No. 10-1042

IN THE

Supreme Court of the United States

TAMMY FORET FREEMAN ET AL.,

Petitioners,

v.

QUICKEN LOANS, INC.,

Respondent.

On a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

Whether Section 2607(b) of the Real Estate Settlement Procedures Act (RESPA), 12 U.S.C. § 2601 *et seq.*, prohibits a real estate settlement services provider from charging an unearned fee only if the fee is divided between two or more parties.

PARTIES TO THE PROCEEDINGS BELOW

Pursuant to Rule 14.1(b), the parties to the proceedings below include petitioners here, and plaintiffs-appellants below, Tammy Foret Freeman and Larry Scott Freeman; Paul Smith and Irma Smith; and John J. Bennett, III, and Stacey B. Bennett, on behalf of themselves and a class of similarly situated persons.

Quicken Loans, Inc. is the sole respondent here, and was the defendant-appellee below.

Title Source, Inc. was a defendant in the district court. Although Title Source prevailed in the district court, and although petitioners did not pursue their claims against Title Source on appeal, the caption of the court of appeals' decision lists Title Source as a defendant-appellee.

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BRIEF FOR PETITIONERS

Petitioners Tammy Foret Freeman *et al.* respectfully request that this Court reverse the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 626 F.3d 799. The district court's opinion (Pet. App. 19a-70a) is unpublished.

JURISDICTION

The court of appeals entered judgment on November 17, 2010. Pet. App. 1a. Petitioner filed a timely petition for a writ of certiorari on February 15, 2011, which this Court granted on October 11, 2011. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Relevant portions of the following provisions of the Real Estate Settlement Procedures Act of 1974, Pub. L. No. 93-544, as amended and codified at 12 U.S.C. § 2601 *et seq.,* are included in the appendix to this brief: § 2601 (Congressional findings and purpose); § 2604 (Special information booklets); § 2607 (Prohibition against kickbacks and unearned fees); and § 2617 (Authority of Bureau).

The appendix also contains relevant regulations, including 24 C.F.R. § 3500.4 and 24 C.F.R. § 3500.14, as well as relevant portions of a Statement of Policy issued by the Department of Housing and Urban Development, 66 Fed. Reg. 53,052 (2001).

STATEMENT OF THE CASE

Petitioners obtained residential mortgages from respondent Quicken Loans. At closing, Quicken charged petitioners a "loan discount fee," but petitioners allege that it did not give them any loan discount. Petitioners filed suit, alleging that respondent violated the Real Estate Settlement Procedures Act (RESPA), 12 U.S.C. § 2607(b), by imposing an unearned charge. The Fifth Circuit held that even if Quicken did nothing to earn the fee, it did not violate the statute because it kept all the unearned money for itself and did not divide the fee with anyone else. Properly construed, the court held, RESPA "prohibits only kickbacks and referral fees." Pet. App. 15a.

I. Statutory and Regulatory Framework

A. Real Estate Settlement Procedures Act

In 1974 Congress enacted the Real Estate Settlement Procedures Act, 12 U.S.C. § 2601 *et seq.*, in response to the "unnecessarily high settlement charges caused by certain abusive practices" in the real estate settlement industry. 12 U.S.C. § 2601(a). The statute addresses these abuses through a series of interrelated provisions.

One section of the statute requires settlement service providers to "clearly itemize all charges imposed upon the borrower . . . in connection with the settlement," using a form developed by the Department of Housing and Urban Development (HUD). 12 U.S.C. § 2603. That form, in turn,

requires the disclosure of any "charge (points) for the specific interest rate chosen."[1]

Section 2607 then prohibits providers from collecting the disclosed fees unless they were earned. Entitled "Prohibition against kickbacks and unearned fees," the provision has two pertinent subsections. 12 U.S.C. § 2607. The first expressly prohibits kickbacks:

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

Id. § 2607(a). Subsection (b) then addresses unearned fees:

> No person shall give and no person shall accept any portion, split, or percentage of any charge made or received for the rendering of a real estate settlement service in connection with a transaction involving a federally related mortgage loan other than for services actually performed.

Id. § 2607(b).[2]

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[1] Department of Housing and Urban Development, OMB Approval No. 2502-0265, Settlement Statement (HUD-1 ¶ 802 (2010)), *available at* http://www.hud.gov/offices/hsg/rmra/res/hud1.pdf.

[2] The codified version of the statute in the U.S. Code includes a subsection title for Section 2607(b), "Splitting

B. Administrative Intepretations

Congress directed HUD "to prescribe such rules and regulations, to make such interpretations, and to grant such reasonable exemptions for classes of transactions, as may be necessary to achieve the purposes of [RESPA]." 12 U.S.C. § 2617(a).[3] Congress further encouraged public reliance on HUD's interpretation of the statute by requiring the agency to produce special information booklets to help consumers better "understand the nature and costs of real estate settlement services," *id.* § 2604, and by exempting from liability "any act done or omitted in good faith in conformity" with any HUD "rule, regulation, or interpretation." *Id.* § 2617(b).

For more than thirty-five years HUD has interpreted RESPA to prohibit unearned charges whether or not they are divided with another provider.

Consumer Booklet. The agency's 1976 consumer booklet explained that RESPA prohibits kickbacks and, in addition, "[i]t is *also* illegal to charge or accept a fee or part of a fee where no

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charges." That title was not a part of the public law enacted by Congress. *See* REPSA, Pub, L. No. 93-533, § 8(b), 88 Stat. 1727.

[3] On July 21, 2011, Congress transferred HUD's RESPA-related responsibilities to the Consumer Financial Protection Bureau (CFPB). *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, §§ 1061(b)(7) and (d), 1062, 1098, 1100H, 124 Stat. 2038, 2039-2040, 2103-2104, 2113. The CFPB, in turn, has adopted HUD's existing regulations as its own. 76 Fed. Reg. 43,570, 43,571 (July 21, 2011). For simplicity, this brief will refer to HUD as the author of the regulations and administrator of the statute.

service has actually been performed." 41 Fed. Reg. 20,279, 20,289 (May 17, 1976) (emphasis added).

Notice-And-Comment Regulations. HUD codified that construction of the statute in its notice-and-comment regulations – commonly known as "Regulation X" – in 1992.[4] After quoting the text of Section 2607(b), the amended regulations provide:

> A charge by a person for which no or nominal services are performed or for which duplicative fees are charged is an unearned fee and violates this section.

24 C.F.R. § 3500.14(c).

Report to Congress. In a 1998 report to Congress, the agency reiterated that:

> HUD has consistently held that the provisions of [Section 2607(b)] apply in various situations, such as where one settlement service provider (1) receives an unearned fee from another provider, (2) charges the consumer for third-party services and retains an unearned fee from the payment received, or (3) accepts any portion of a charge other than for services actually performed.[5]

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[4] Prior to 1992, HUD's regulations largely repeated the statutory language of Section 2706(b). *See* 24 C.F.R. § 3500.14(b) (1977) (initial regulations).

[5] BD. OF GOVERNORS OF THE FED. RESERVE SYS. & DEP'T OF HOUS. & URBAN DEV., JOINT REPORT TO CONG. CONCERNING REFORM TO THE TRUTH IN LENDING ACT AND THE REAL ESTATE SETTLEMENT PROCEDURES ACT 29 (1998), *available at* http://www.federalreserve.gov/boarddocs/rptcongress/tila.pdf.

Statement of Policy. In 2001, the Seventh Circuit nonetheless concluded that the statute extended only to kickbacks, and that HUD had not clearly expressed a contrary interpretation. *Echevarria v. Chi. Title & Trust Co.*, 256 F.3d 623 (7th Cir. 2001). In response, HUD formally issued a Statement of Policy, published in the Federal Register, stating unambiguously that:

> Section [2607(b)] forbids the paying or accepting of any portion or percentage of a settlement service – including up to 100% – that is unearned, whether the entire charge is divided or split among more than one person or entity or is retained by a single person.

Real Estate Settlement Procedures Act Statement of Policy 2001-1: Clarification of Statement of Policy 1999-1 Regarding Lender Payments to Mortgage Brokers, and Guidance Concerning Unearned Fees Under Section 8(b), 66 Fed. Reg. 53,052, 53,058 (Oct. 18, 2001) (Statement of Policy).[6]

Amicus Briefs. In no fewer than seven amicus briefs filed in the federal courts of appeals, HUD has consistently repeated this interpretation of the statute and its regulations.[7] At this Court's

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[6] Relevant portions of the Statement of Policy are reproduced in Appendix C to this brief.

[7] *See* Br. for the United States as *Amicus Curiae* Supporting Reversal, *Boulware v. Crossland Mortg. Corp.*, 291 F.3d 261 (4th Cir. 2002) (No. 01-2318), *available at* 2002 WL 32351432; Br. for the United States as *Amicus Curiae* Supporting Reversal, *Krzalic v. Republic Title Co.*, 314 F.3d 875 (7th Cir. 2002) (No. 02-2285), *available at* 2002 WL 32115107;

invitation, the Solicitor General reiterated that position in a brief filed in this case and signed by the General Counsel for HUD's successor agency. *See* U.S. Invitation Br. 3, 9.

II. Factual Background

The Freemans, Bennetts, and Smiths all secured mortgages in Louisiana from respondent Quicken Loans.

Quicken charged the Freemans $980, and the Bennetts $1100, for a "loan discount fee" at the closing on their mortgages. Pet. App. 21a n.2, 22a n.6. A "loan discount fee" is money borrowers pay to purchase "points." U.S. DEP'T OF HOUS. & URBAN DEV., HUD-398-H[4], BUYING YOUR HOME: SETTLEMENT COSTS AND INFORMATION 6, 14 (1997).[8] In industry parlance, such "points" are "a one-time charge imposed by the lender or broker to lower the

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Br. for the United States as *Amicus Curiae* Supporting Affirmance, *Haug v. Bank of Am., N.A.*, 317 F.3d 832 (8th Cir. 2003) (No. 02-2458), *available at* 2002 WL 32144590; Br. for the United States as *Amicus Curiae* Supporting Reversal, *Sosa v. Chase Manhattan Mortg. Corp.*, 348 F.3d 979 (11th Cir. 2003) (No. 02-13930-DD), *available at* 2002 WL 32366238; Br. for the United States as *Amicus Curiae* Supporting Reversal, *Kruse v. Wells Fargo Home Mortg., Inc.*, 383 F.3d 49 (2d Cir. 2004) (No. 03-7665), *available at* 2003 WL 24072306; Br. for the United States as *Amicus Curiae* Supporting Reversal, *Santiago v. GMAC Mortg. Group, Inc.*, 417 F.3d 384 (3d Cir. 2005) (No. 03-4273), *available at* 2004 WL 3759909; Letter Br. for the United States as *Amicus Curiae, Cohen v. JP Morgan Chase & Co.*, 498 F.3d 111 (2d Cir. 2007) (No. 06-0409).

[8] *Available at* http://portal.hud.gov/hudportal/documents/huddoc?id=DOC_12893.pdf.

rate at which the lender or broker would otherwise offer the loan." *Id.* at 14-15.[9] In this case, however, petitioners allege that Quicken charged the loan discount fee but did not provide petitioners any corresponding reduction in their interest rate. *See* Pet. App. 2a.

Quicken charged the Smiths a $575.00 "loan processing fee" and a duplicative $5,107.44 "loan origination" fee. Pet. App. 22a n.4. Quicken later claimed that "the loan origination" fee was, in fact, a mislabeled "loan discount fee" like the one imposed on the Freemans and Bennetts. Pet. App. 2a-3a. However labeled, the Smiths allege that they received no loan discount or any other service in exchange for the fee. *Id.*

III. Procedural History

1. On February 19, 2008, the Freemans filed suit in state court against Quicken, alleging, as relevant here, violations of Section 2607(b) of RESPA. Pet. App. 20a.[10] Quicken removed the case to federal

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[9] *See also* 15 U.S.C. § 1639c(b)(2)(C)(iii) (defining, for purposes of another consumer protection statute, the term "bona fide discount points" to mean "loan discount points which are knowingly paid by the consumer for the purpose of reducing, and which in fact result in a bona fide reduction of, the interest rate or time-price differential applicable to the mortgage").

