Arizona Association of REALTORS®

CERTIFIED
RISK MANAGEMENT
SPECIALIST

Federal Legal Issues

Student Manual

rCRMS COURSE LIST

REQUIREMENTS FOR CERTIFICATION:

- Must take ALL 3 Core Courses
- Must take 1 Contract Course
- Must take 1 Elective Course

CORE COURSES: (must take **ALL 3** of the following one-day courses):

Employment, Agency, and the Standard of Care *(3hrs Agency, 3hrs Commissioners Standards)*
Explore agency and employment agreements, duties, and learn how to comply with the standard of care in the industry.

Disclosure & Due Diligence *(6hrs Disclosure)*
Explore how to fulfill the disclosure obligations in a real estate transaction and the due diligence responsibilities of the parties.

Essential Skills for a Successful Closing *(6hrs Real Estate Legal Issues)*
Explore the complexities of handling escrow, title, and financing issues in a real estate transaction.

CONTRACT COURSES: (must take **1** of the following two-day courses)

Mastering the Commercial Transaction *(6hrs Contract Law)*
Master the complexities of the commercial real estate transaction and business brokerage transaction from offer to closing, including drafting the AAR Commercial Real Estate Contract and related addenda.

Mastering the Land Transaction *(9hrs Contract Law, 3hrs Real Estate Issues)*
Master the complexities of the vacant land real estate transaction from offer to closing, including drafting the AAR Vacant Land/Lot Purchase Contract and the most common addenda.

Mastering the Residential Resale Transaction *(3hrs Disclosure, 9hrs Contract Law)*
Master the complexities of the residential resale real estate transaction from offer to closing, including drafting the AAR Residential Resale Real Estate Purchase Contract and related addenda.

ELECTIVE COURSES: (must take **1** of the following one day courses):

Advertising, Marketing & Misrepresentation: Risk and Regulation Examine advertising and marketing principles, the rules and regulations governing these activities and how to avoid misrepresentation in a real estate transaction.

Claims, Litigation and Remedies
Explore the elements of common real estate claims and litigation, the available remedies, claims management, and dispute resolution.

Federal Legal Issues
Examine how best to comply with the federal laws that impact a real estate transaction such as: fair housing, RESPA, and antitrust.

Leasing Essentials *(3hrs Contract Law, 3hrs Real Estate Legal Issues)*
Master the essential elements of real estate leasing, including landlord/tenant laws, property management and a broker's responsibility in this specialty

Short Sales, REO's & Foreclosures *(3hrs Contract Law, 3hrs Real Estate Legal Issues)*
Short sales and foreclosures are on the rise. Because these transactions are likely to make up a large percentage of your business, it is important to understand the risks inherent in these situations. By familiarizing yourself with the problems that can and do occur in these transactions, you can develop strategies to reduce risks for the clients, salespersons and brokers involved.

Recertification Requirement: Take at least one rCRMS class every two years.

rCRMS Federal Legal Issues

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Course Introduction

This course is a detailed look at federal issues that impact a real estate transaction, including antitrust, *RESPA* and fair housing. This course allows students to master the complexities of these federal issues and incorporate appropriate risk reduction strategies into their practices. Sections of the text in this course were taken directly from the book *Arizona Real Estate: A Professional's Guide to Law and Practice* by K. Michelle Lind, CEO of the Arizona Association of REALTORS®. Other sources used are annotated.

Unit 1: RESPA

Segment 1: Introduction

Learning Objectives:

- Define *RESPA*.
- Describe how *RESPA* affects the practice of real estate.
- Explain the risks associated with non-compliance of *RESPA*.
- Recognize situations that can increase risk and liability for salespersons and brokers for non-compliance to *RESPA*.

This Unit focuses on RESPA – the Real Estate Settlement Procedures Act and how it affects real estate licensees.

Can you guess what these letters stand for?

T_____
N_____
S_____
T_____
A_____
A_____
F_____
L_____

Quickly answer the following questions with a True or False with regard to current RESPA regulations. You have 5 minutes! Be prepared to explain your answer.

Q 1: *RESPA* applies to transactions involving commercial real estate.
True False

Q 2: *RESPA* permits a lender to give a borrower an incentive, such as a chance to win a trip or a rebate for doing business with them.
True False

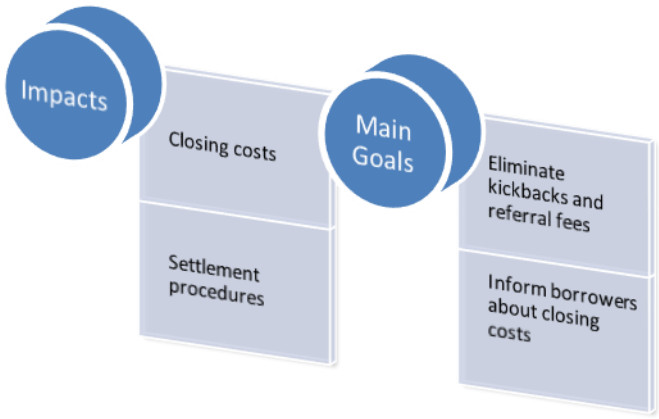
Q 3: When a real estate salesperson works for a brokerage that has affiliated settlement services such as title insurance, the salesperson is required to disclose the relationship and state that the use of the referred service is not required.
True False

Q 4: In October 2015, the closing disclosures required under RESPA were integrated with the closing disclosures required under TILA to make it easier for consumers to comparison shop for mortgages
True False

Segment 2: *RESPA* – General Information

- The *Real Estate Settlement Procedures Act* (*RESPA*)is a federal consumer protection statute
- was created to ensure that buyers receive adequate information about the costs of financing and closing escrow on the purchase of a home
- was enacted to protect consumers from unfair practices by settlement service providers.

For real estate licensees, *RESPA* primarily impacts closing costs and settlement procedures and has two overarching goals:



Segment 3: *RESPA* Definitions

Match the following words to the correct definition.

1. Affiliated Business Arrangement
2. Federally Related Mortgage Loan
3. Person
4. Referral
5. Settlement Services

DEF 1	Where a person (or an associate) who is in a position to refer business incident to or a part of a real estate settlement service involving a federally related mortgage loan has either an affiliate relationship with or a direct or an ownership interest of more than 1 percent in a provider of settlement services; and directly or indirectly refers business to that provider or affirmatively influences the selection of that provider.
DEF 2	Includes individuals, corporations, associations, partnerships, and trusts.
DEF 3	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 of business. This also occurs whenever a person paying for a settlement service or business incident thereof is required to use a particular provider of a settlement service or business incident thereto.
DEF 4	Includes any loan (other than temporary financing such as a construction loan) which – (A) is secured by a first or subordinate lien on residential real property (including individual units of condominiums and cooperatives) designed principally for the occupancy of from one to four families, including any such secured loan, the proceeds of which are used to prepay or pay off an existing loan secured by the same property; and (B)(i) is made in whole or in part by any lender the deposits or accounts of which are insured by any agency of the Federal

DEF 4 CONT.	Government, or is made in whole or in part by any lender which is regulated by any agency of the Federal Government, or (ii) is made in whole or in part, or insured, guaranteed, supplemented, or assisted in any way, by the Secretary or any other officer or agency of the Federal Government or under or in connection with a housing or urban development program administered by the Secretary or a housing or related program administered by any other such officer or agency; or (iii) is intended to be sold by the originating lender to the Federal National Mortgage Association, the Government National Mortgage Association, the Federal Home Loan Mortgage Corporation, or a financial institution from which it is to be purchased by the Federal Home Loan Mortgage Corporation; or (iv) is made in whole or in part by any ``creditor'', as defined in section 1602(f) of title 15, who makes or invests in residential real estate loans aggregating more than $1,000,000 per year, except that for the purpose of this chapter, the term ``creditor'' does not include any agency or instrumentality of any State.
DEF 5	Includes any service provided in connection with a real estate transaction including, but not limited to title searches, title examinations, the provision of title certificates, title insurance, services rendered by an attorney, the preparation of documents, property surveys, the rendering of credit reports or appraisals, pest and fungus inspections, services rendered by a real estate agent or broker, the origination of a federally related mortgage loan (including, but not limited to, the taking of loan applications, loan processing, and the underwriting and funding of loans), and the handling of the processing, and closing or settlement.

