niche that most of NARs members enjoy when competing against the mega brokerage firms. We believe that most of NARs members will be thrilled with the opportunity to provide a higher and more meaningful level of representation for distressed property owners. Mr. Thomas may be speaking out for his own self interests since he owns a California brokerage firm called Evergreen Realty that appears to have well over a thousand agents and multiple locations.

NAR's comments about HUD's policy possibly conflicting with state licensing laws and the MLS Rules are factually incorrect. There is no state license law in any state in the country for which HUD's policy would conflict. The fact that states have legalized dual agency does not translate into a state requirement or encouragement to engage in dual agency. That is preposterous. The opposite is true. Dual agency is a bad thing that is allowed in limited circumstances and state licensing laws exist to warn consumers about the dangers of dual agency. In addition, the "formal complaint" process for dual agency violations is meaningless because most dual agency violations are rarely discovered by consumers and difficult to prove.

Concerning the possible violations of MLS guidelines, keep in mind that MLSs are owned by the local Realtor trade associations, that they are controlled by the Realtors and that any such MLS "guidelines" that seek to control the consumers' ability to negotiate the terms of their broker's representation is likely an antitrust violation. If what Mr. Thomas said was true and MLS guidelines actually forbade HUD's ban on dual agency, it would be a self fulfilling prophecy as those guidelines are set by NAR and its



subservient associations. More importantly, the stated purpose of the MLS is to offer a unilateral offer of compensation to cooperating brokerage firms and the MLS has no authority over internal broker prohibitions on dual agency. Mr. Thomas is factually incorrect on that point as well.

Finally, we see an omission in HUD's restrictions in that affiliated title firms are not included as a barrier to an arms-length transaction. Perhaps the most important safeguard in any residential transaction is the title firm that is in a position to spot illegal monies changing hands (often between Realtors, sellers and buyers), ensure that title defects are properly cleared and that impartial and meaningful closing procedures are practiced. How can a title firm deliver impartial service when it essentially reports to the real estate firm that owns it (or the parent corporation) and a large real estate commission is dependent upon a successful closing?

We support HUD in its Mortgage Letter 2013-23 that restricts dual agency on pre-foreclosure sales and encourage HUD to invoke even stricter guidelines in all HUD properties. It is our vision to see all federally backed mortgages assert similar commonsense restrictions.

Sincerely,

*Douglas R. Miller*

Douglas R. Miller  
Executive Director