[10] Petitioners also brought claims against the title company that conducted the closing, but those claims were ultimately dismissed, Pet. App. 70a, and petitioners do not challenge that dismissal here. Petitioners further brought state law claims premised upon the alleged RESPA violations. Pet. App. 3a, 14a & n.15. Those claims were dismissed along with petitioners' RESPA claims, but would be revived should petitioners' RESPA

court, where it was consolidated with a nearly identical suit filed by the Smiths and a putative class action filed by the Bennetts. Pet. App. 21a-22a.

Quicken moved for summary judgment on petitioners' RESPA claims on the sole ground that "Section 8(b) only prohibits fee splitting." Def.'s Mem. Supp. Summ. J. 5; *see also* J.A. 54-55 (Def's Mot Summm. J. ¶ II).[11] Quicken argued that even if it had not provided anything in exchange for the challenged fees, petitioners' claims should fail "because neither of the challenged fees were split or otherwise shared with any other party." *Id.*

The district court agreed and granted summary judgment to Quicken. After reviewing HUD's 2001 Statement of Policy and the conflicting circuit court opinions, the district court found "the circuit decisions that have held that Section [2607(b)] only applies to divided fees" more persuasive. Pet. App. 66a. And because it concluded that this result was required by the "plain language of Section [2607(b)]," it refused to defer to HUD's contrary interpretation. *Id.*[12]

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claims be reinstated. *Id*.

[11] In the district court, Quicken filed two materially identical motions – one with respect to the suits filed by the Freemans and the Bennetts, and another regarding the Smiths' suit. The citations in this brief refer to the Freeman/Bennett filings.

[12] In its summary judgment reply brief, Quicken briefly raised for the first time the additional arguments that (1) a loan discount fee is not a charge for a "settlement service" within the meaning of RESPA; and that (2) "Plaintiffs' theory rests upon the incorrect presumption that 'discount points' may only be

2. The Fifth Circuit affirmed, holding "that the language of RESPA § [2607(b)] is unambiguous and does not cover undivided unearned fees." Pet. App. 7a. Instead, "RESPA prohibits only kickbacks and referral fees, not unearned fees by a sole provider of settlement services." Pet. App. 15a.

First, the court examined the phrase "[n]o person shall give and no person shall accept." Pet. App. 7a. The "use of the conjunctive 'and,'" the court concluded, implies that "the provision requires two parties each committing an act," one giving and one accepting payment. *Id*. (citation omitted). The Fifth Circuit found further support in the fact that the prior subsection, Section 2607(a), used similar language while expressly prohibiting "kickbacks." Pet. App. 8a. "To be consistent with" Subsection (a), the court concluded, Subsection (b) "should require two culpable actors as well." *Id.*

Next, the court looked at the words "portion, split, or percentage," and found that "all three words require less than 100% or the whole of something." Pet. App. 8a-9a. The court acknowledged that "certain statutes use 'any portion' and 'any percentage' to include situations that involve the entirety of something." Pet. App. 9a (citing *Cohen v. JP Morgan Chase & Co.*, 498 F.3d 111, 118-19 (2d Cir. 2007) (collecting examples)). But, invoking the canon of *noscitur a sociis*, the Fifth Circuit reasoned

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charged where there is a quantifiable interest rate reduction." Def.'s Reply Mem. Supp. Summ. J. 9, 10. The district court did not decide whether either argument was preserved, having resolved the case on other grounds. Pet. App. 65a-67a, 69a.

that Congress intended a narrower interpretation of "percentage" and "portion" in this provision because it also included the word "split," which "requires dividing a single thing among several parties." Pet. App. 9a-10a.

Finally, the court rejected petitioners' argument that the court should defer to HUD's interpretation of the statute as encompassing more than kickbacks. Pet. App. 11a-14a. "Even assuming *arguendo* that this RESPA provision is ambiguous, the HUD statement is not due *Chevron* deference because there is no indication that the HUD statement carries the force of law." Pet. App. 12a. The 2001 Statement of Policy, the court wrote, "was not promulgated through traditional notice-and-comment rulemaking or any similar deliberative process and does not identify any clear methodology by which it reached its conclusion." Pet. App. 13a.[13]

3. Judge Higginbotham dissented. He explained that he "would, in the main, take the path set forth in

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[13] Quicken also reiterated on appeal its belated argument that loan discount fees are not necessarily paid to secure a loan discount, although it did not assert that the loan discount fees petitioners paid in this case were for some other service (much less identify what that service was). *See* C.A. Appellee Br. 24-25. The Fifth Circuit did not address that contention or decide whether the argument was preserved.

The Fifth Circuit also noted that "Quicken cursorily contends that the loan discount fees are not settlement services, and therefore are not covered by the statute," but ultimately did not decide whether Quicken had waived the argument by failing to raise it in its initial motion for summary judgment or by failing to adequately brief the question on appeal. Pet. App. 4a n.1.

the Second Circuit's well-reasoned opinion in" *Cohen v. JP Morgan Chase & Co.*, 498 F.3d 111 (2d Cir. 2007). Pet. App. 15. In *Cohen*, the Second Circuit rejected the claim that Section 2607(b) of RESPA was unambiguously limited to kickbacks. 498 F.3d at 113. The phrase "any portion, split, or percentage," the court concluded, could extend to cases in which a defendant kept the entirety of an unearned charge for itself. *Id*. at 117-20.

The court in *Cohen* further rejected any reliance on the *noscitur a sociis* canon. "Whether or not any one noun" in the statutory phrase could be read to require a division of unearned fees, the Second Circuit explained, Congress's "use of the expansive modifier 'any' in conjunction with all three words" precluded the conclusion that the statute unambiguously applied only to kickbacks. 498 F.3d at 120.

The Second Circuit thus found that Section 2607(b) could "plausibly be construed to demonstrate a legislative intent to sweep broadly, prohibiting all unearned fees, however structured." 498 F.3d at 120. At the same time, the court concluded that this permissible interpretation was not compelled by the language of the statute, resulting in an ambiguity the court resolved by deferring to HUD's Statement of Policy. *Id*. at 124-26.

While Judge Higginbotham disagreed with the Second Circuit's decision to afford *Chevron* deference to HUD's Statement of Policy, Pet. App. 15a, he adopted the same interpretation of the statute. Prohibiting unearned fees, he explained, "strikes at a core objective of RESPA: promoting transparency of costs associated with settlement." Pet. App. 17a.

Although "the greatest concern may be when that fee is part of a hidden referral relationship, the damage done to borrowers is similar: they are led to believe that they are paying for something they are not." *Id*.

SUMMARY OF ARGUMENT

In the Fifth Circuit's view, RESPA allows service providers to charge consumers for services they never performed so long as they keep all the unearned money for themselves. The agency Congress charged with administering and interpreting RESPA reads the statute otherwise, explaining in multiple forms over many years its position that Section 2607(b) prohibits all unearned fees, whether divided or not. That longstanding view reflects the best reading of the statute and, at the very least, is a reasonable interpretation entitled to deference.

I. Section 2607(b) prohibits accepting "any portion, split, or percentage" of an unearned fee. The Fifth Circuit read this language to require that the defendant split the unearned charge with a third party. But in common usage and throughout the U.S. Code, the phrases "any portion" and "any percentage" also include the entirety, or one hundred percent. Federal embezzlement statutes, for example, prohibit those entrusted with public funds from misappropriating "any portion" of that money. No one would seriously contend that such a statute would permit someone to embezzle *all* of the funds entrusted to her care.

The Fifth Circuit also believed that the phrase "[n]o person shall give and no person shall accept," implied that the statute required both a culpable giver and a culpable receiver to establish a violation. But that is not a natural, much less a necessary,

reading of this language. In this case, there were two parties to the transaction – Quicken required petitioners to "give," and Quicken then "accept[ed]" the unearned charge. To the extent a culpability requirement is reasonably read into the statute, the provision nonetheless does not require both a culpable giver and a culpable receiver in any one transaction. For example, a law providing that "no person shall knowingly send and no person shall knowingly accept child pornography" is most naturally understood to prohibit knowingly sending child pornography, even if it is never knowingly received (either because it gets lost in the mail or because it is mistakenly sent to an innocent recipient). Section 2607(b) likewise establishes two independent prohibitions.

The Fifth Circuit's reading also renders Section 2607(b) largely superfluous. The immediately preceeding provision – Section 2607(a) – already broadly prohibits kickbacks, including those paid from unearned fees. The distinct language of Section 2607(b) must serve some independent purpose. As indicated in the Section's title – "Prohibition against kickbacks and unearned fees" – that purpose was to ban all unearned fees, even if they are not shared with another provider.

Reading Section 2607(b) to do little more than prohibit the kickbacks already banned by subsection (a) would also thwart RESPA's goal of protecting consumers from "abusive practices" that lead to "unnecessarily high settlement charges." 12 U.S.C. § 2601(a). Charging fees for services never provided is an abusive practice that results in the same increase in settlement costs to the consumer whether

the provider shares its ill-gotten gains with another provider or keeps them all for itself.

II. If there is any question regarding the scope of the statute, the ambiguity should be resolved by deferring to the interpretation of the agency Congress charged with administering the statute. Congress expressly gave HUD authority to issue "regulations" and "interpretations" to achieve the purposes of the statute. 12 U.S.C. § 2617(a). The agency has exercised both powers to the same effect, declaring in multiple formats for the past thirty-five years that RESPA prohibits undivided, unearned fees. In 1992, for example, HUD established through notice-and-comment rulemaking that "[a] charge by a person for which no or nominal services are performed is an unearned fee and violates this section." 24 C.F.R. § 3500.14(c) (1993). The agency has moreover consistently interpreted that regulation, as well as the statute itself, as precluding any suggestion that an unearned fee must be split to violate the statute. The regulation, so construed, is entitled to *Chevron* deference.

Even if the regulation were unclear, HUD's 2001 Statement of Policy is not. The Statement "specifically interprets [Section 2607(b)] as not being limited to situations where at least two persons split or share an unearned fee." 66 Fed. Reg. 53,052, 53,057 (2001). The Fifth Circuit held that the Statement of Policy was not eligible for *Chevron* deference because it was issued without notice and comment. But this Court has specifically disavowed any intent to limit *Chevron* deference to notice-and-comment rulemaking. And in this case, Congress expressly authorized HUD to exercise its delegated

interpretive authority through either regulations or interpretations. Moreover, the Statement of Policy was the product of a formal, deliberative process undertaken by high-level officials of an expert agency, and advances an entirely reasonable interpretation of the statute.

ARGUMENT

For three and a half decades, the Department of Housing and Urban Development (and, since July, 2011, the Consumer Finance Protection Bureau) has construed RESPA to prohibit all unearned charges and not simply kickbacks. The Fifth Circuit's contrary interpretation is inconsistent with the language, structure, and purposes of the statute, as well as the deference owed to the agencies Congress charged with administering the statute.

I. The Text, Structure, And Purposes Of RESPA Establish That HUD Properly Construed Section 2607(b) To Prohibit Undivided, Unearned Charges.

A. The Plain Text Of Section 2607(b) Prohibits All Unearned Charges.

Consistent with its title, Section 2607 of RESPA regulates two abusive practices: "kickbacks and unearned fees." 12 U.S.C. § 2607. Subsection (a) expressly prohibits kickbacks. *See id.* § 2607(a) ("No person shall give and no person shall accept any . . . kickback"). And on its face, Subsection (b) prohibits a settlement services provider from accepting any unearned fee. That is, by charging petitioners a loan discount fee without actually providing any loan discount, Quicken "accept[ed]" a "portion, split, or percentage" of a settlement service

charge (*i.e.*, one hundred percent of the loan discount fee) "other than for services actually performed." *Id.* § 2607 (b).

The Fifth Circuit's objections to this interpretation are unavailing.