Segment 4: Settlement Service Providers Covered by *RESPA*

Who is covered by *RESPA*

- Real estate brokers
- Real estate agents
- Title agents
- Title/escrow companies
- Lenders
- Inspectors
- Appraisers

- Attorneys
- Home Warranty Companies
- Termite Inspector
- Insurance company
- Builder??

K. Michelle Lind, in *Arizona Real Estate: A Professional's Guide to Law and Practice*, states:

> "Because brokers generally have the initial relationship with the client, title/escrow companies, lenders, and inspectors often compete for the business that the broker's client brings.
>
> Competition based on service to the client is legitimate and results in a higher level of professionalism in the industry.
>
> Competition based on kickbacks and prohibited referral fees result in higher costs to the client and expose the broker and affiliated industries to civil and regulatory penalties."

Why are these companies NOT impacted by *RESPA?*

- *Moving companies,*
- *Decorators*
- *Renovation contractors*
- *Lawn service providers*

Rule of Thumb: _____

Segment 5: Transactions NOT Covered by *RESPA*

Transactions NOT covered by *RESPA*?

- Cash sales
- Purchase-money mortgages
- Loan for commercial purposes

- Loan for business purposes
- Loan for agricultural purposes
- Loan to purchase 25+ acres
- Loan to purchase vacant land
- Temporary loan
- Seller-financed transaction
- Loan conversions
- Secondary market transactions

Expanded definitions are from §35005.5, 24 CFR Ch. XX (4-1-09 Edition

Not all real estate transactions are covered by *RESPA.* Real estate licensees need to be aware of which transactions are covered—or have the potential to be covered—in order to protect themselves.

Key words to trigger a *RESPA* transaction are:

- _____
- _____ and
- _____

Segment 6: *RESPA* Sections that Affect Real Estate Licensees and Brokers

Sections of *RESPA* that primarily affect Real Estate Licensees and brokers

Requirements of *RESPA* by Section

Section 8 – Kickbacks and Referral Fees

Section 8 (12 U.S.C. §2607; 24 C.F.R §3500) Kickbacks and Referral Fees

Section 8(a) of *RESPA* prohibits kickbacks and referral fees. Section 8(a) states:

> 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.

Unearned Fees: Section 8(b) of *RESPA* prohibits a person from giving or accepting any part of a charge for services that he or she did not perform (unearned fees). *That is, a business entity (whether or not in an affiliate relationship) may not pay any other business entity or the employees of any other business entity for the referral of settlement service business.* Section 8(b) states:

RESPA defines a "thing of value" as any payment, advance, funds, loan, service, or other consideration.

NOTE: Payment is synonymous with the giving or receiving of a thing of value and does not require the actual transfer or funds.

Why are these types of things prohibited*?*

What types of things are service providers permitted to do?

- Thank you note for the referral
- Appreciation party so long as invitation to the party is not predicated on referrals *(e.g., a REALTOR® appreciation party where any REALTOR® can attend)*

    - 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.

- Any referral of a settlement service is NOT a compensable service, with a few exceptions.
- A charge by a person for which no actual services were performed, or limited actual services were performed, is an unearned fee and violates this section of *RESPA.*

Section 8(c) Exceptions to 8(a) and 8(b):

RESPA does not preclude payments for **all** settlement services. *RESPA* does not prohibit:

- Payments to attorneys for actual services.
- Payment by a title company to its duly appointed agent for services actually performed in the issuance of a title insurance policy.
- 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.
- A payment to any person of a *bona fide* salary or compensation or other payment for goods, services or facilities actually furnished or performed.
- A payment pursuant to cooperative brokerage and referral arrangements or agreements between real estate agents and real estate brokers.
- 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.
- An employer's payment to its own employees for any referral activities.
- Affiliated business arrangements, as long as certain requirements are met.
- Requirements for this arrangement include:
- A disclosure must be made of the existence of the arrangement. *There are deadlines for the disclosure, see §2607 (c)(4)(A) and HUD Regulation X. Sec. 3500.15 Affiliated business arrangements for additional* details.
- A written estimate of the charge or range of charges for the service must be made at or before the time of the referral. There are deadlines
- Buyer cannot be required to use the service.
- Only thing of value that is received from the arrangement is a return on the ownership interest.

[*Arizona Real Estate: A Professional's Guide to Law and Practice*]

Marketing Service Agreements

An agreement by which a settlement service provider, such as a real estate broker, agrees to market and promote the business of another provider such as a title company, in exchange for payment.

Agents and brokerages should review any existing MSAs to ensure they comply with the Real Estate Settlement Procedures Act (RESPA).

Lighthouse Title
In the fall of 2014, the CFPB found that Lighthouse Title's MSAs with various real estate brokers violated RESPA.

The CFPB and Lighthouse Title entered into a Consent Order.
- Civil money penalty in the amount of $200,000;
- Prohibition from entering into any MSAs in the future;
- Terminate all existing MSAs;
- Require documentation for all exchanges of things of value worth $5.00 or more with persons in a position to refer business for five years.

What caused the CFPB's findings?

- MSAs were entered into and renewed with the agreement or understanding that business would be referred
- No documentation for how FMV was determined
- Fees were based on how many referrals were received
- Parties were not monitored to ensure contracted services were received.

Do's
- The MSA should list the actual marketing or advertising to be performed
- Consider using an independent valuation of services to reduce conflicts of interest
- One party to the agreement must perform actual marketing and advertising services that are general in nature and are not related to any specific or closed transaction
- Create a reporting system or records to ensure all services are performed and measure the level of performance
- Create a method for reviewing and verifying types of services and when they are performed
- Make sure the marketing fee paid is commensurate with the fair market value of the marketing and advertising services actually performed
- Have documentation that supports your determination of fair market value

- Consider a flat fee that is only adjusted to correlate to the marketing services performed
- If both parties are equally visible in marketing efforts, each party should equally share expenses.

Don’ts

- Do not base fees or payments on a per transaction basis
- Fees should not be tied to the success of the marketing arrangement
- Fees should not exceed reasonable, fair market value for contracted services performed
- Fees cannot defray a marketing expense that the other party would otherwise incur
- Payments should not be tied to the success of the other party’s efforts
- The MSA should not contain an exclusivity provision; do not lock out competitors
- The MSA should not contain duplicative general marketing services
- The MSA should not contain direct sales pitches to particular customers.
- Any lease agreement between the parties should be kept separate from the MSA

Scenarios

Scenario 1

Friendly Lending is an insured FHA lender. Friendly Lending has a promotional program designed to encourage real estate agents to refer mortgage loan business to it. For each loan that is referred and that goes to settlement, Friendly Lending awards the real estate agent one point. Agents who receive five points during the specified time period qualify for a free, all expenses paid trip to Hawaii.

Is this a potential *RESPA violation?*

Why or why not?

Scenario 2

Gary is a provider of settlement services and he provides settlement services at abnormally low rates or free to Bob, a builder, in conjunction with a subdivision Bob is building. Bob agrees to refer purchasers of the completed homes in the subdivision to Gary for the purchase of settlement services in conjunction with the sale of the individual lots by Bob.

Is this a potential *RESPA* violation?

Why or why not?

Scenario 3

Mort the Mortgage Man is attending the local REALTOR® association's "Meet and Greet." He has brought with him notepads with his name and contact information printed on them and distributes them to all the members present at the event.

Is this a potential *RESPA* violation?

Why or why not?

Scenario 4

Bonnie the Broker and Larry the Lender jointly advertise their services in various media – a brochure, a newspaper ad, on the web, using social media, etc. Each month the various invoices come in and their joint expense for this marketing is $2,000.

Is this a potential *RESPA* violation?

Why or why not?

Scenario 5

Benny the Broker finds an ad in the paper for free continuing education courses being offered by Larry the Lender. Benny and all his agents go to the free continuing education courses that were offered by Larry the Lender. While there, they are requested to refer real estate lending business to Larry the Lender.

Is this a potential *RESPA* violation?

Why or why not?