1. The court of appeals construed the statutory phrase "any portion, split, or percentage" to require that "two parties share something." Pet. App. 8a. "The definitions of all three words," the court said, "require less than 100% or the whole of something." *Id.* 9a. But that is plainly incorrect.

a. In common usage, the phrase "any portion" encompasses the whole. For example, a mother who tells her son that she does not want him to spend any portion of his allowance on comic books is not, of course, permitting him to spend *all* of his allowance on comic books. Likewise, federal embezzlement statutes frequently ban those entrusted with public money from embezzling "any portion" of those funds. *See* 18 U.S.C. § 648.[14] No one would seriously contend that such a statute permits officials to misappropriate public funds so long as they embezzle *everything* entrusted to them. Similarly, a lender plainly would violate the federal law prohibiting it from collecting "any portion of the interest on the

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[14] *See also, e.g.*, 18 U.S.C. § 644 (defining embezzlement using the phrase "*any portion* of the public money") (emphasis added); 18 U.S.C. § 653 (same); 19 U.S.C. § 1620 (making "[a]ny officer of the United States who directly or indirectly receives, accepts, or contracts for *any portion* of the money which may accrue to any person making such detection and seizure" guilty of a felony) (emphasis added).

note which is payable by the Secretary," 20 U.S.C. § 1077(a)(2)(E), if it collected *all* of the interest payable by the Secretary.

At the same time, one hundred percent is obviously a "percentage." For example, to say that a tax is assessed as a "percentage" of the value of a transaction does not exclude a tax rate of one hundred percent. *See, e.g.*, 26 U.S.C. § 4975(a)-(b) (imposing a tax rate on certain "prohibited transactions" of fifteen percent of the value of the transaction for a first offense and one hundred percent for a subsequent offense); *see also* 42 U.S.C. § 1396a(*l*)(4)(B) (allowing certain states to substitute "any percentage" for the regularly prescribed 75 percent or 133 percent of the income official poverty line in determining eligibility for medical assistance); *Wis. Dep't of Health & Family Servs. v. Blumer*, 534 U.S. 473, 481 (2002) (acknowledging that "percent" in 42 U.S.C. § 1396r-5(d)(3)(A)-(B) can mean 150 percent).

b. If there was any cause to doubt whether Congress intended "portion" and "percentage" to carry their ordinary breadth, Congress removed it by referring to "*any* portion . . . or percentage." 12 U.S.C. § 2607(b) (emphasis added). This Court repeatedly has recognized that "'the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'"" *Dep't of Hous. & Urban Dev. v. Rucker*, 535 U.S. 125, 131 (2002) (quoting *United States v. Gonzales*, 520 U.S. 1, 5 (1997)); *see also* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 97 (1993) (defining "any" as "great, unmeasured, or unlimited in amount, quantity, number, time, or extent"). "The word *any*

excludes selection or distinction." *Citizens' Bank v. Parker*, 192 U.S. 73, 81 (1904). If Congress truly had intended the Fifth Circuit's narrow construction of the words "portion" and "percentage," it surely would have omitted "any" from the statute.

c. Giving "portion" and "percentage" their natural breadth also avoids rendering those words surplusage. The statute already prohibits a "split" of unearned fees. The Fifth Circuit offered no explanation why Congress would use three words to express an idea already fully encompassed in "split" alone. *See Duncan v. Walker*, 533 U.S. 167, 174 (2001) (courts should avoid construing a statute to render terms surplusage); *see also Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or.*, 515 U.S. 687, 702 (1995) (holding that the lower court erred in giving the term "'harm' essentially the same function as other words in the definition, thereby denying it independent meaning").

2. The Fifth Circuit nonetheless found that this surplusage was required by the canon of *noscitur a sociis*. This canon, the court explained, "dictates that words grouped in a list should be given related meaning." Pet. App. 9a (citation omitted). For that reason, the court concluded that all three terms must share the same basic meaning as the word "split" standing alone. *Id.* 9a-10a.

This "argument seems to assume that pairing a broad statutory term with a narrow one shrinks the broad one, but there is no such general usage." *S.D. Warren Co. v. Maine Bd. of Envtl. Prot.*, 547 U.S. 370, 379 (2006) (rejecting similar misuse of *noscitur* canon); *see also Russell Motor Car Co. v. United States*, 261 U.S. 514, 519 (1923) ("That a word may be

known by the company it keeps is, however, not an invariable rule, for the word may have a character of its own not to be submerged by its association."). For instance, a rule banning "liquids, alcohol, or fluids" on airplanes would never be read to prohibit only alcohol on the premise that the broader terms "liquids" and "fluids" must be given a narrow meaning in light of their conjunction with "alcohol." Yet that is the logic the Fifth Circuit applied to RESPA in this case: it read the broader words "portion" and "percentage" to mean nothing more than the more specific term "split" standing by itself.

To be sure, some overlap among the terms is inevitable under any construction. Under either petitioners' or respondent's interpretation, for example, the words "portion" and "percentage" cover much of the same ground.[15] But that is not a justification for the construction adopted by the Fifth Circuit, which renders both words entirely without effect when an alternative interpretation is available that limits redundancy and gives the statute the breadth naturally implied by the ordinary meaning of the statutory language.

3. The Fifth Circuit also asserted that Section 2607(b) "was clearly aiming at an exchange or transaction, not a unilateral act" because the statute

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[15] Under petitioner's interpretation, however, they are not entirely duplicative. A kickback exceeding the amount of an unearned fee – for example, payment of double the amount of a loan processing charge to a real estate agent for a first time referral to a lender in order to encourage repeat business – would constitute a "percentage" of the charge (*i.e.*, two hundred percent) even if it were not easily seen as a "portion" of the fee.

prohibits both the giving and the accepting of an unearned fee. Pet. App. 7a (citation omitted). The court asserted that "[t]he term 'and' normally means that both of the listed conditions must be satisfied." *Id*.

Even if that were so, it would not help Quicken here. The unearned discount fee in this case *was* exchanged between two parties – Quicken required petitioners to "give" the fees, and Quicken indisputably "accept[ed]" them.[16]

That being true, the only way the statute would not apply here would be if it required not only a giver and an acceptor, but a *culpable* giver and a *culpable* acceptor. Pet. App. 8a. But there is no such requirement in the text, nor can one be reasonably implied.

The phrase "[n]o person shall give and no person shall accept" creates two separate prohibitions, one on giving an unearned fee and one on accepting an unearned fee. Only one of these actions is required

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[16] This is not to say that a consumer may be held liable for paying what turns out to be an unearned fee. As the Eleventh Circuit has observed, "a consumer could not be liable as the giver of an unearned portion of a fee because a consumer will always intend to pay the fee for services that are actually performed." *Sosa v. Chase Manhattan Mortg. Corp.*, 348 F.3d 979, 982 (11th Cir. 2003). Moreover, the statute expressly provides that "[a]ny person or persons who violate the prohibitions or limitations of this section shall be jointly and severally liable" for treble damages "*to the person* or *persons charged* for the settlement service." 12 U.S.C. § 2607(d)(2) (emphasis added). It would make no sense to construe the statute to render a consumer liable to herself under a statute expressly enacted for the protection of consumers, *see id.* § 2601.

for a violation to occur. For example, a statute providing that "[n]o person shall make and no person shall solicit or knowingly accept any political contribution in a building owned by a governmental entity," Fla. Stat. § 106.15(4), is plainly violated by a person who makes such a contribution, even if no one "knowingly accept[s]" it (for example, because the acceptor does not know he is in a government building).[17]

Had Congress intended to limit Section 2607(b) to kickbacks, it easily could have written the statute to say so clearly. For example, it could have provided that "it shall be unlawful for two or more persons to exchange any portion, split, or percentage of any charge . . . ." *Compare* 18 U.S.C. § 1511(a) ("It shall be unlawful for *two or more persons to conspire* to obstruct the enforcement of [certain] criminal laws . . . .") (emphasis added). Or it could have

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[17] In *McConnell v. Federal Election Commission*, 540 U.S. 93 (2003), this Court confronted a similarly phrased federal statute which provided that "[n]o person shall make a contribution in the name of another person . . . and no person shall knowingly accept a contribution made by one person in the name of another person." 2 U.S.C. § 441f; *see McConnell*, 540 U.S. at 232. Rather than embracing the Fifth Circuit's view that the use of "and" requires that "both of the listed conditions must be satisfied," Pet. App. 7a, this Court described the provision as establishing two independent proscriptions, prohibiting "any person from 'mak[ing] a contribution in the name of another person' *or* 'knowingly accept[ing] a contribution made by one person in the name of another.'" *McConnell*, 540 U.S. at 232 (emphasis added). That reading is obviously correct – a donor would violate the statute by making an unlawful contribution even if the candidate ultimately refused to accept it.

declared that "two or more persons shall not split any portion of any charge . . . ." Instead, Congress chose language that does not naturally create a two-party requirement. *See* H.R. Rep. No. 93-1177, at 13 (1974) (describing Section 2607(b) as prohibiting "the giving *or* accepting of any portion of any charge made or received for performing a real estate settlement service in connection with a transaction involving a federally-related mortgage loan other than for services rendered") (emphasis added).

B. The Structure Of Section 2607 Further Indicates That 2607(b) Applies To Undivided, Unearned Charges.

The Fifth Circuit further purported to find support for its interpretation in the structure of Section 2607. It observed that both Subsections (a) and (b) of the provision began with the phrase "No person shall give and no person shall accept . . . ." Relying on the principle that "'[a] term appearing in several places in a statutory text is generally read the same way each time it appears,'" the court of appeals concluded that because Subsection (a) requires two parties, Subsection (b) "should require two culpable actors as well." Pet. App. 8a (citation omitted). The court's analysis is flawed. In fact, the structure of the statute strongly supports the opposite conclusion.

1. The premise of the Fifth Circuit's analysis – that Subsection (a) requires two culpable parties by virtue of the language it shares with Subsection (b) – is incorrect. To the extent Subsection (a) requires two culpable parties, that is because the it applies only to payments made pursuant to an "agreement or understanding." 12 U.S.C. § 2607(a).

2. The Fifth Circuit's construction, on the other hand, renders Subsection (b) largely surplusage Having already prohibited "kickbacks" by name in Subsection (a), Congress presumably had something else in mind for Subsection (b). The title of the Section suggests, and the language of the Subsection confirms, that the role is prohibiting unearned fees. *See* 12 U.S.C. § 2607 ("Prohibition against kickbacks *and* unearned fees") (emphasis added).

Admittedly, it is possible to conjure a handful of hypothetical situations in which Subsection (b) performs some independent function even under the court of appeals' interpretation. For example, Subsection (a) prohibits kickbacks only "pursuant to [an] agreement or understanding." Some courts have speculated that Subsection (b) targets gratuitous kickbacks that would otherwise fall outside the scope of Subsection (a). *See Boulware v. Crossland Mortg. Corp.*, 291 F.3d 261, 266 (4th Cir. 2002). But it is hard to imagine why Congress would go through the trouble of enacting Subsection (b) simply to repeal a limitation it had just written into Subsection (a). It would have been easier, and clearer, to simply omit the limitation from Subsection (a) in the first place.

HUD's construction of the statute is by far the more natural, affording Subsection (b) the important independent function of protecting consumers from fraudulent charges for services never performed. While petitioners' interpretation leaves some overlap between Subsections (a) and (b) – a traditional kickback violates both – that is true under the Fifth Circuit's interpretation as well. As between a construction that entails a degree of unavoidable overlap and one that renders an entire subsection

almost entirely surplusage, the former is by far more likely the one Congress intended.

C. Banning Undivided, Unearned Charges Is Consistent With RESPA's Core Purpose Of Preventing Abusive Practices That Increase Settlement Costs.

The Fifth Circuit pointed out that the statutory purposes section of the statute lists "the elimination of kickbacks or referral fees" as among Congress's objectives but does not expressly mention unearned fees. Pet. App. 10a. (quoting 12 U.S.C. § 2601(b)(2)). From this, the court concluded that RESPA was intended to "explicitly and *exclusively* prohibit[] kickback and referral fees." *Id*. (emphasis in original). That is simply wrong.

1. While it is true that Congress intended RESPA to address kickbacks, the Fifth Circuit ignored the first, overarching expression of Congress's intent in enacting RESPA:

> The Congress finds that significant reforms in the real estate settlement process are needed to insure that consumers throughout the Nation are provided with greater and more timely information on the nature and costs of the settlement process and are *protected from unnecessarily high settlement charges caused by certain abusive practices* that have developed in some areas of the country.

12 U.S.C. § 2601(a) (emphasis added).

For most Americans, purchasing a home is "one of the largest and most complex financial transactions in their lives." 59 Fed. Reg. 37,360,

37,362 (July 21, 1994). Congress recognized that consumers' "lack of understanding . . . about the settlement process and its costs" made them vulnerable to abuse. S. REP. No. 93-866, at 2. Padding closing costs with fraudulent fees for services never rendered is indisputably an "abusive practice[]" that inflates settlement costs unnecessarily. In this case, for example, by charging fees for loan discounts it never provided, Quicken increased petitioners' collective settlement costs by thousands of dollars. This had a far greater effect on petitioners' settlement costs than any ten-dollar kickback would have. *Compare Weizeorick v. ABN Amro Mortg. Grp., Inc.*, 337 F.3d 827, 829 (7th Cir. 2003). Consistent with its broader objectives, Congress thus regulated not only kickbacks, but also "unearned fees, and unreasonable escrow accounts," each of which "increase[s] settlement costs to home buyers without providing any real benefits to them." S. REP. No. 93-866, at 3, 2 (1974); *see also* H.R. REP. No. 93-1177, at 3 (1974) (same).

There is ample basis to believe that without protection against unearned fees, consumers would be subject to all manner of fraudulent charges at closing. Indeed, petitioners' experiences are far from uncommon. HUD has repeatedly determined that other lenders have engaged in the same practice of charging loan discount points without providing any reduction in interest rate,[18] and has conveyed those findings to Congress on more than one occasion.[19]

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[18] *See* HUD Audit Case No. 2008-SE-1004, at 8-10 (2008), *available at* http://www.hudoig.gov/pdf/auditreports/WA/

In light of the substantial risk to consumers, and Congress's express purpose of protecting homebuyers from abusive practices that lead to excessive settlement fees, it is difficult to believe that Congress intended to draw a critical distinction between a settlement service provider who retained 99.99 percent of an unearned fee for itself, and one who retained 100 percent of the fee. The effect on the consumer, and the provider's culpability, is materially the same in either case. Nor did the Fifth Circuit offer any explanation why Congress would have intended to prohibit even small unearned fees when they are split, but turn a blind eye when providers falsely charge exorbitant fees for services they never provided, so long as they retain the entirety of the ill-gotten gains for themselves.

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ig0801004.pdf; HUD Audit Case No. 2005-FW-1019, at 5 (2005), *available at* http://archives.hud.gov/offices/oig/reports/files/ig561019.pdf; HUD Audit Case No. 2005-FW-1014, at 5-6 (2005), *available at* http://archives.hud.gov/offices/oig/reports/files/ig561014.pdf,; HUD Audit Case No. 2005-FW-1017, at 6 (2005), *available at available at* http://archives.hud.gov/offices/oig/reports/files/ig561017.pdf; HUD Audit Case No. 2004-LA-1005, at 3-6 (2004), *available at* http://archives.hud.gov/offices/oig/reports/files/ig491005.pdf.

[19] *See* U.S. DEP'T OF HOUS. & URBAN DEV., OFFICE OF THE INSPECTOR GEN., SEMIANNUAL REPORT TO CONG., APRIL 1, 2008 THROUGH SEPTEMBER 30, 2008, at 12-13, *available at* http://www.hudoig.gov/pdf/sar/sar60.pdf; U.S. DEP'T OF HOUS. & URBAN DEV., OFFICE OF THE INSPECTOR GEN., SEMIANNUAL REPORT TO CONG., APRIL 1, 2005 THROUGH SEPTEMBER 30, 2005, at 14, *available at* http://www.hudoig.gov/pdf/sar/sar54.pdf.

2. Quicken suggests that Congress would have drawn such distinctions to prevent Section 2607(b) from becoming "a price-control mechanism." BIO 25. But petitioners do not claim that Quicken violated the statute by charging an unreasonable price for a service it actually performed.[20] Rather, they allege that Quicken did not provide the service for which that they had paid. As Judge Higginbotham explained, determining whether a rate is reasonable is very different from "determining whether *any* service was provided" at all. Pet. App. 17a (emphasis added). Prohibiting providers from charging for services never performed is no more a form of price-control than are statutes prohibiting fraud.

To be sure, petitioners' interpretation of the statute requires courts to decide whether a charge was earned. But so does Quicken's. Respondent acknowledges that once a fee is split, the question becomes whether the recipient's share was "for services actually performed." 12 U.S.C. § 2607(b). To the extent that determination may be difficult in some cases, the difficulty is an unavoidable consequence of Congress's decision to prohibit in Section 2607(b) certain fees only if they are unearned. Any complaints about that choice are properly directed to Congress, not this Court.

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[20] As the Fifth Circuit observed, Pet. App. 5a-6a, all circuits agree that a provider does not violate the statute simply by overcharging for a service actually provided.

II. If Section 2607(b) Is Ambiguous, HUD's Interpretation Of The Statute Is Entitled To Deference.

"[W]hen it appears that Congress delegated authority to [an] agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority," *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001), courts must accept the agency's resolution of any statutory ambiguity unless the statute "cannot bear" the agency's reading, *see Sullivan v. Everhart*, 494 U.S. 83, 91 (1990). *See Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

In this case, Congress charged HUD with responsibility to authoritatively resolve any statutory ambiguity under RESPA, delegating it the power "to prescribe such rules and regulations, to make such interpretations, and to grant such reasonable exemptions . . . as may be necessary to achieve the purposes of [the statute]." 12 U.S.C. § 2617(a). Pursuant to that grant of authority, HUD has repeatedly construed RESPA to prohibit unearned fees whether split or not. To the extent the statute itself does not already resolve that question, HUD's reasonable interpretation controls.

A. The Regulations, As Construed By HUD, Merit *Chevron* Deference.

Deference is due first, and most straightforwardly, to HUD's interpretation as embodied in its notice-and-comment regulations, known collectively as Regulation X.

As originally enacted, the regulation largely restated the language of Section 2607(b). 24 C.F.R. § 3500.14(b) (1977). In 1992, HUD amended the regulation to, among other things, address "certain matters which were previously only covered by informal legal or program advice." 57 Fed. Reg. 49,600, 49,601 (Nov. 2, 1992). Consistent with the agency's prior understanding of the statute[21] the Secretary amended the regulation to add that:

> A charge by a person for which no or nominal services are performed or for which duplicative fees are charged is an unearned fee and violates this section. The source of the payment does not determine whether or not a service is compensable. Nor may the prohibitions of this Part be avoided by creating an arrangement wherein the purchaser of services splits the fee.

24 C.F.R. § 3500.14(c).[22]

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[21] *See* 41 Fed. Reg. 20,279, 20,289 (May 17, 1976) (RESPA consumer information booklet) (explaining that in addition to RESPA's ban on kickbacks, "[i]t is *also* illegal to charge or accept a fee or part of a fee where no service has actually been performed") (emphasis added).

[22] The Subsection is entitled "No split of charges except for actual services performed." However, any inference from this language that HUD views the statute as prohibiting only split fees is unsupported. In its 2001 Statement of Policy, HUD explained that the "rule headings and preamble text are a generalized description of Section 8 that is more developed in the actual regulation text . . . HUD believes that the actual text of the rules, as amended in 1992, makes clear that Section 8(b)'s prohibitions against unearned fees apply even when only one

For at least a decade, HUD has construed this regulation to prohibit all unearned fees, whether split or not. *See, e.g.*, Statement of Policy, 66 Fed. Reg. 53,052, 53,053 (Oct. 18, 2001) ("Since RESPA was enacted, HUD has consistently interpreted Section [2607(b)] and HUD's REPSA regulations to prohibit settlement service providers from charging unearned fees . . . ."); *id.* at 53,057 ("HUD guidance and regulations have consistently interpreted Section [2607] as prohibiting all unearned fees."); *id*. at 53,058 (explaining that the "regulations also make clear that a charge by a single service provider where little or no services are performed is an unearned fee that is prohibited by the statute"); *see also supra* n. 7 (amicus briefs expressing same interpretation of the regulations). That interpretation of the regulation is entitled to deference unless "plainly erroneous or inconsistent with the regulations or there is any other reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question." *Talk Am., Inc. v. Mich. Bell Tel. Co.*, 131 S. Ct. 2254, 2261 (2011) (alteration in original). In this case, the agency's interpretation of its regulation is both long-standing and eminently reasonable.

By its terms, the regulation makes clear that all unearned fees, even if charged and kept by a single provider, violate the statute. The regulation thus states that a single person, acting alone, may run afoul of the provision. *See* 24 C.F.R. § 3500.14(c) ("A

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settlement service provider is involved." 66 Fed. Reg. 53,052, 53,057 n.4 (Oct. 18, 2001).

charge by *a person* for which no or nominal services are performed" violates the statute) (emphasis added). And it makes clear, without qualification, that charging an unearned fee constitutes a full and completed violation. *Id*. ("A charge by a person for which no or nominal services are performed . . . *violates this section.*") (emphasis added). The regulation does not so much as hint that there is an additional requirement that the fee be shared in order to violate the statute and the regulation.

The final sentence of the regulation confirms this reading, providing that the statute is violated by "an arrangement wherein the purchaser of services splits the fee" between two providers. 24 C.F.R. 3500.14(c). Under the Fifth Circuit's construction, the statute would not be violated in such circumstances because neither provider would share the fee it received from the consumer with anyone else. Yet, the regulation makes perfectly clear that even in the absence of a split, the statute is violated.

Another provision, later in the regulation, makes the same point. In addressing fees for multiple services, the regulation explains that "to receive compensation as a title agent, the attorney must perform core title agent services . . . separate from attorney services," 24 C.F.R. § 3500.14(g)(3). By giving an example in which a single person violates the statute simply by charging an unearned fee, without any suggestion that the fee was split with another provider, the regulation confirms HUD's view that the statute is not limited to kickbacks.

B. HUD's 2001 Statement Of Policy Also Merits *Chevron* Deference.

Even apart from the regulations, the 2001 Statement of Policy unambiguously establishes HUD's interpretation of Section 2607(b) as extending to all unearned fees, and that interpretation independently warrants *Chevron* deference.

1. The Fifth Circuit did not dispute that the Statement of Policy unequivocally construes RESPA to prohibit charging unearned fees even if they are not split with another provider. Nor could it. In the Statement, HUD straightforwardly explained that it "specifically interprets [Section 2607(b)] as not being limited to a situation where at least two persons split or share an unearned fee." 66 Fed. Reg. at 53,057.

Instead, the court of appeals held that the Statement of Policy was ineligible for *Chevron* deference because it "was not promulgated through traditional notice-and-comment rulemaking or any similar deliberative process." Pet. App. 13a. In the panel's view, "interpretations such as those in opinion letters – like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law – do not warrant *Chevron*-style deference." *Id*. 12a-13a (quoting *Christensen v. Harris Cnty.*, 529 U.S. 576, 587 (2000)). That conclusion was in error.

This Court has repeatedly rejected the suggestion that notice and comment is a prerequisite for *Chevron* deference. *See, e.g.*, *Barnhart v. Walton*, 535 U.S. 212, 221-22 (2002) (noting that, to the extent *Christensen* "suggested an absolute rule" that agency interpretations reached "through means less formal than 'notice and comment'" do not qualify for

Chevron deference, *Mead* "denied the suggestion"); *United States v. Mead Corp.*, 533 U.S. 218, 231 (2001) ("[T]he want of" notice-and-comment procedure "does not decide the case, for we have sometimes found reasons for *Chevron* deference even when no such administrative formality was required and none was afforded."); *Edelman v. Lynchburg Coll.*, 535 U.S. 106, 114 (2002) ("[D]eference under *Chevron* . . . does not necessarily require an agency's exercise of express notice-and-comment rulemaking power."). Indeed, this Court has given authoritative weight to agency interpretations embodied in formats even less formal than the Statement of Policy at issue here. *See, e.g.*, *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633 (1990) (deferring to Pension Benefit Guaranty Corporation's decision to restore pension benefit plan); *Young v. Cmty. Nutrition Inst.*, 476 U.S. 974 (1986) (deferring to interpretation reflected in agency's longstanding practice, but not set forth in any regulation); *cf. also Gonzales v. Oregon*, 546 U.S. 243, 275 (2006) (Scalia, J., dissenting) (urging deference to an interpretive rule promulgated by the Attorney General).

Neither *Christensen* nor *Mead* purported to overrule these decisions. To the contrary, in *Mead* itself, this Court reaffirmed a prior decision in which it deferred to a letter to a private party from a Senior Deputy Comptroller of the Currency. *See Mead*, 533 U.S. at 231, 252 (citing *NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251 (1995)).