HUD Court Cases Enforcing *RESPA*

- January 2010 – HUD and the State of Alaska's Division of Insurance (Alaska DOI) announced a legal settlement with Alyeska Title Guaranty Agency for alleged violations of *RESPA* and Alaska's anti-rebating law. HUD and Alaska DOI claim Alyeska paid a sham employee for referring consumers to the title company. Alyeska agreed to cease the alleged sham employment arrangement and to pay up to $155,000 to the U.S. government and the State of Alaska. HUD and the Alaska DOI alleged that Alyeska maintained a sham employment arrangement with Kirk Wickersham, owner of FSBO System, Inc. in which Wickersham acted as a "title marketer," and was paid a percentage of Alyeska's title insurance premiums in exchange for referrals.

- August 2008 – HUD announced that it settled its federal lawsuit under *RESPA* against Property I.D. Corporation (a large hazard reporting company in California), Realogy Corporation, Cendant Corporation, and Coldwell Banker Residential Brokerage Corporation. HUD alleged that Property I.D. Corporation of Los Angeles made improper payments to large real estate brokers in California based on the referral of consumers to Property I.D.

  November 2005 – A $150,000 settlement was reached with one of the largest mortgage companies in New England for violations of the *Real Estate Settlement Procedures Act* (*RESPA*). HUD and FDIC found that 1-800-East-West Mortgage Company solicited and received tickets from certain settlement service providers to Boston Red Sox and New England Patriots events as well as music concerts and restaurant gift certificates in exchange for the referral of business.

> "RESPA can't be any clearer when it comes to the giving or receiving of "things of value" in exchange for the referral of business – it's illegal. The message to the rest of the industry should be equally clear, we will not only investigate those who give, but those who receive kickbacks." Brian Montgomery, HUD's Assistant Secretary for Housing-Federal Housing Commissioner

Busby Case

Busby v. RealtySouth was a case decided in the U.S. District Court for Northern Alabama. This case raised questions as to whether real estate agents and brokers must perform separate and distinct services under *Section 8(b)* of *RESPA* in return for administrative fees.

Key points:

Section 9 – Title Insurance

Section 9 of *RESPA – Title Insurance (12 U.S.C. §2608; 24 C.F.R. Sec. 3500.16)*

Section 9 of *RESPA* prohibits sellers from requiring buyers to purchase title insurance from a specific title company. Section 9 of *RESPA* states:

(a) No seller of property that will be purchased with the assistance of a federally related mortgage loan shall require directly or indirectly, as a condition to selling the property, that title insurance covering the property be purchased by the buyer from any particular title company.
(b) Any seller who violates the provisions of subsection (a) of this section shall be liable to the buyer in an amount equal to three times all charges made for such title insurance.

According to *Arizona Real Estate: A Professional's Guide to Law and Practice*, "Required use" means: a situation in which a person must use a particular provider of a settlement service in order to have access to some distinct service or property, and the person will pay for the settlement service of the particular provider or will pay a charge attributable, in whole or in part, to the settlement service.

Scenario:

Real estate agent Rob is working with a seller, Stan. Rob has advised Stan to require, as a condition of sale, that the buyer, Elise, purchase title insurance from a specific title insurance company – Safe Titles. Safe Titles is owned by Rob's friend. Elise will have to purchase and pay for the title insurance from Safe Titles.

Q1 – is this a possible RESPA violation? Why or why not?

Q2 – did Rob breach his fiduciary responsibility to Stan?

Conclusion and Review:
RESPA Section 8(a) prohibits kickbacks and referral fees between settlement service providers. RESPA Section 8(b) prohibits unearned fees. It is important to understand the exceptions to 8(a) and 8(b), including payments to bona fide employees. Many of the prosecutions by CFPB for RESPA violations cite Section 8(a) and 8(b). Section 9 discusses title insurance and "required use" by consumers.

Segment 7: Consumer Financial Protection Bureau (CFPB): Enforcement of *RESPA*

RESPA is enforced by the CFPB. CFPB took over regulation of RESPA in July 2011.

Penalties:
According to CFBP, the penalties for *RESPA* violation are as follows:

- Violations of *Section 8*'s anti-kickback, referral fees and unearned fees provisions of *RESPA* are subject to criminal and civil penalties. In a criminal case a person who violates *Section 8* may be fined up to $10,000 and imprisoned for up to one year. In a private law suit a person who violates *Section 8* may be liable to the person charged for the settlement service an amount equal to three times the amount of the charge paid for the service.

- *Section 9* of *RESPA* prohibits a seller from requiring the home buyer to use a particular title insurance company, either directly or indirectly, as a condition of sale. Buyers may sue a seller who violates this provision for an amount equal to three times all charges made for the title insurance. *Additionally, the seller may face sanctions from the Arizona Department of Real Estate [A.R.S. §32-2153(B) (10)]*.

- Individuals have one (1) year to bring a private lawsuit to enforce violations of *Section 8* or *9*. A person may bring an action for violations of *Section 6* within three years. Lawsuits for violations of *Section 6*, *8*, or *9* may be brought in any federal district court in the district in which the property is located or where the violation is alleged to have occurred.

  CFPB, a State Attorney General or State insurance commissioner may bring an injunctive action to enforce violations of *Section 6*, *8* or *9* of *RESPA* within three (3) years.
  http://www.hud.gov/offices/hsg/ramh/res/respamor.cfm

To file a complaint with the CFPB visit their website:
http://www.consumerfinance.gov/complaint/

What happens after I submit a complaint?

The CFPB forward your complaint to the company and work to get a response. After the CFPB forwards your complaint, the company has 15 days to respond to you and the CFPB. Companies are expected to close all but the most complicated complaints within 60 days. You'll be able to review the response and give the CFPB feedback. If the CFPB finds that another agency would be better able to assist, they will forward your complaint and let you know.

Segment 8: Additional Facts about *RESPA*

Section 10 – Escrow Requirements

Section 10 defines limits on escrow requirements. From the HUD website:

- *Section 10* of *RESPA* sets limits on the amounts that a lender may require a borrower to put into an escrow account for purposes of paying taxes, hazard insurance and other charges related to the property. *RESPA* does not require lenders to impose an escrow account on borrowers; however, certain government loan programs or lenders may require escrow accounts as a condition of the loan.
- During the course of the loan, *RESPA* prohibits a lender from charging excessive amounts for the escrow account. Each month the lender may require a borrower to pay into the escrow account no more than 1/12 of the total of all disbursements payable during the year, plus an amount necessary to pay for any shortage in the account. In addition, the lender may require a cushion, not to exceed an amount equal to 1/6 of the total disbursements for the year.
- The lender must perform an escrow account analysis once during the year and notify borrowers of any shortage. Any excess of $50 or more must be returned to the borrower.

Disclosure Requirements

Lenders for transactions to which *RESPA* applies **must**:

1. Provide a copy of "Shopping For Your Home Loan" booklet contained in the CFPB's Your Home Loan Toolkit to all borrowers that submit a loan application after October 2, 2015. The booklet is available free of charge on the CFPB website at:
   https://files.consumerfinance.gov/f/201503_cfpb_your-home-loan-toolkit-web.pdf
   The creditor shall deliver or place in the mail the booklet not later than three business days after the "consumer's application" is received, and the credit need not provide the booklet if the creditor denies the consumer's application before the end of the "three-business-day period."

Segment 9: Risk Reduction Tips

Brokers' Risk Reduction Tips	Agents' Risk Reduction Tips
Know the difference between legal marketing techniques and illegal kickbacks and referral fees.	Educate buyer clients about the home buying and financing process, including the Loan Estimate and Closing Disclosure forms
Enter into compensation agreements with lenders **after** checking with legal counsel.	Inform your clients about other *RESPA*-required disclosures.
Create and implement a *RESPA* policy for your brokerage.	Ensure that your client receives any *RESPA* required disclosures.
Implement a *RESPA* training program for agents.	Inform buyer clients that they are not obligated to use lenders' or sellers' preferred service providers.
Supervise agents for *RESPA* compliance.	Ensure you are being paid for actual, substantive services performed.
Do not accept "a thing of value" from other settlement service providers.	Direct your clients to lenders, title insurance providers, etc. who will best fulfill your client's needs – not the ones who have the best referral programs for you.
Do not allow your agents to accept "a thing of value" from other settlement service providers.	
If working within the affiliated business construct, ensure that all *RESPA* requirements are met.	
If working within the affiliated business construct, ensure that all *RESPA*	

required disclosures are made to the consumer.	
Be aware of any possible undisclosed referrals.	