2. Rather than asking simply whether an interpretation is the product of notice-and-comment rulemaking, this Court considers "a variety of indicators that Congress would expect *Chevron*

deference." *Mead*, 533 U.S. at 237. "[T]he ultimate question," the Court has explained, is "whether Congress would have intended, and expected, courts to treat an agency's rule, regulation, application of a statute, or other agency action as within, or outside, its delegation to the agency of 'gap-filling' authority." *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 173 (2007) (emphasis omitted). For a number of reasons, HUD's Statement of Policy is entitled to *Chevron* deference under *Mead*.[23]

First, HUD's Statement of Policy "assumes a form expressly provided for by Congress." *Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 157 (1991). In conferring lawmaking authority on the agency, Congress gave HUD the option to construe the statute through "regulations" *or* through "such interpretations . . . as may be necessary to achieve the purposes of" the statute. 12 U.S.C. § 2617(a). Nothing in the text of the provision distinguishes between thsee modes of interpretation or otherwise suggests that Congress intended to give HUD's interpretations the force of law only if set forth in a regulation.

Second, HUD expressly exercised that gap-filling authority when it issued the Statement of Policy. *See* 66 Fed. Reg. 53,052 (explaining that HUD was "issuing this Statement of Policy . . . as a formal pronouncement of its interpretation of relevant

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[23] As it unquestionably represents the authoritative interpretation of the agency, the Statement of Policy also merits deference under the Court's pre-*Mead* standard. *See Mead Corp.*, 533 U.S. at 239 (Scalia, J., dissenting).

statutory and regulatory provisions," pursuant to its power "to prescribe such rules and regulations [and] to make such interpretations * * * as may be necessary to achieve the purposes of [RESPA]") (quoting 12 U.S.C. § 2617(a)); *see also* 24 C.F.R. § 3500.4(a).

Third, Congress encouraged the public to rely on HUD's interpretations as having the force of law, whether expressed through regulations or interpretations like the 2001 Statement of Policy. RESPA's safe harbor provision shields providers from liability for any act done "in conformity with any rule, regulation, *or interpretation*" issued by the agency. 12 U.S.C. § 2617(b) (emphasis added). That Congress protected providers from liability for relying on an agency interpretation, as well as agency regulations, strongly suggests that Congress intended both forms of interpretation to be authoritative.

Fourth, though not issued through notice and comment, HUD's Statement of Policy was developed through a formal and deliberative process. *See Mead*, 533 U.S. at 228. In contrast to the ruling letter in *Mead*, which was one among thousands churned out by low-level bureaucrats in more than forty Customs offices, *id*. at 233, HUD's Statement of Policy was issued in the name of the Secretary of Labor who accordingly took political responsibility for its content. *See*, *e.g.*, 66 Fed. Reg. at 53,058 ("The Secretary, charged by statute with interpreting RESPA, interprets Section [2607(b)] to mean that two persons are not required for the provision to be violated."). Moreover, the Statement was developed by the Assistant Secretary for Housing (also known as the Federal Housing Commissioner), the third-

ranking,[24] Senate-confirmed official[25] in the agency in charge of RESPA's implementation. *Id*. at 53,052. And as required by HUD regulations governing the exercise of its interpretive authority, 24 C.F.R. § 3500.4(a)(ii), HUD published the Statement of Policy in the Federal Register, where it has been available for public inspection and review for more than a decade. *See* 66 Fed. Reg. 53,052.

The Statement also reflects the agency's careful contemplation of the various competing interpretations and policy considerations underlying the proper construction of the statute. The agency explained that it was issuing the Statement "as a result of questions raised by" *Echevarria v. Chi. Title & Trust Co.*, 256 F.3d 623 (2001). 66 Fed. Reg. at 53,052. The Statement took in account the Seventh Circuit's rationale for deciding that RESPA prohibits only kickbacks, *id*. at 53,058, but ultimately concluded that the court's interpretation was not compelled by the text, *id*. 53,058-059, and is "contrary to the Congressional finding when enacting RESPA that consumers need protection from unnecessarily high settlement charges," *id.* at 53,058. The agency explained that although the statute establishes important disclosure requirements, effective protection against unearned fees is a

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[24] Exec. Order No. 13,243, 66 Fed. Reg. 66,262 (Dec. 18, 2001).

[25] 42 U.S.C. § 3533(a)-(b).

necessary supplement to the Act's disclosure provisions. *Id*. at 53,057.[26]

Fifth, the agency had previously taken the same position in a prior notice-and-comment proceeding. In 1996, HUD explained in a preamble to a final notice-and-comment rulemaking that the premise of some comments – "that a single settlement service provider can charge unearned or excessive fees so long as the fees are not shared with another" – misconstrued the unearned fee provision. 61 Fed. Reg. 29,238, 29,249 (June 7, 1996).[27] "The Secretary, charged by statute with interpreting RESPA, interprets [Section 2607(b)] to mean that two persons are not required for the provision to be violated." *Id*. The Secretary acknowledged that some cases held to the contrary, but found "their reasoning not to be persuasive," given that the "statute and the legislative history make it clear that no person is allowed to receive 'any portion' of charges for settlement services, except for services actually performed." *Id*. Restricting Section 2607(b) to split

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[26] In light of the Statement's lengthy and thoughtful analysis, the Fifth Circuit was simply wrong to assert that the agency had failed to identify "any clear methodology by which it reached its conclusion." Pet. App. 13a.

[27] In 1992, HUD had amended Regulation X to exempt from scrutiny under Section 2607 charges for use of computer systems that allowed borrowers to compare loans. *See* 59 Fed. Reg. 37,360, 37,361 (July 21, 1994). Two years later, the agency proposed to narrow this exemption to only "qualified" computer systems. *Id.* at 37,368. In response, some commenters questioned whether HUD had authority to regulate payments for the use of *any* computer system, given that the computer fee generall was not split. 61 Fed. Reg. 29at 29,249.

fees, the Secretary concluded, was "an unnecessarily restrictive interpretation of a statute designed to reduce unnecessary costs to consumers." *Id*.

Sixth, HUD possesses considerable specialized expertise regarding the settlement service industry. *See Mead* 533 U.S. at 228. Indeed, RESPA was enacted in large part in response to a study Congress had asked HUD and the Veterans Administration to undertake, in recognition of those agencies' housing market expertise. *See* Emergency Home Finance Act of 1970, Pub. L. No. 91-351, 84 Stat. 462 (1970). And HUD was later given interpretative authority over the Act in large part at the request of the settlement services industry, which explained that HUD "is in the business [and] understands our questions."[28]

Seventh, the interpretation in HUD's Statement of Policy is one of "longstanding duration." *Barnhart*, 535 U.S. at 220 (quotation marks omitted). HUD first construed the statute to prohibit all unearned fees in a consumer information booklet in 1976. 41 Fed. Reg. at 20,289. It repeated that understanding in its amendments to Regulation X in 1992, 24 C.F.R. § 3500.14(c), and in the preamble to further regulatory amendments in 1996, 61 Fed. Reg. at 29,249. Over the past decade, it has consistently repeated and defended that position in amicus briefs

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[28] *Real Estate Settlement Procedures Act of 1974: Hearings on H.R. 5352, S. 2327, and H.R. 10283 Before the Subcomm. on Hous. & Cmty. Dev. of the H. Comm. on Banking, Currency & Hous.,* 94th Cong. 327 (1975) (statement of James D. Rowe, Mortgage Bankers Association of America).

filed in numerous courts, including most recently in this case. *Supra* n. 7.

Finally, Congress has acquiesced to HUD's interpretation by electing not to alter Section 2607(b) during the thirty-five years in which HUD has repeatedly articulated and enforced its view of the statute. *See Barnhart*, 535 U.S. at 220. In addition to its regulations, Statement of Policy, and other public pronouncements noted above, HUD has directly reported to Congress its view that the provisions of Section 2607(b) apply "where one settlement service provider . . . accepts any portion of a charge other than for services actually performed."[29] HUD has likewise reported to Congress its enforcement actions against other lenders accused to be engaging in precisely the same conduct as Quicken in this case.[30] Nonetheless, although Congress has amended Section 2607 five times – including, on one occasion, to forestall the

[29] BD. OF GOVERNORS OF THE FED. RESERVE SYS. & DEP'T OF HOUS. & URBAN DEV., JOINT REPORT TO CONG. CONCERNING REFORM TO THE TRUTH IN LENDING ACT AND THE REAL ESTATE SETTLEMENT PROCEDURES ACT 29 (1998), *available at* http://www.federalreserve.gov/boarddocs/rptcongress/tila.pdf.

[30] *See* U.S. DEP'T OF HOUSING & URBAN DEV., OFFICE OF THE INSPECTOR GEN., SEMIANNUAL REPORT TO CONG., APRIL 1, 2008 THROUGH SEPTEMBER 30, 2008, 12-13, *available at* http://www.hudoig.gov/pdf/sar/sar60.pdf (reporting on enforcement actions against lenders who charged loan discount points without providing any loan discount); U.S. DEP'T OF HOUSING & URBAN DEV. OFFICE OF THE INSPECTOR GEN., SEMIANNUAL REPORT TO CONG., APRIL 1, 2005 THROUGH SEPTEMBER 30, 2005, 14, *available at* http://www.hudoig.gov/pdf/sar/sar54.pdf (same).

effective date of another subsection of the same regulation that governs unearned fees[31] – it has never altered HUD's interpretation of Section 2607(b).[32] Such "congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress." *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 846 (1986) (quotation marks omitted).

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[31] Pub. L. No. 104-208, tit. II, § 2103(f), 110 Stat. 3009-401 (1996).

[32] Pub. L. No. 98-181, tit. I, ch. I, § 461(b), (c), 97 Stat. 1231 (1983); Pub. L. No. 100-242, tit.V, § 570(g), 101 Stat. 1950 (1988); Pub. L. No. 102-54, § 13(d)(4), 105 Stat. 275 (1991); Pub. L. No. 104-208, tit. II, § 2103(c)(2), (d), 110 Stat. 3009-400 (1996); Pub. L. No. 111-203, tit. X, subtit. H, § 1098(6), (7), 124 Stat. 2104 (2010).

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

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STATUTORY APPENDIX

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APPENDIX A

Real Estate Settlement Procedures Act

The Real Estate Settlement Procedures Act of 1974, Pub. L. No. 93-533*, as amended and codified at* 12 U.S.C. § 2601 et seq.*, provides in relevant part:*

§ 1 [12 U.S.C. § 2601]. FINDINGS AND PURPOSE.

(a) The Congress finds that significant reforms in the real estate settlement process are needed to insure that consumers throughout the Nation are provided with greater and more timely information on the nature and costs of the settlement process and are protected from unnecessarily high settlement charges caused by certain abusive practices that have developed in some areas of the country. The Congress also finds that it has been over two years since the Secretary of Housing and Urban Development and the Administrator of Veterans' Affairs submitted their joint report to the Congress on "Mortgage Settlement Costs" and that the time has come for the recommendations for Federal legislative action made in that report to be implemented.

(b) It is the purpose of this Act to effect certain changes in the settlement process for residential real estate that will result –

(1) in more effective advance disclosure to home buyers and sellers of settlement costs;

(2) in the elimination of kickbacks or referral fees that tend to increase unnecessarily the costs of certain settlement services;

(3) in a reduction in the amounts home buyers are required to place in escrow accounts established to insure the payment of real estate taxes and insurance; and

(4) in significant reform and modernization of local recordkeeping of land title information.

§ 5 [12 U.S.C. § 2604]. HOME BUYING INFORMATION BOOKLETS.

(a) PREPARATION AND DISTRIBUTION. – The Director of the Bureau of Consumer Financial Protection (hereafter in this section referred to as the 'Director') shall prepare, at least once every 5 years, a booklet to help consumers applying for federally related mortgage loans to understand the nature and costs of real estate settlement services. The Director shall prepare the booklet in various languages and cultural styles, as the Director determines to be appropriate, so that the booklet is understandable and accessible to homebuyers of different ethnic and cultural backgrounds. The Director shall distribute such booklets to all lenders that make federally related mortgage loans. The Director shall also distribute to such lenders lists, organized by location, of homeownership counselors certified under section 106(e) of the Housing and Urban Development Act of

1968 (12 U.S.C. 1701x(e)) for use in complying with the requirement under subsection (c) of this section.

(b) CONTENTS. – Each booklet shall be in such form and detail as the Director shall prescribe and, in addition to such other information as the Director may provide, shall include in plain and understandable language the following information:

(1) A description and explanation of the nature and purpose of the costs incident to a real estate settlement or a federally related mortgage loan. The description and explanation shall provide general information about the mortgage process as well as specific information concerning, at a minimum

(A) balloon payments;

(B) prepayment penalties;

(C) the advantages of prepayment; and

(D) the trade-off between closing costs and the interest rate over the life of the loan.

(2) An explanation and sample of the uniform settlement statement required by section 4.

(3) A list and explanation of lending practices, including those prohibited by the Truth in Lending Act or other applicable Federal law, and of other unfair practices and unreasonable or unnecessary charges to be avoided by the prospective buyer with respect to a real estate settlement.

(4) A list and explanation of questions a consumer obtaining a federally related mortgage loan should ask regarding the loan, including whether the consumer will have the ability to repay the loan, whether the consumer sufficiently shopped for the loan, whether the loan terms include prepayment

penalties or balloon payments, and whether the loan will benefit the borrower.

(5) An explanation of the right of rescission as to certain transactions provided by sections 125 and 129 of the Truth in Lending Act.

(6) A brief explanation of the nature of a variable rate mortgage and a reference to the booklet entitled 'Consumer Handbook on Adjustable Rate Mortgages', published by the Director, or to any suitable substitute of such booklet that the Director may subsequently adopt pursuant to such section.

(7) A brief explanation of the nature of a home equity line of credit and a reference to the pamphlet required to be provided under section 127A of the Truth in Lending Act.

(8) Information about homeownership counseling services made available pursuant to section 106(a)(4) of the Housing and Urban Development Act of 1968 (12 U.S.C. 1701x(a)(4)), a recommendation that the consumer use such services, and notification that a list of certified providers of homeownership counseling in the area, and their contact information, is available.

(9) An explanation of the nature and purpose of escrow accounts when used in connection with loans secured by residential real estate and the requirements under section 10 of this Act regarding such accounts.

(10) An explanation of the choices available to buyers of residential real estate in selecting persons to provide necessary services incidental to a real estate settlement.

(11) An explanation of a consumer's responsibilities, liabilities, and obligations in a mortgage transaction.

(12) An explanation of the nature and purpose of real estate appraisals, including the difference between an appraisal and a home inspection.

(13) Notice that the Office of Housing of the Department of Housing and Urban Development has made publicly available a brochure regarding loan fraud and a World Wide Web address and toll-free telephone number for obtaining the brochure.

The booklet prepared pursuant to this section shall take into consideration differences in real estate settlement procedures that may exist among the several States and territories of the United States and among separate political subdivisions within the same State and territory.

(c) Each lender shall include with the booklet a good faith estimate of the amount or range of charges for specific settlement services the borrower is likely to incur in connection with the settlement as prescribed by the Bureau. Each lender shall also include with the booklet a reasonably complete or updated list of homeownership counselors who are certified pursuant to section 106(e) of the Housing and Urban Development Act of 1968 (12 U.S.C. 1701x(e)) and located in the area of the lender.

(d) Each lender referred to in subsection (a) of this section shall provide the booklet described in such subsection to each person from whom it receives or for whom it prepares a written application to borrow money to finance the purchase of residential real estate. The lender shall provide the booklet in the

version that is most appropriate for the person receiving it. Such booklet shall be provided by delivering it or placing it in the mail not later than 3 business days after the lender receives the application, but no booklet need be provided if the lender denies the application for credit before the end of the 3-day period.

(e) Booklets may be printed and distributed by lenders if their form and content are approved by the Bureau as meeting the requirements of subsection (b) of this section.

§ 8 [12 U.S.C. § 2607]. PROHIBITION AGAINST KICKBACKS AND UNEARNED FEES.

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

(b) No person shall give and no person shall accept any portion, split, or percentage of any charge made or received for the rendering of a real estate settlement service in connection with a transaction involving a federally related mortgage loan other than for services actually performed.

(c) Nothing in this section shall be construed as prohibiting (1) the payment of a fee (A) to attorneys at law for services actually rendered or (B) by a title company to its duly appointed agent for services actually performed in the issuance of a policy of title

insurance or (C) by a lender to its duly appointed agent for services actually performed in the making of a loan, (2) the payment to any person of a bona fide salary or compensation or other payment for goods or facilities actually furnished or for services actually performed, (3) payments pursuant to cooperative brokerage and referral arrangements or agreements between real estate agents and brokers, (4) affiliated business arrangements so long as (A) a disclosure is made of the existence of such an arrangement to the person being referred and, in connection with such referral, such person is provided a written estimate of the charge or range of charges generally made by the provider to which the person is referred (i) in the case of a face-to-face referral or a referral made in writing or by electronic media, at or before the time of the referral (and compliance with this requirement in such case may be evidenced by a notation in a written, electronic, or similar system of records maintained in the regular course of business); (ii) in the case of a referral made by telephone, 1 within 3 business days after the referral by telephone, (and in such case an abbreviated verbal disclosure of the existence of the arrangement and the fact that a written disclosure will be provided within 3 business days shall be made to the person being referred during the telephone referral); or (iii) in the case of a referral by a lender (including a referral by a lender to an affiliated lender), at the time the estimates required under section 5(c) are provided (notwithstanding clause (i) or (ii)); and any required written receipt of such disclosure (without regard to the manner of the disclosure under clause (i), (ii), or (iii)) may be obtained at the closing or settlement (except that a person making a face-to-face referral

who provides the written disclosure at or before the time of the referral shall attempt to obtain any required written receipt of such disclosure at such time and if the person being referred chooses not to acknowledge the receipt of the disclosure at that time, that fact shall be noted in the written, electronic, or similar system of records maintained in the regular course of business by the person making the referral), (B) such person is not required to use any particular provider of settlement services, and (C) the only thing of value that is received from the arrangement, other than the payments permitted under this subsection, is a return on the ownership interest or franchise relationship, or (5) such other payments or classes of payments or other transfers as are specified in regulations prescribed by the Bureau, after consultation with the Attorney General, the Secretary of Veterans Affairs, the Federal Home Loan Bank Board, the Federal Deposit Insurance Corporation, the Board of Governors of the Federal Reserve System, and the Secretary of Agriculture. For purposes of the preceding sentence, the following shall not be considered a violation of clause (4)(B): (i) any arrangement that requires a buyer, borrower, or seller to pay for the services of an attorney, credit reporting agency, or real estate appraiser chosen by the lender to represent the lender's interest in a real estate transaction, or (ii) any arrangement where an attorney or law firm represents a client in a real estate transaction and issues or arranges for the issuance of a policy of title insurance in the transaction directly as agent or through a separate corporate title insurance agency that may be established by that attorney or law firm and operated as an adjunct to his or its law practice.

(d) Penalties for violations; joint and several liability; treble damages; actions for injunction by Bureau and Secretary and by State officials; costs and attorney fees; construction of State laws

(1) Any person or persons who violate the provisions of this section shall be fined not more than $10,000 or imprisoned for not more than one year, or both.

(2) Any person or persons who violate the prohibitions or limitations of this section shall be jointly and severally liable to the person or persons charged for the settlement service involved in the violation in an amount equal to three times the amount of any charge paid for such settlement service.

(3) No person or persons shall be liable for a violation of the provisions of section 8(c)(4)(A) of this section if such person or persons proves by a preponderance of the evidence that such violation was not intentional and resulted from a bona fide error notwithstanding maintenance of procedures that are reasonably adapted to avoid such error.

(4) The Bureau, the Secretary, or the attorney general or the insurance commissioner of any State may bring an action to enjoin violations of this section. Except, to the extent that a person is subject to the jurisdiction of the Bureau, the Secretary, or the attorney general or the insurance commissioner of any State, the Bureau shall have primary authority to enforce or administer this section, subject to subtitle B of the Consumer Financial Protection Act of 2010.

(5) In any private action brought pursuant to this subsection, the court may award to the prevailing party the court costs of the action together with reasonable attorneys fees.

(6) No provision of State law or regulation that imposes more stringent limitations on affiliated business arrangements shall be construed as being inconsistent with this section.

§ 19 [12 U.S.C. § 2617]. AUTHORITY OF BUREAU.

(a) The Bureau is authorized to prescribe such rules and regulations, to make such interpretations, and to grant such reasonable exemptions for classes of transactions, as may be necessary to achieve the purposes of this Act.

(b) No provision of this Act or the laws of any State imposing any liability shall apply to any act done or omitted in good faith in conformity with any rule, regulation, or interpretation thereof by the Bureau or the Attorney General, notwithstanding that after such act or omission has occurred, such rule, regulation, or interpretation is amended, rescinded, or determined by judicial or other authority to be invalid for any reason.

(c)(1) The Bureau may investigate any facts, conditions, practices, or matters that may be deemed necessary or proper to aid in the enforcement of the provisions of this Act, in prescribing of rules and regulations thereunder, or in securing information to serve as a basis for recommending further legislation concerning real estate settlement practices. To aid in

the investigations, the Bureau is authorized to hold such hearings, administer such oaths, and require by subpena the attendance and testimony of such witnesses and production of such documents as the Bureau deems advisable.

(2) Any district court of the United States within the jurisdiction of which an inquiry is carried on may, in the case of contumacy or refusal to obey a subpena of the Bureau issued under this section, issue an order requiring compliance therewith; and any failure to obey such order of the court may be punished by such court as a contempt thereof.

(d) Delay of effectiveness of recent final regulation relating to payments to employees –

(1) In general

The amendment to part 3500 of title 24 of the Code of Federal Regulations contained in the final regulation prescribed by the Secretary and published in the Federal Register on June 7, 1996, which will, as of the effective date of such amendment –

> **(A)** eliminate the exemption for payments by an employer to employees of such employer for referral activities which is currently codified as section 3500.14(g)(1)(vii) of such title 24; and
>
> **(B)** replace such exemption with a more limited exemption in new clauses (vii), (viii), and (ix) of section 3500.14 of such title 24, shall not take effect before July 31, 1997.

(2) Continuation of prior rule –

The regulation codified as section 3500.14(g)(1)(vii) of title 24 of the Code of Federal Regulations, relating to employer-employee

payments, as in effect on May 1, 1996, shall remain in effect until the date the amendment referred to in paragraph (1) takes effect in accordance with such paragraph.

(3) Public notice of effective date –

The Secretary shall provide public notice of the date on which the amendment referred to in paragraph (1) will take effect in accordance with such paragraph not less than 90 days and not more than 180 days before such effective date.

APPENDIX B

Regulation X

Part 3500 of Title 24, Chapter XX of the Code of Federal Regulations, 24 C.F.R. § 3500 et seq.*, provides in relevant part:*

§ 3500.4. RELIANCE UPON RULE, REGULATION, OR INTERPRETATION BY HUD.

(a) *Rule, regulation or interpretation*.

(1) For purposes of sections 19 (a) and (b) of RESPA (12 U.S.C. 2617 (a) and (b)) only the following constitute a rule, regulation or interpretation of the Secretary:

(i) All provisions, including appendices, of this part. Any other document referred to in this part is not incorporated in this part unless it is specifically set out in this part;

(ii) Any other document that is published in the Federal Register by the Secretary and states that it is an "interpretation," "interpretive rule," "commentary," or a "statement of policy" for purposes of section 19(a) of RESPA. Such documents will be prepared by HUD staff and counsel. Such documents may be revoked or amended by a subsequent document published in the Federal Register by the Secretary.

(iii) Any other document that is published in the Federal Register by the Secretary and

states that it is an "interpretation," "interpretive rule," "commentary," or a "statement of policy" for purposes of section 19(a) of RESPA. Such documents will be prepared by HUD staff and counsel. Such documents may be revoked or amended by a subsequent document published in the Federal Register by the Secretary.

(2) A "rule, regulation, or interpretation thereof by the Secretary" for purposes of section 19(b) of RESPA (12 U.S.C. 2617(b)) shall not include the special information booklet prescribed by the Secretary or any other statement or issuance, whether oral or written, by an officer or representative of the Department of Housing and Urban Development (HUD), letter or memorandum by the Secretary, General Counsel, any Assistant Secretary or other officer or employee of HUD, preamble to a regulation or other issuance of HUD, Public Guidance Document, report to Congress, pleading, affidavit or other document in litigation, pamphlet, handbook, guide, telegraphic communication, explanation, instructions to forms, speech or other material of any nature which is not specifically included in paragraph (a)(1) of this section.