Segment 10: Conclusion

To minimize the risk of *RESPA* violations, real estate salespersons and brokers must remain vigilant in pursuing proper business arrangements with other settlement service providers.

There is an inherent risk of possible *RESPA* violations when accepting fees for minimal or no work *(e.g., simply taking a loan application and passing it along to the lender)* or for making referrals of business in exchange for “a thing of value.”
Consumers must be notified of affiliate business relationships and that they are not required to use those services. Such disclosures minimize broker and agent risk.

RESPA is not a static law. It is a law that is reviewed and modified based on changes in the real estate environment..

Q1: In 2020, the Supreme Court ruled the head of the CFPB serves at the pleasure of the President, what impact might this have on RESPA laws?

Q2: Can a real estate broker and title company advertise their services on the same brochure?
Answer:

Q3: Does offering a package of settlement services or offering discounts to consumers for the purchase of multiple settlement services violate RESPA?
Answer: .

Q4: What is the safest course for a seller who wants to require the use of a certain title insurance policy?
Answer:

Q5: What are the penalties for a violation of Section 9 of RESPA?
Answer:

Q6: What is the effect of a seller's counteroffer changing the title company to be used in a transaction?
Answer:

KEY POINTS TO REMEMBER

- A broker cannot accept any fee, kickback or "thing of value" for referrals to a settlement service provider.
- A prohibited "thing of value" under RESPA is interpreted very broadly and may include joint advertising if one settlement service provider is paying more than a pro-rata share, or any other item that would defray the broker's expenses.
- Generally, a broker cannot accept any portion of a settlement service charge other than for services rendered.
- Generally, a seller may not require as a condition of sale that the buyer purchase title insurance from any particular title company.
- Affiliated business arrangements are allowed under RESPA as long as certain requirements are met.

Unit 2: Dodd Frank-Seller Carryback Overview

True or False:

Q1 The Seller Finance provisions of the Dodd Frank Act are not yet enforceable.
True *False*

Q2 The Dodd Frank Act only applies to commercial transactions.
True *False*

Q3 The Dodd Frank Act allows parties to charge whatever interest rate they may choose or agree upon.
True *False*

Q4 The Dodd Frank Act specifically allows default interest and late payment penalties.
True *False*

Q5 The provisions of the Dodd Frank Act sometimes treat corporations differently than individual actors.
True *False*

Q6 The Dodd Frank Act applies to a purchaser of residential property who will not reside in the property.
True *False*

Q7 The Dodd Frank Act allows a seller to engage in six separate seller-finance transactions in any given year without special requirements.
True *False*

Q8 The Dodd Frank Act prohibits balloon payments under all circumstances.
True *False*

Q9 The Dodd Frank Act does not require that borrowers in seller-finance transactions have the ability to repay the loan.
True False

Q10 AAR does not have any forms to assist in compliance with the Dodd Frank Act.
True False

Qualified Mortgage Rule Impacting Seller Carry Back Financing:

The Dodd-Frank Act mandates that a loan originator for a consumer credit transaction must, when required by applicable State or Federal laws, be registered and/or licensed in accordance with those laws.
Exempt from the definition of a consumer credit transaction is:
(1) an extension of credit primarily for a business, commercial or agricultural purpose.

AAR FORMS:

SELLER FINANCING ADDENDUM: Credit Transaction Secured By A Dwelling — Seller providing financing for only one residential property in any 12-month period.

The first exemption to the definition of a loan originator requires that:
(1) the seller originates financing for only one property in any 12-month period;
(2) the seller is a natural person, estate or trust;
(3) the seller did not construct the residence on the property;
(4) the financing does not result in negative amortization; and
(5) the financing has a fixed rate or does not adjust for the first five years.
If a seller is able to satisfy each and every one of these requirements, that seller will utilize this form

(2) an extension of credit to other than a natural person. *See* 12 CFR § 1026.2(a). As such, business, commercial, agricultural, or organizational credit transactions are not considered consumer credit transactions and are not governed by the Dodd-Frank Act's seller-financing restrictions.

SELLER FINANCING ADDENDUM: Credit Transaction Secured By A Dwelling — Seller providing financing for three or fewer residential properties in any 12-month period.

The second exemption include:
(1) the seller originates financing for no more than three residential properties in any 12-month period;
(2) the seller is a natural person or an organization, including a partnership, corporation, proprietorship, association, cooperative, trust, estate, or government unit;
(3) the seller did not construct the residence on the property;
(4) the loan is fully amortizing;
(5) the financing has a fixed rate or does not adjust for the first five years; and
(6) The seller has determined that the borrower has the reasonable ability to repay the loan according to its terms per 12 CFR § 1026.43(c).
If a seller is able to satisfy each and every one of these requirements, that seller will now utilize this form.

An exemption exists whereby under certain circumstances, property owners offering seller carry back financing are excluded from having to obtain a loan originator's license provided that the property owner provides mortgage financing for less than a pre-determined amount of properties in any 12 month period.

In order to additionally qualify for this Title XIV exemption, **the following five requirements must be satisfied:**

1. The seller did not construct the home to which the financing is being applied.
2. The loan is fully amortizing, meaning no balloon mortgages are permitted.
3. The seller determines in good faith and documents that the buyer has a reasonable ability to pay back the loan.
4. The loan has a fixed rate or is adjustable after five or more years, subject to reasonable annual and lifetime caps.
5. The loan meets other criteria set by the Federal Reserve Board.

In the event of deviation from these requirements, the buyer has up to three years to rescind the sale and demand a return of all money paid.

Ability to Pay Rule Effective: January 10, 2014.

Pursuant to the rule, all lenders, including seller carry back lenders, must consider and verify, at a minimum, the following **eight** underwriting standards:

1. Current income or assets;
2. Current employment status;
3. Credit history;
4. The monthly payment for the mortgage;
5. The monthly payments on any other loans associated with the property;
6. The monthly payment for other mortgage related obligations (such as property taxes);
7. Other debt obligations; and
8. The monthly debt-to-income ratio or residual income the borrower would be taking on with the mortgage.

DOCUMENTS:
Note and Deed of Trust

Lender Policy – Title Insurance

SELLER FINANCING ADDENDUM: Credit Transaction Not Secured By A Dwelling.

The Dodd-Frank Act provisions governing seller-financed transactions apply only to those consumer credit transactions secured by a dwelling, which is defined as “a residential structure that contains one to four units.”

Sellers originating financing for raw land, commercial properties and other transactions not secured by a dwelling need not utilize Dodd-Frank Act compliant forms. Sellers of this nature will therefore now utilize this form.

LOAN ASSUMPTION ADDENDUM

Two key warnings:

1) The first new warning, found on lines 16 through 21, advises the seller of the importance of securing a release of liability from the lender in conjunction with the assumption.
2) The second, found on lines 22 through 25, warns the parties of the risks associated with a due-on-sale clause contained in the seller's deed of trust (or other conveyance document) and the remedies available to the seller's lender if the due-on-sale clause is not waived.

The Dodd Frank Act Limits Interest Rate in Seller Carryback

FACTS:

The buyer and seller entered into an AAR Residential Resale Real Estate Purchase Contract for the residential property. The buyer is going to reside in the property as his personal home. The seller is willing to finance the buyer only if the promissory note bears interest at 12% per annum because the buyer is a relatively high risk.

ISSUE: Is a 12% promissory note compliant with the Dodd Frank Act?

ANSWER:

Promissory Note and Deed of Trust Required in Carryback Financing

FACTS:

The seller and buyer have entered into a contract for the sale of a single-family residence with seller carryback financing.
The agent for the buyer completes the Arizona REALTORS® addendum "Seller Financing Addendum – Consumer Credit Transaction Secured by A Dwelling" (the "Addendum").

ISSUE: Is the Addendum the only additional document needed in the transaction between the buyer and seller?

DISCUSSION:

Unit 3: Fair Housing

Segment 1: The Basics

Learning Objectives:

At the conclusion of this unit, participants will be able to:

- Define fair housing.
- Define how fair housing laws affect the practice of real estate.
- Explain the risks associated with non-compliance to fair housing laws.
- Recognize situations that can increase risk and liability for salespersons and brokers for non-compliance to fair housing laws.