(b) *Unofficial interpretations; staff discretion*. In response to requests for interpretation of matters not adequately covered by this part or by an official interpretation issued under paragraph (a)(1)(ii) of this section, unofficial staff interpretations may be provided at the discretion of HUD staff or counsel. Written requests for such interpretations should be directed to the address indicated in § 3500.3. Such

interpretations provide no protection under section 19(b) of RESPA (12 U.S.C. 2617(b)). Ordinarily, staff or counsel will not issue unofficial interpretations on matters adequately covered by this part or by official interpretations or commentaries issued under paragraph (a)(1)(ii) of this section.

(c) All informal counsel's opinions and staff interpretations issued before November 2, 1992, were withdrawn as of that date. Courts and administrative agencies, however, may use previous opinions to determine the validity of conduct under the previous Regulation X.

§ 3500.14. PROHIBITION AGAINST KICKBACKS AND UNEARNED FEES.

(a) *Section 8 violation*. Any violation of this section is a violation of section 8 of RESPA (12 U.S.C. 2607) and is subject to enforcement as such under § 3500.19.

(b) *No referral fees*. No person shall give and no person shall accept any fee, kickback or other thing of value pursuant to any agreement or understanding, oral or otherwise, that business incident to or part of a settlement service involving a federally related mortgage loan shall be referred to any person. Any referral of a settlement service is not a compensable service, except as set forth in § 3500.14(g)(1). A company may not pay any other company or the employees of any other company for the referral of settlement service business.

(c) *No split of charges except for actual services performed*. No person shall give and no person shall

accept any portion, split, or percentage of any charge made or received for the rendering of a settlement service in connection with a transaction involving a federally related mortgage loan other than for services actually performed. A charge by a person for which no or nominal services are performed or for which duplicative fees are charged is an unearned fee and violates this section. The source of the payment does not determine whether or not a service is compensable. Nor may the prohibitions of this Part be avoided by creating an arrangement wherein the purchaser of services splits the fee.

(d) *Thing of value*. This term is broadly defined in section 3(2) of RESPA (12 U.S.C. 2602(2)). It includes, without limitation, monies, things, discounts, salaries, commissions, fees, duplicate payments of a charge, stock, dividends, distributions of partnership profits, franchise royalties, credits representing monies that may be paid at a future date, the opportunity to participate in a money-making program, retained or increased earnings, increased equity in a parent or subsidiary entity, special bank deposits or accounts, special or unusual banking terms, services of all types at special or free rates, sales or rentals at special prices or rates, lease or rental payments based in whole or in part on the amount of business referred, trips and payment of another person's expenses, or reduction in credit against an existing obligation. The term "payment" is used throughout §§ 3500.14 and 3500.15 as synonymous with the giving or receiving any "thing of value" and does not require transfer of money.

(e) *Agreement or understanding*. An agreement or understanding for the referral of business incident to

or part of a settlement service need not be written or verbalized but may be established by a practice, pattern or course of conduct. When a thing of value is received repeatedly and is connected in any way with the volume or value of the business referred, the receipt of the thing of value is evidence that it is made pursuant to an agreement or understanding for the referral of business.

(f) *Referral*.

(1) A referral includes any oral or written action directed to a person which has the effect of affirmatively influencing the selection by any person of a provider of a settlement service or business incident to or part of a settlement service when such person will pay for such settlement service or business incident thereto or pay a charge attributable in whole or in part to such settlement service or business.

(2) A referral also occurs whenever a person paying for a settlement service or business incident thereto is required to use (see § 3500.2, "required use") a particular provider of a settlement service or business incident thereto.

(g) *Fees, salaries, compensation, or other payments*.

(1) Section 8 of RESPA permits:

(i) A payment to an attorney at law for services actually rendered;

(ii) A payment by a title company to its duly appointed agent for services actually performed in the issuance of a policy of title insurance;

(iii) A payment by a lender to its duly appointed agent or contractor for services actually performed in the origination, processing, or funding of a loan;

(iv) A payment to any person of a bona fide salary or compensation or other payment for goods or facilities actually furnished or for services actually performed;

(v) A payment pursuant to cooperative brokerage and referral arrangements or agreements between real estate agents and real estate brokers. (The statutory exemption restated in this paragraph refers only to fee divisions within real estate brokerage arrangements when all parties are acting in a real estate brokerage capacity, and has no applicability to any fee arrangements between real estate brokers and mortgage brokers or between mortgage brokers.);

(vi) Normal promotional and educational activities that are not conditioned on the referral of business and that do not involve the defraying of expenses that otherwise would be incurred by persons in a position to refer settlement services or business incident thereto; or

(vii) An employer's payment to its own employees for any referral activities.

(2) The Department may investigate high prices to see if they are the result of a referral fee or a split of a fee. If the payment of a thing of value bears no reasonable relationship to the market value of the goods or services provided, then the excess is not for

services or goods actually performed or provided. These facts may be used as evidence of a violation of section 8 and may serve as a basis for a RESPA investigation. High prices standing alone are not proof of a RESPA violation. The value of a referral (i.e., the value of any additional business obtained thereby) is not to be taken into account in determining whether the payment exceeds the reasonable value of such goods, facilities or services. The fact that the transfer of the thing of value does not result in an increase in any charge made by the person giving the thing of value is irrelevant in determining whether the act is prohibited.

(3) *Multiple services*. When a person in a position to refer settlement service business, such as an attorney, mortgage lender, real estate broker or agent, or developer or builder, receives a payment for providing additional settlement services as part of a real estate transaction, such payment must be for services that are actual, necessary and distinct from the primary services provided by such person. For example, for an attorney of the buyer or seller to receive compensation as a title agent, the attorney must perform core title agent services (for which liability arises) separate from attorney services, including the evaluation of the title search to determine the insurability of the title, the clearance of underwriting objections, the actual issuance of the policy or policies on behalf of the title insurance company, and, where customary, issuance of the title commitment, and the conducting of the title search and closing.

(h) *Recordkeeping*. Any documents provided pursuant to this section shall be retained for five (5) years from the date of execution.

(i) *Appendix B of this part*. Illustrations in Appendix B of this part demonstrate some of the requirements of this section.

APPENDIX C

HUD Statement of Policy

HUD's Statement of Policy 2001-1, 66 Fed. Reg. 53,052 (2001), provides in relevant part:

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 C.F.R. Part 3500

[Docket No. FR-4714-N-01]

RIN 2502-AH74

Real Estate Settlement Procedures Act Statement of Policy 2001–1: Clarification of Statement of Policy 1999–1 Regarding Lender Payments to Mortgage Brokers, and Guidance Concerning Unearned Fees Under Section 8(b)

AGENCY: Office of the Assistant Secretary for Housing-Federal Housing Commissioner, HUD.

ACTION: Statement of Policy 2001-1.

SUMMARY: This Statement of Policy is being issued to eliminate any ambiguity concerning the Department's position with respect to those lender payments to mortgage brokers characterized as yield

spread premiums and to overcharges by settlement service providers as a result of questions raised by two recent court decisions, *Culpepper* v. *Irwin Mortgage Corp*. and *Echevarria* v. *Chicago Title and Trust Co*., respectively. In issuing this Statement of Policy, the Department clarifies its interpretation of Section 8 of the Real Estate Settlement Procedures Act (RESPA) in Statement of Policy 1999-1 Regarding Lender Payments to Mortgage Brokers (the 1999 Statement of Policy), and reiterates its long-standing interpretation of Section 8(b)'s prohibitions. *Culpepper v. Irwin Mortgage Corp*. involved the payment of yield spread premiums from lenders to mortgage brokers. *Echevarria v. Chicago Title and Trust Co*. involved the applicability of Section 8(b) to a settlement service provider that overcharged a borrower for the service of another settlement service provider, and then retained the amount of the overcharge.

Today's Statement of Policy reiterates the Department's position that yield spread premiums are not per se legal or illegal, and clarifies the test for the legality of such payments set forth in HUD's 1999 Statement of Policy. As stated there, HUD's position that lender payments to mortgage brokers are not illegal per se does not imply, however, that yield spread premiums are legal in individual cases or classes of transactions. The legality of yield spread premiums turns on the application of HUD's test in the 1999 Statement of Policy as clarified today.

The Department also reiterates its long-standing position that it may violate Section 8(b) and HUD's implementing regulations: (1) For two or more persons to split a fee for settlement services, any

portion of which is unearned; or (2) for one settlement service provider to mark-up the cost of the services performed or goods provided by another settlement service provider without providing additional actual, necessary, and distinct services, goods, or facilities to justify the additional charge; or (3) for one settlement service provider to charge the consumer a fee where no, nominal, or duplicative work is done, or the fee is in excess of the reasonable value of goods or facilities provided or the services actually performed.

This Statement of Policy also reiterates the importance of disclosure so that borrowers can choose the best loan for themselves, and it describes disclosures HUD considers best practices. The Secretary is also announcing that he intends to make full use of his regulatory authority to establish clear requirements for disclosure of mortgage broker fees and to improve the settlement process for lenders, mortgage brokers, and consumers.

* * * *

Part C. Section 8(b) Unearned Fees

A. Background

RESPA was enacted in 1974 to provide consumers "greater and more timely information on the nature of the costs of the [real estate] settlement process" and to protect consumers from "unnecessarily high settlement charges caused by certain abusive practices* * *" 12 U.S.C. 2601.

Since RESPA was enacted, HUD has interpreted Section 8(b) as prohibiting any person from giving or accepting any unearned fees, i.e., charges or payments for real estate settlement services other

than for goods or facilities provided or services performed. Payments that are unearned fees for settlement services occur in, but are not limited to, cases where: (1) Two or more persons split a fee for settlement services, any portion of which is unearned; or (2) one settlement service provider marks-up the cost of the services performed or goods provided by another settlement service provider without providing additional actual, necessary, and distinct services, goods, or facilities to justify the additional charge; or (3) one settlement service provider charges the consumer a fee where no, nominal, or duplicative work is done, or the fee is in excess of the reasonable value of goods or facilities provided or the services actually performed.

In the first situation, two settlement service providers split or share a fee charged to a consumer and at least part, if not all, of at least one provider's share of the fee is unearned. In the second situation, a settlement service provider charges a fee to a consumer for another provider's services that is higher than the actual price of such services, and keeps the difference without performing any actual, necessary, and distinct services to justify the additional charge. In the third situation, one settlement service provider charges a fee to a consumer where no work is done or the fee exceeds the reasonable value of the services performed by that provider, and for this reason the fee or any portion thereof for which services are not performed is unearned.

HUD regards all of these situations as legally indistinguishable, in that they involve payments for settlement services where all or a portion of the fees

are unearned and, thus, are violative of the statute. HUD, therefore, specifically interprets Section 8(b) as not being limited to situations where at least two persons split or share an unearned fee for the provision to be violated. As already indicated in this Statement of Policy, meaningful disclosure of all charges and fees is essential under RESPA. Such disclosures help protect consumers from paying unearned or duplicate fees. However, as noted above, in the 1999 Statement of Policy the Department reiterated "its long-standing view that disclosure alone does not make illegal fees legal under RESPA." 64 FR 10087.

As already indicated in this Statement of Policy, meaningful disclosure of all charges and fees is essential under RESPA. Such disclosures help protect consumers from paying unearned or duplicate fees. However, as noted above, in the 1999 Statement of Policy the Department reiterated "its long-standing view that disclosure alone does not make illegal fees legal under RESPA." 64 FR 10087.

B. HUD's Guidance and Regulations

HUD guidance and regulations have consistently interpreted Section 8 as prohibiting all unearned fees. In 1976, HUD issued a Settlement Costs Booklet that provided that "[i]t is also illegal to charge or accept a fee or part of a fee where no service has actually been performed." 41 FR 20289 (May 17, 1976). Between 1976 and 1992, HUD indicated in informal opinions that unearned fees occur where there are excessive fees charged,

regardless of the number of settlement service providers involved.[3]

In the preamble to HUD's 1992 final rule revising Regulation X (57 FR 49600 (November 2, 1992)), HUD stated: "Section 8 of RESPA (12 U.S.C. 2607) prohibits kickbacks for referral of business incident to or part of a settlement service and also prohibits the splitting of a charge for a settlement service, other than for services actually performed (i.e., no payment of unearned fees)." 57 FR 49600 (November 2, 1992).