Group Activity: True or False

Q 1: Under federal law, it is legal for an apartment building owner to assign families with younger children to one particular building.
True False

Q 2: An apartment building owner has the right to reject an applicant because of poor housekeeping habits.
True False

Q 3: Forbidding the construction of a wheelchair ramp on the apartment building owner's property is permissible—even if the tenant agrees to remove it at his/her own expense upon leaving.
True False

Q 4: Under federal law, indicating a religious preference when advertising an available apartment is perfectly legal.
True False

Q 5: An apartment building owner may legally reject an applicant with a history of mental illness, though he/she is not a danger to others.
True False

Q 6: When using a real estate agent, a family may sell their house only to a white buyer.
True False

Q 7: A real estate agent is allowed to limit a home search to certain neighborhoods based on the client's race/ethnicity.
True False

Q 8: A loan officer may turn down a Black applicant because of the applicant's lack of steady job and income.
True False

Q 9: It is legal for a loan officer to require higher down payments from Hispanic families in order to get a mortgage.
True False

The Fair Housing Act prohibits the following, if based on race, religion, color, national origin, sex, familial status, or disability (i.e. protected classes):

- Refusal to rent or _____ a dwelling
- Refusal to _____ for sale or rental of a dwelling
- To otherwise make unavailable or ____ a dwelling
- To discriminate in the terms, conditions or _____ for sale or rental of a dwelling
- To discriminate in the provision of services or facilities in _____ with a dwelling
- To make, print or publish or _____ to be made, printed or published any statement, or advertisement regarding the sale or rental of a dwelling that indicates any preference, limitation or discrimination
- To _____ to any person that a dwelling is not available, if untrue
- To _____ or attempt to induce any person to sell or rent by representations regarding entry or prospective entry into the neighborhood of a person

Note: In addition to the seven protected classes under Title VIII, state or local ordinances may include a prohibition against discrimination for additional classes, such as:

- Age
- Source of income
- Marital status

- Sexual orientation
- Occupation
- Gender identity

Exemptions to the Fair Housing Act
There are three primary types of transactions that are exempt from the *Federal Fair Housing Act*:

- Single-family house sold or rented by owner [*42 U.S.C. §3603(b)(1)*]

- Owner-occupied home with no more than four units [*42 U.S.C. §3603(b) (2)*]

- Housing operated by religious organizations and clubs that limit occupancy to members, unless the membership in the religion is based on race, color, national origin. [*42 U.S.C. §3607*]

There is also an exemption for qualified senior housing. Qualified senior housing is exempt only from the familial status provision of the Act. Specific standards must be met to qualify as senior housing: (The Housing for Older Persons Act of 1995 (HOPA).

1. *Housing is intended for, and solely occupied by persons 62 years of age or older (i.e., 100% of the community is 62 years or older).*
2. *Housing is intended and operated for occupancy by persons 55 and over.*
3. *At least 80% of the households have at least one resident 55 years or older.*
4. *The community publishes and adheres to policies and procedures that demonstrate intent.*
5. *The community complies with rules for verification of occupancy.*

Two things to remember about exemptions:

1. There are **no exemptions** for real estate transactions that involve real estate licensees.

2. Although there are exemptions/exceptions to the federal *Fair Housing Act*, the *Civil Rights Act of 1866* still applies and prohibits discrimination based on race or ancestry in **any** real estate transaction.

Segment 2: Reasonable Accommodations & Modification for People with Disabilities

Americans with Disabilities Act of 1990 (ADA)

ADA requires that:

- Public accommodations have no architectural or communication barriers so that services or goods are accessible.
- Public accommodations provide auxiliary services or aids so that no one is excluded, denied services or treated differently.
- New commercial construction must be accessible to individuals with disabilities, unless structurally impractical.

Two key terms: "_____ _____" or _____.

Brokers' Risk Reduction Tip

Like hotels, retail stores and banks, a real estate office is considered to be a public accommodation so there should be no impediments for individuals with disabilities to enter and use the facility. Things to consider are:

- Handicap parking near the entrance
- Easily opened exterior doors
- Lower countertop in lobby so the individual using a wheelchair can be seen and spoken to at a comfortable height for them
- Handicap accessible restrooms
- Conference room with tables that can accommodate a wheelchair
- Wider doorways

Segment 3: Advertising

Prohibition against Discriminatory Advertising
What does the prohibition against discriminatory advertising include?

Section 804(c) of the *Fair Housing Act* addresses advertising guidelines.

The prohibition applies to publishers, *such as newspapers and directories,* as well as to persons and entities who place real estate advertisements.

The *Fair Housing Act* prohibits:

- Conveying preference to one group over another or exclusion due to one of the protected classes
- Using catchwords such as restricted, exclusive, private, integrated, traditional
- Using symbols or logos that imply or suggest discrimination
- Writing out directions to the property that refer to well-known ethnic or racial landmarks
- Targeting ads to one particular segment of the community
- Using words or phrases describing persons with disabilities or with respect to families with children (e.g., crippled, singles, adult building, restricted community, etc.)
- Advertising exclusively in:
    - A strategically limited geographic area
    - Particular editions of a print media that only reach certain segments of the population
    - Only selected sales offices

What can you say about a property? _____
_____
_____
_____

Should you avoid certain words or phrases to make sure you don't violate a protected class?

_____
_____

https://www.hud.gov/sites/documents/DOC_7784.PDF

A real estate licensee owns a single-family residence. The garage of the home has been converted into a small studio apartment. The licensee wants to advertise the studio apartment for rent to a "Single" person. The licensee believes she can advertise for single tenants because she is exempt from the Fair Housing Rules as her property is an owner-occupied property.

ISSUE: Can a licensee advertise her studio apartment for rent to a single tenant only?

ANSWER:

Best practices to keep your advertisements in compliance with the Fair Housing Act:

- Focus on the property and its amenities, not on your "ideal" buyer or renter.
- Do not make statements that have the effect of excluding individuals of a protected class from your advertising initiative.
- Avoid restricting your advertisements from only reaching certain individuals or audiences by, for example, using platform features that allow advertisers to restrict who sees the advertisements based on certain characteristics like race, religion or age.
- If you use pictures of people in your advertisements, make sure the advertisement includes individuals reflective of the population in the area where the advertisement is placed.
- Include the phrase "Equal Housing Opportunity" or the fair housing logo in your advertisements. Not only will this signify your commitment to fair housing to your audience, but HUD will also consider this language when determining your fair housing compliance efforts.
- Be familiar with applicable local and state fair housing that may afford even broader protections.

Are you required to use the Equal Housing Opportunity logo in all ads? _____

HUD originally published Fair Housing Advertising Regulations that have since been repealed. They are still available on the HUD site, though, as a reference.
NAR's *Fair Housing Handbook* is an excellent reference for advertising guidelines. NAR provides an abundance of articles and information for writing classified advertisements.

The field guide can be found on NAR's website at: http://www.realtor.org/field-guides/field-guide-to-fair-housing

Specific rules and advertising guidelines from HUD can be found at http://www.hud.gov/offices/fheo/library/part109.pdf

Brokers' Risk Reduction Tips for Advertising

- Establish office policies regarding all advertising.
- Review (or have reviewed by a knowledgeable person) all advertising for compliance with fair housing laws before the ad is placed.
- Enforce the same rules with agents' social media advertising. *Brokers should thoroughly educate agents regarding their actions in social media and how those actions are subject to all risk management principles, especially fair housing regulations.*
- Require that print media advertisements using images of people vary the photos or illustrations to represent all types of people.
- Require the use of the Equal Opportunity logo on ads.

Agents' Risk Reduction Tips for Advertising

- When creating advertisements, describe the features of the property—*not the characteristics of the current tenant/homeowner or potential tenant/homeowner.*
- Do not use language that is discriminatory (e.g., "White" private home, No Blacks, No Kids, etc.)
- Use positive language such as "Housing is available on an Equal Opportunity Basis" or "This complex does not discriminate on the basis of race, color, religion, etc."
- Do not use language suggesting a religious preference or limitation.
- Do not use language suggesting or stating a preference for gender *(a notable exception is if the advertisement is for a roommate where there will be shared common spaces and/or shared bedroom)*.
- Keep consistent records of all contacts and prospects.
- Use the Equal Housing Opportunity logo.

Segment 4: Service Animals

There are several categories of assistive animals. The categories are similar, but these animals provide very different services and are treated differently under state and federal law (source: doctorevictor.com)

Service animals. These animals are specifically and rigorously trained to perform specific tasks or alerts to mitigate their handler's disability. These animals are permitted to accompany the human in public areas because of ADA laws. They are working and should not be interacted with by others unless the handler gives permission to do so. These animals qualify as an assistive animal under Fair Housing laws.

Emotional Support (also called Comfort animals). These animals do not have to have any specialized training. They help alleviate symptoms of that person's disability that impact one or more daily activities. These animals also qualify as an assistive animal under Fair Housing laws.

Therapy animals. These animals are trained to provide psychological or physiological therapy to individuals other than their handlers. Typically, they visit various institutions like hospitals, schools, hospices, psychotherapy offices, nursing homes and more. These animals are encouraged to interact positively with others. These animals do not qualify as an assistive animal under Fair Housing laws.

Working animals. These animals have been specially trained for specific jobs and are used by the military, law enforcement, search and rescue. These animals do not qualify as an assistive animal under Fair Housing laws.

Segment 4: Discriminatory Behavior – Sellers, Buyers, Landlord/Renters

Article 10 of the Code of Ethics

Besides being required to abide by federal and Arizona fair housing laws, REALTORS® are obligated by Article 10 of the Code of Ethics.

Duties to the Public

Article 10

REALTORS® shall not deny equal professional services to any person for reasons of race, color, religion, sex, handicap, familial status, national origin, sexual orientation, or gender identity. REALTORS® shall not be parties to any plan or agreement to discriminate against a person or persons on the basis of race, color, religion, sex, handicap, familial status, national origin, sexual orientation, or gender identity. *(Amended 1/14)*

REALTORS®, in their real estate employment practices, shall not discriminate against any person or persons on the basis of race, color, religion, sex, handicap, familial status, national origin, sexual orientation, or gender identity. *(Amended 1/14)*

Standard of Practice 10-1

When involved in the sale or lease of a residence, REALTORS® shall not volunteer information regarding the racial, religious or ethnic composition of any neighborhood, however, REALTORS® may provide other demographic information. REALTORS® shall not engage in any activity which may result in panic selling or steering. *(Adopted 1/94, Amended 1/06, Amended and effective June 5, 2025)*

Standard of Practice 10-2

When not involved in the sale or lease of a residence, REALTORS® may provide demographic information related to a property, transaction or professional assignment to a party if such demographic information is (a) deemed by the REALTOR® to be needed to assist with or complete, in a manner consistent with Article 10, a real estate transaction or professional assignment and (b) is obtained or derived from a recognized, reliable, independent, and impartial source. The source of such information and any additions, deletions, modifications, interpretations, or other changes shall be disclosed in reasonable detail. *(Adopted 1/05, Renumbered 1/06)*

Standard of Practice 10-3

REALTORS® shall not print, display or circulate any statement or advertisement with respect to selling or renting of a property that indicates any preference, limitations or discrimination based on race, color, religion, sex, handicap, familial status, national origin, sexual orientation, or gender identity. *(Adopted 1/94, Renumbered 1/05 and 1/06, Amended 1/14)*

Standard of Practice 10-4

As used in Article 10 “real estate employment practices” relates to employees and independent contractors providing real estate-related services and the

administrative and clerical staff directly supporting those individuals. *(Adopted 1/00, Renumbered 1/05 and 1/06)*

Standard of Practice 10-5

REALTORS®, in their capacity as real estate professionals, in association with their real estate businesses, or in their real estate-related activities, shall not harass any person or persons based on race, color, religion, sex, disability, familial status, national origin, sexual orientation, or gender identity.

As used in this Code of Ethics, harassment is unwelcome behavior directed at an individual or group based on one or more of the above protected characteristics where the purpose or effect of the behavior is to create a hostile, abusive, or intimidating environment which adversely affects their ability to access equal professional services or employment opportunities. *(Adopted and effective November 13, 2020, Amended 1/23, Amended and effective June 5, 2025)*

WORKING WITH BUYERS & SELLERS:

Beware of STEERING:

> ***Real Estate Principles*** *provides an example: The salespeople at PQR Realty are encouraged to show Hispanic buyers only properties in the city's predominantly Hispanic neighborhood. Non-Hispanic buyers aren't shown properties there, except by specific request. This is done on the principle that Hispanic buyers would be more "comfortable" living in the Hispanic neighborhood and non-Hispanic buyers would be "uncomfortable" there. PQR Realty is guilty of steering.*

Best Practices to avoid Steering: (from NAR)

- Provide clients with listings based on their objective criteria alone.
- When a client uses vague terms such as "nice," "good," or "safe," ask impartial questions to clarify their criteria, such as property features and price point.
- Only communicate objective information about neighborhoods and direct clients to third-party sources with neighborhood-specific information.
- Learn to pay attention to your unconscious biases. When evaluating what a client objectively wants, ask yourself why you have eliminated certain areas, if you have.

Buyer Love Letters (from NAR)

Before the next time you are faced with a buyer love letter, consider these best practices to protect yourselves and your clients from fair housing liability:

- Educate your clients about the fair housing laws and the pitfalls of buyer love letters.
- Inform your clients that you will not deliver buyer love letters and advise others that no buyer love letters will be accepted as part of the MLS listing.
- Remind your clients that their decision to accept or reject an offer should be based on objective criteria only.
- If your client insists on drafting a buyer love letter, do not help your client draft or deliver it.
- Avoid reading any love letter drafted or received by your client.
- Document all offers received and the seller's objective reason for accepting an offer.

These are examples of questions that you may be asked. NAR's *Fair Housing Pocket Guide* (Sales) and *Fair Housing Pocket Guide* (Rental) provide more examples.

Q: Are there any "safe" questions I can ask prospects?

Q: What if prospects ask me if any Hispanics (or other ethnic group) live here?

Q: What if that information is readily available on the Internet?

Q: My new buyer client (who is Caucasian) has asked to be shown houses in "white" neighborhoods only. Can I do that?

Q: My seller client asked me why she can't sell her home to whomever she wishes at whatever price she wishes. What should I tell her?

Q: I was working at an open house and was speaking with a Latino couple when a Caucasian couple came. I didn't ask the two couples identical questions. Am I guilty of a fair housing violation?

LENDERS:

ARS 20-1548 Prohibits discrimination in the issuance or extension of mortgage guaranty insurance.

Equal Credit Opportunity Act (ECOA)
[15 U.S.C. 1691-1691(f)]

- Forbids discrimination in all consumer credit/lending*, including residential real estate loans and credit extended to a person or family for personal, family or household purchases.*
  - Refuse to make a mortgage loan
  - Refuse to provide information regarding loans
  - Impose different terms or conditions on a loan, such as different interest rates, points or fees
  - Discriminate in appraising property
  - Refuse to purchase a loan or set different terms or conditions for purchasing a loan

- Makes discrimination unlawful with respect to any aspect of a credit application on the basis of race, color, religion, national origin, sex, marital status, age or because the applicant's income is derived in whole or in part from any public assistance program.

Lenders may ask optional questions about applicants' race, national origin, sex and marital status but only to gather these demographics to allow the government to monitor compliance with the ECOA.

If the applicant is denied, the lender is responsible for providing a written explanation.

Home Mortgage Disclosure Act (HMDA)

- Implemented by the Federal Reserve Board's *Regulation C*

- Assists the government to determine whether:
  1) Lenders are fulfilling their obligation to serve the housing needs of their communities,
  2) Public officials are distributing public-sector investments to attract private investment to needed areas, and
  3) There are possible discriminatory lending patterns.

The *Home Mortgage Disclosure Act* also helps the federal government enforce the prohibition against redlining.

Lenders may ask optional questions about applicants' race, national origin, sex and marital status but only to gather these demographics to allow the government to monitor compliance with the ECOA.

If the applicant is denied, the lender is responsible for providing a written explanation.