HUD's regulations, published on November 2, 1992, implement Section 8(b). Section 3500.14(c)[4] provides:

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[3] *See e.g.*, Old Informal Opinion (6), August 16, 1976 and Old Informal Opinion (65), April 4, 1980; Barron and Berenson, Federal Regulation of Real Estate and Mortgage Lending, (4th Ed.1998). On November 2, 1992 (57 F.R. 49600), when HUD issued revisions to its RESPA regulations, it withdrew all of its informal counsel opinions and staff interpretations issued before that date. The 1992 rule provided, however, that courts and administrative agencies could use HUD's previous opinions to determine the validity of conduct occurring under the previous version of Regulation X. *See* 24 CFR 3500.4(c).

[4] The heading to 24 CFR 3500.14 is titled "Prohibition against kickbacks and unearned fees." However, the heading of subsection (c) is titled "split of charges," and the preamble to the November 1992 rule states "[s]ection 8 of RESPA (12 U.S.C. 2607) prohibits kickbacks for referral of business incident to or part of a settlement service and also prohibits the splitting of a charge for a settlement service, other than for services actually performed (i.e., no payment of unearned fees)." 57 FR 49600 (November 2, 1992). The rule headings and preamble text are a generalized description of Section 8 that is more developed in the actual regulation text. As discussed in Section D of this Statement of Policy, HUD believes that the actual text of the

> No person shall give and no person shall accept any portion, split, or percentage of any charge made or received for the rendering of a settlement service in connection with a transaction involving a federally-related mortgage loan other than for services actually performed. A charge by a person for which no or nominal services are performed or for which duplicative fees are charged is an unearned fee and violates this Section. The source of the payment does not determine whether or not a service is compensable. Nor may the prohibitions of this part be avoided by creating an arrangement wherein the purchaser of services splits the fee.

24 CFR 3500.14(g)(2) states in part:

> The Department may investigate high prices to see if they are the result of a referral fee or a split of a fee. If the payment of a thing of value bears no reasonable relationship to the market value of the goods or services provided, then the excess is not for services or goods actually performed or provided. These facts may be used as evidence of a violation of Section 8 and may serve as a basis for a RESPA investigation. High prices standing alone are not proof of a RESPA violation.

24 CFR 3500.14(g)(3) provides in part:

> When a person in a position to refer settlement service business * * * receives a

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rules, as amended in 1992, makes clear that Section 8(b)'s prohibitions against unearned fees apply even when only one settlement service provider is involved.

> payment for providing additional settlement services as part of a real estate transaction, such payment must be for services that are actual, necessary and distinct from the primary services provided by such person.

In Appendix B to the HUD RESPA regulations, HUD provides illustrations of the requirements of RESPA. Comment 3 states in part:

> The payment of a commission or portion of the * * * premium * * * or receipt of a portion of the payment * * * where no substantial services are being performed * * * is a violation of Section 8 of RESPA. It makes no difference whether the payment comes from [the settlement service provider] or the purchaser. The amount of the payment must bear a reasonable relationship to the services rendered. Here [the real estate broker in the example] is being compensated for a referral of business to [the title company].

In 1996, in the preamble to the final rule on the Withdrawal of Employer/Employee and Computer Loan Origination Systems Exemptions[5] (61 FR 29238 (June 7, 1996)), HUD reiterated its interpretation of Section 8(b) of RESPA as follows:

> HUD believes that Section 8(b) of the statute and the legislative history make clear that no person is allowed to receive 'any portion' of charges for settlement services, except for

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[5] This final rule was delayed by legislation, but the Department implemented portions of the final rule that were not affected by the legislative delay on November 15, 1996. 61 FR 58472 (November 15, 1996).

> services actually performed. The provisions of Section 8(b) could apply in a number of situations: (1) where one settlement service provider receives an unearned fee from another provider; (2) where one settlement service provider charges the consumer for third-party services and retains an unearned fee from the payment received; or (3) where one settlement service provider accepts a portion of a charge (including 100% of the charge) for other than services actually performed. The interpretation urged [by the commenters to the proposed rule published on July 21, 1994], that a single settlement service provider can charge unearned or excessive fees so long as the fees are not shared with another, is an unnecessarily restrictive interpretation of a statute designed to reduce unnecessary costs to consumers. The Secretary, charged by statute with interpreting RESPA, interprets Section 8(b) to mean that two persons are not required for the provision to be violated. 61 FR 29249.

The latest revision to the Settlement Costs Booklet for consumers, issued in 1997, also provides "[i]t is also illegal for anyone to accept a fee or part of a fee for services if that person has not actually performed settlement services for the fee." 62 FR 31998 (June 11, 1997).

Further, HUD has provided information to the public and the mortgage industry in the "Frequently Asked Questions" section of its RESPA Web site,

located at <*http://www.hud.gov/fha/sfh/res/resindus.html*>. Question 25 states:

> Can a lender collect from the borrower an appraisal fee of $200, listing the fee as such on the HUD–1, yet pay an independent appraiser $175 and collect the $25 difference?

The answer reads:

> No, the lender may only collect $175 as the actual charge. It is a violation of Section 8(b) for any person to accept a split of a fee where services are not performed.

In 1999, by letter submitted at the request of the Superior Court of California, Los Angeles County, in the case of *Brown v. Washington Mutual Bank* (Case No. BC192874), HUD provided the following response to a specific question posed by the court on lender "markups" of another settlement service provider's fees:

> A lender that purchases third party vendor services for purposes of closing a federally related mortgage loan may not, under RESPA, mark up the third party vendor fees for purposes of making a profit. HUD has consistently advised that where lenders or others charge consumers marked-up prices for services performed by the third party providers without performing additional services, such charges constitute "splits of fees" or "unearned fees" in violation of Section 8(b) of RESPA.

HUD noted in its letter to the court that the response reflected the Department's long-standing position.

C. Recent Cases

Notwithstanding HUD's regulations and other guidance, the Court of Appeals for the Seventh Circuit held, in *Echevarria v. Chicago Title and Trust Co.*, 256 F.3d 623 (7th Cir. 2001), that Section 8(b) was not violated where a title company, without performing any additional services, charged the plaintiffs more money than was required by the recorder's office to record a deed and the title company then retained the difference. The court reasoned that plaintiffs "failed to plead facts tending to show that Chicago Title illegally shared fees with the Cook County Recorder. The Cook County Recorder received no more than its regular recording fees and it did not give to or arrange for Chicago Title to receive an unearned portion of these fees. The County Recorder has not engaged in the third party involvement necessary to state a claim under [RESPA § 8(b)]." *Id.* at 626. The court in essence concluded that unearned fees must be passed from one settlement provider to another in order for such fees to violate Section 8(b).

Earlier, in *Willis v. Quality Mortgage USA, Inc.*, 5 F. Supp. 2d 1306 (M.D. Ala. 1998), cited by the Seventh Circuit in support of its conclusion, the district court concluded that 24 CFR 3500.14(c), "[w]hen read as a whole," prohibits payments for which no services are performed "only if those payments are split with another party." *Id.* at 1309. The *Willis* court held that there must be a split of a charge between a settlement service provider and a third party to establish a violation Section 8(b). The court also concluded that 24 CFR 3500.14(g)(3) only applied when there was a payment from a lender to a

broker, or vice versa. The payment from a borrower to a mortgage lender could not be the basis for a violation of 24 CFR 3500.14(g)(3) and Section 8(b).

HUD was not a party to the cases and disagrees with these judicial interpretations of Section 8(b) which it regards as inconsistent with HUD's regulations and HUD's long-standing interpretations of Section 8(b).

D. Unearned Fees Under Section 8(b)

This Statement of Policy reaffirms HUD's existing, long-standing interpretation of Section 8(b) of RESPA. Sections 8(a) and (b) of RESPA contain distinct prohibitions. Section 8(a) prohibits the giving or acceptance of any payment pursuant to an agreement or understanding for the referral of settlement service business involving a federally related mortgage loan; it is intended to eliminate kickbacks or compensated referral arrangements among settlement service providers. Section 8(b) prohibits the giving or accepting of any portion, split, or percentage of any charge other than for goods or facilities provided or services performed; it is intended to eliminate unearned fees. Such fees are contrary to the Congressional finding when enacting RESPA that consumers need protection from unnecessarily high settlement charges. 12 U.S.C. 2601(a).

It is HUD's position that Section 8(b) proscribes the acceptance of any portion or part of a charge other than for services actually performed. Inasmuch as Section 8(b)'s proscription against "any portion, split, or percentage" of an unearned charge for settlement services is written in the disjunctive, the

prohibition is not limited to a split. In HUD's view, Section 8(b) forbids the paying or accepting of any portion or percentage of a settlement service – including up to 100% – that is unearned, whether the entire charge is divided or split among more than one person or entity or is retained by a single person. Simply put, given that Section 8(b) proscribes unearned portions or percentages as well as splits, HUD does not regard the provision as restricting only fee splitting among settlement service providers. Further, since Section 8(b) on its face prohibits the giving or accepting of an unearned fee by any person, and 24 CFR 3500.14(c) speaks of a charge by "a person," it is also incorrect to conclude that the Section 8(b) proscription covers only payments or charges among settlement service providers.[6]

A settlement service provider may not levy an additional charge upon a borrower for another settlement service provider's services without providing additional services that are bona fide and justify the increased charge. Accordingly, a settlement service provider may not mark-up the cost of another provider's services without providing additional settlement services; such payment must be for services that are actual, necessary and distinct services provided to justify the charge. 24 CFR 3500.14(g)(3).[7]

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[6] HUD is, of course, unlikely to direct any enforcement actions against consumers for the payment of unearned fees, because a consumer's intent is to make payment for services, not an unearned fee.

[7] HUD notes that some lenders have charged an additional fee merely for "reviewing" another settlement service provider's services. HUD does not regard such "review" as constituting an

The HUD regulation implementing Section 8(b) states: "[a] charge by a person for which no or nominal services are performed or for which duplicative fees are charged is an unearned fee and violates this Section." 24 CFR 3500.14 (c).

The regulations also make clear that a charge by a single service provider where little or no services are performed is an unearned fee that is prohibited by the statute. 24 CFR 3000.14(c). A single service provider is also prohibited from charging a duplicative fee. Further, a single service provider cannot serve in two capacities, e.g., a title agent and closing attorney, and be paid twice for the same service. The fee the service provider would be receiving in this case is duplicative under 24 CFR 3000.14(c) and not necessary and distinct under 24 CFR 3000.14(g)(3). Clearly, in all of these instances, the source of the payment – whether from consumers, other settlement service providers, or other third parties – is not relevant in determining whether the fee is earned or unearned because ultimately, all settlement payments come directly or indirectly from the consumer. See 24 CFR 3500.14(c). Therefore, a single settlement service provider violates Section 8(b) whenever it receives an unearned fee.

A single service provider also may be liable under Section 8(b) when it charges a fee that exceeds the reasonable value of goods, facilities, or services provided. HUD's regulations as noted state: "If the payment of a thing of value bears no relationship to the goods or services provided, then the excess is for

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actual, necessary, or distinct additional service permissible under HUD's regulations.

services or goods actually performed or provided." 24 CFR 3500.14(g)(2). Section 8(c)(2) only allows "the payment to any person of a bona fide salary or compensation or other payment for goods or facilities actually furnished or services actually performed," i.e., permitting only that compensation which is reasonably related to the goods or facilities provided or services performed. Compensation that is unreasonable is unearned under Section 8(b) and is not bona fide under Section 8(c)(2).

The Secretary, therefore, interprets Section 8(b) of RESPA to prohibit all unearned fees, including, but not limited to, cases where: (1) Two or more persons split a fee for settlement services, any portion of which is unearned; or (2) one settlement service provider marks-up the cost of the services performed or goods provided by another settlement service provider without providing additional actual, necessary, and distinct services, goods, or facilities to justify the additional charge; or (3) one service provider charges the consumer a fee where no, nominal, or duplicative work is done, or the fee is in excess of the reasonable value of goods or facilities provided or the services actually performed.

* * * *