The Housing for Older Persons Act of 1995 (HOPA)

There is also an exemption for qualified senior housing. Qualified senior housing is exempt only from the familial status provision of the Act. Specific standards must be met to qualify as senior housing:

1. *Housing is intended for, and solely occupied by persons 62 years of age or older (i.e., 100% of the community is 62 years or older).*
2. *Housing is intended and operated for occupancy by persons 55 and over.*
3. *At least 80% of the households have at least one resident 55 years or older.*
4. *The community publishes and adheres to policies and procedures that demonstrate intent.*
5. *The community complies with rules for verification of occupancy.*

Two things to remember about exemptions:

1. There are **no exemptions** for real estate transactions that involve real estate licensees.

2. Although there are exemptions/exceptions to the federal *Fair Housing Act*, the *Civil Rights Act of 1866* still applies and prohibits discrimination based on race or ancestry in **any** real estate transaction.

Agents' Risk Reduction Tips

- If a seller client indicates any unwillingness to abide by the *Fair Housing Act*, walk away from the transaction.
- Watch out for subtle signs that the seller might discriminate. Again, make sure you tell the seller that what he or she is suggesting violates fair housing laws and you will no longer work with them. Document what transpired following your brokerage's policies and procedures.
- If a rental client (i.e., landlord or rental property manager) asks you to conduct yourself in a way that is discriminatory or noncompliant with the *Fair Housing Act*, tell them in clear language that what they asked you to do is a violation of the *Fair Housing Act* and that you will not be a party to it.
- Do not in any way imply that if a protected class moves into the neighborhood that the home values, quality of life, school system, etc. will be detrimentally impacted. This is known as blockbusting.
- Never change listing details based on the race, religion, etc. of the prospective buyer. The listing should be the same for everyone.
- Never refuse to show a property to a possible buyer based on race, religion, etc. This is known as steering.

Segment 6: Complaints and Enforcement

Enforcement and Penalties for Violations of the *Fair Housing Act*

The *Fair Housing Act* is enforced by the Department of Housing and Urban Development (HUD) through its Office of Fair Housing and Equal Opportunity. HUD is also responsible for developing and enforcing regulations to promote the *Fair Housing Act*. One of these regulations is a requirement for businesses involved in housing/real estate transactions to display a fair housing poster [HUD-928.1 (2/2003)] in their office.

Brokers' Risk Reduction Tip:

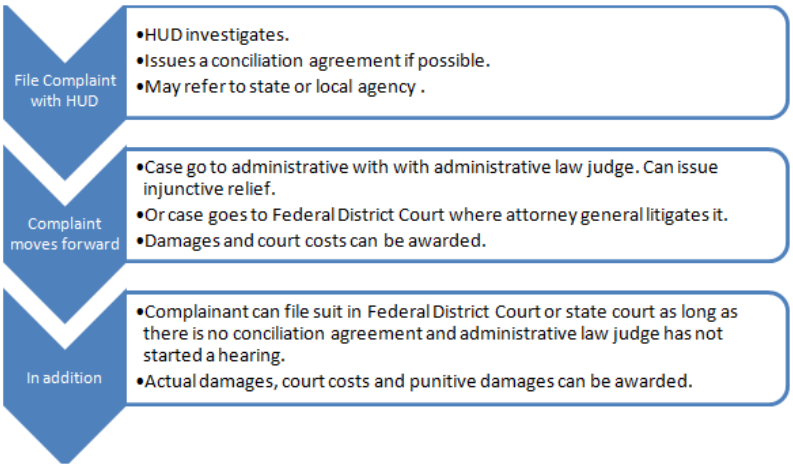
Prominently display the requisite Fair Housing Poster in your lobby or at your front desk. A copy of the poster is available from HUD at: http://www.hud.gov/offices/fheo/promotingfh/928-1.pdf.

Testers

Since complaints of discrimination or discriminatory practices are often difficult to prove, HUD uses "testers" to help determine compliance with the *Fair Housing Act*.

Ensure that anyone working in your office – whether a licensee or support person – understands that everyone is to be treated equally at all times. This includes in-person contact as well as phone calls, texts and emails.

The Complaint Process



Anyone can file a complaint with HUD at no cost. Fair housing complaints can be filed by any entity, including individuals and community groups. Those that file fair housing complaints are known as complainants. Those against whom fair housing complaints are filed are called respondents.

Complaints about discrimination in housing in Arizona should be made to the regional office of HUD:

San Francisco Regional Office of FHEO
U.S. Department of Housing and Urban Development
600 Harrison Street, 3rd Floor
San Francisco, California 94107-1387
(415) 489-6524
1-800-347-3739
TTY (415) 436-6594

Complaint form:
portal.hud.gov/hudportal/HUD?SRC=/program_offices/fair_housing_equal_opp/online-complaint

What happens after a complaint is filed?

HUD will notify the complainant when it receives the complaint. Normally, HUD also will:

- Notify the alleged violator (the respondent) of the complaint and permit that person to submit an answer
- Investigate the complaint and determine whether there is reasonable cause to believe the *Fair Housing Act* has been violated
- Notify the complainant if it cannot complete an investigation within 100 days of receiving a complaint

What happens after a complaint is received?

Conciliation

HUD will try to reach an agreement with the respondent. A conciliation agreement must protect both the complainant and the public interest. If an agreement is signed, HUD will take no further action on the complaint. However, if HUD has reasonable cause to believe that a conciliation agreement is breached, HUD will recommend that the Attorney General or US Department of Justice file suit.

Complaint Referrals

If HUD has determined that the complainant's state or local agency has the same fair housing powers as HUD, HUD will refer the complaint to that agency for investigation and notify the complainant of the referral. That agency must begin work on the complaint within 30 days or HUD may take it back.

What happens after a complaint investigation?

If, after investigating the complaint, HUD finds reasonable cause to believe that discrimination occurred, it will inform the complainant. The case will be heard in an

administrative hearing within 120 days, unless the complainant or the respondent wants the case to be heard in Federal District Court. Either way, there is no cost to the complainant.

The Administrative Hearing

If the case goes to an administrative hearing HUD attorneys will litigate the case. The complainant may intervene in the case and be represented by a private attorney if so desired. An administrative law judge (ALJ) will consider evidence from the complainant and the respondent. If the ALJ decides that discrimination occurred, the respondent can be ordered:

- To compensate the complainant for actual damages, including humiliation, pain and suffering.
- To provide injunctive or other equitable relief, for example, to make the housing available to the complainant.
- To pay the federal government a civil penalty to vindicate the public interest. The maximum penalties are $16,000 for a first violation in addition to actual damages for the complainant, injunctive or other equitable relief, and attorney fees; and $65,000 for a third violation within seven years.
- To pay reasonable attorney's fees and costs.

Federal District Court

If the complainant or the respondent chooses to have the case decided in Federal District Court, the attorney general will file a suit and litigate it. Like the ALA, the District Court can order relief, and award actual damages, attorney's fees and costs. In addition, the court can award punitive damages.

In Addition

The complainant may file suit at the complainant’s own expense in Federal District Court or State Court within two years of an alleged violation. If the complainant cannot afford an attorney, the Court may appoint one. The complainant may bring suit even after filing a complaint, if the complainant has not signed a conciliation agreement and an administrative law judge has not started a hearing. A court may award actual and punitive damages and attorney's fees and costs.

Arizona Fair Housing Act

(A.R.S. §41-1491 ET. SEQ)

The *Arizona Fair Housing Act* is very similar to the federal *Fair Housing Act*. Arizona's law has different procedures for the administrative complaint process.

- Fair housing complaints are filed with the Civil Rights Division of the Arizona Attorney General's Office (ACRD).

- ACRD will investigate the complaint at no charge to the complaining person.

- Fair housing complaints filed with ACRD will be automatically dual filed with the United States Department of Housing and Urban Development (HUD) *pursuant to a cooperative agreement between the two agencies.*

- A person has one year after an alleged violation to file a complaint, *but should file as soon as possible if they believe in good faith that a violation has occurred.* http://www.azag.gov/civil_rights

Individuals who believe their rights have been violated can call the Civil Rights Division at 877-491-5742 (Phoenix office) or 877-491-5740 (Tucson) or use an online civil rights complaint form at http://www.azag.gov/civil_rights/complaintform.html, or write a letter and mail it to:

Arizona Civil Rights Division
Office of the Attorney General
1275 W. Washington Street
Phoenix, Arizona 85007

Arizona Department of Housing

The Arizona Department of Housing's website is a resource for consumers, and anyone involved in housing decision-making. The URL for the Arizona Department of Housing is: http://www.azhousing.gov/

Civil Rights Division of the Attorney General's Office

The Civil Rights Division of the Attorney General's Office also has resources on housing discrimination and fair housing. Several resources are available in English and in Spanish. This website is located at http://www.azag.gov/civil_rights/fairhousing/

Review and Conclusion

Arizona state laws regarding fair housing are very similar to the federal fair housing laws; however, the enforcement processes are different. Arizona cross-files fair housing complaints with HUD. Arizona real estate agents and brokers may lose their real estate license or their right to a real estate license if they are found in violation of fair housing laws.

Other Tools to Combat Housing Discrimination

If there is noncompliance with the order of an administrative law judge, HUD may seek temporary relief, enforcement of the order or a restraining order in a United States Court of Appeals.

The Attorney General may file a suit in a Federal District Court if there is reasonable cause to believe a pattern or practice of housing discrimination is occurring.

http://portal.hud.gov/hudportal/HUD?src=/program_offices/fair_housing_equal_opp/FHLaws/yourrights

Brokers' and Agents' Risk Reduction Tips

- Become familiar with the *Fair Housing Act* and the seven protected classes and how they impact your real estate practice. Stay current with any changes in the laws or the regulations. Violations can and do occur without an intent to discriminate.
- Make a personal commitment to provide equal, professional service to all clients, customers, buyers, sellers and renters – regardless of their race, national origin, religion, sex, disability, color or familial status.
- Inform clients and customers about their rights and responsibilities under the federal and state fair housing laws. The Arizona Department of Housing, NAR, and HUD have free sources available.

Brokers' Risk Reduction Tips

- Develop, implement and enforce fair housing policies for your firm. Make sure to include corrective action procedures for when an agent violates the firm's policies.
- Publicize your firm's commitment to fair housing.
- Use the Equal Housing Opportunity logo in your advertisements.
- Require fair housing training for your agents. Repeat it at regular intervals or as needed.
- Designate someone in your firm to be a "fair housing" officer. This individual will be responsible for keeping current and answering questions from other employees and agents.
- If property management is part of the firm's practice, make sure that the tenant selection process is objective, applied consistently to every applicant, and based on fulfilling lease obligations.
- Review your policies and procedures with a competent attorney.
- Review your policies and procedures periodically to make any necessary changes and review the changes with a competent attorney.

Segment 7: Unit Conclusion and Review

Practices such as refusing to sell or rent to individuals or families based on any of the seven protected classes is a fair housing violation. Actions such as redlining, blockbusting or steering are strictly prohibited.

Real estate practitioners should educate themselves about fair housing and stay well informed. Agents should have good lines of communication with their clients throughout the process and efficiently document any discussion. To help ensure adherence to fair housing laws, brokerages should have in place policies and procedures that are consistently enforced.

NAR is an excellent source of information. NAR's *Fair Housing Handbook* has sample checklists, sample forms, sample policies, etc.

HUD also has resources, including a blog and Face Book page.

Fair housing isn't just a broker issue or a sales agent issue. It's both. As an agent, you may be willing to take a risk and engage in activities that violate

fair housing laws. Should you choose to do so you not only risk your reputation and your license, you also jeopardize the reputation and license of your broker.

Unit 4 - Lead-Based Paint Disclosure

The Law

In 1992, Congress passed the Residential Lead-Based Paint Hazard Reduction Act (also referred to as Title X or the Act). The law required the EPA and HUD to promulgate joint rules and regulations for lead-based paint disclosure. As a result, the Code of Federal Regulations (24 CFR Part 35, Subpart H and 40 CFR Part 745, Subpart F) and the final joint EPA and HUD Rule (61 FR 9064) were promulgated to implement the Act. There are literally hundreds of pages of statutes, regulations and rules addressing this issue.

Title X: Lead-Based Paint Disclosure – Pre-1978

- Required in transactions involving properties constructed prior to 1978.

- Before the buyer is obligated under any contract to purchase the property, the seller must:

    - Provide the lead hazard pamphlet.
    - Disclose any information concerning known hazards.
    - Provide any available records or reports concerning lead-based paint.
    - Permit the buyers with an opportunity to conduct a lead-based paint risk assessment or inspection.

- Contracts on homes constructed before 1978 must contain certain language and disclosures to satisfy the statutory requirements. The AAR Disclosure of Information on Lead-based Paint Hazards form may be used for this purpose.

What specific risks are addressed by the LBP Disclosure?

Can the LBP Disclosure be completed after contract acceptance?

Is the use of MLS electronic lead-based paint disclosures acceptable?

What are the penalties for violation?

What properties are exempt from the LBP disclosure requirements?

- Property constructed after 1978
- Housing for elderly (retirement communities composed of persons over the age of 62) or disabled housing unless a child under the age of six will reside therein
- Foreclosure transactions
- Short-term leases (100 days or less where no renewal or extension can occur)
- Lease renewals where the disclosures were previously made and no new information since the initial disclosure was provided
- Purchase, sale or servicing of mortgages
- Sale or lease of zero-bedroom dwellings

For additional information contact:

- National Lead Information Clearinghouse — 800/424-LEAD
- HUD Office of Lead Hazard Control — **www.hud.gov/offices/lead/index.cfm**
- EPA website — **www.epa.gov/opptintr/lead**

Unit 5: Antitrust

Segment 1: Introductions

Learning Objectives
At the conclusion of this Unit, participants will be able to:

- Define the applicable antitrust laws.
- Describe how the antitrust laws affect the practice of real estate.
- Explain the risks associated with violation of the antitrust laws
- Recognize situations that can increase risk and liability for salespersons and brokers for violations of the antitrust laws

SCENARIOS

Q 1: Several association leaders remained at the restaurant bar after an association function and agreed that they would raise their commission rates beginning the first of the month.

Is this a possible antitrust violation?

Q 2: At a broker's breakfast, brokers of the three largest firms in the area decided they would all offer a 40% split to cooperating brokers in the MLS.

Is this a possible antitrust violation?

Q 3: A group of REALTORS® from different firms met for an MLS meeting to discuss proposed policy revisions. A discussion about a new firm that was a "limited service" firm was held. Several of the brokers decided they wouldn't show this firm's listings.

Is this a potential antitrust violation?

[Adapted from Arizona REALTOR® Digest, May 2004. Vol. 26. No. 4]

Segment 2: Federal Antitrust Law

Antitrust laws were created to protect the public from unscrupulous business practices *that unreasonably deprived consumers of the benefits of* competition*, resulting in higher prices or inferior goods or services.*

These laws were also enacted with the underlying belief that competition *is good for the economy and society. The antitrust laws prohibit certain business practices in general terms and allow the court system to decide the legality or illegality of individual cases based on the actual facts. [Real Estate Agent's Field Guide]*

The nature of real estate practice, as it exists today anyway, makes brokers susceptible to antitrust challenges. Because our industry is based on competition **and** cooperation with our own competitors there are ample opportunities for antitrust misconduct – intentional or otherwise. [Antitrust and the Real Estate Brokerage Firm]

The basic objective of the federal antitrust laws is: to protect the process of competition for the benefit of consumers, making sure there are strong incentives for businesses to operate efficiently, keep prices down, and keep quality up. *[FTC Guide to the Antitrust Laws].*

Segment 3: The Sherman Antitrust Act

The *Sherman Act* is the foundation of federal antitrust law.

- The *Sherman Act* was named for Senator John Sherman from Ohio.

- The term "antitrust" was used because the original intent of act was to prohibit the creation of business trusts. Business trusts are created when the shareholders of all companies in a specific industry transfer all their shares to a separate board of trustees. In exchange they receive dividend-paying certificates. The board of trustees then manages ALL of the companies, thus minimizing if not outright eliminating competition within that industry. *Trusts were corporate holding companies that, by 1888, had created vast monopolies*

of most of the US manufacturing and mining industries. The most well-known trusts were John D. Rockefeller's Oil Trust (Standard Oil of New Jersey), the Tobacco Trust, and J.P. Morgan's Steel Trust (U.S. Steel Corporation. [thefreedictionary.com]

The Sherman Act outlaws "every contract, combination, or conspiracy in restraint of trade," as well as any "monopolization, attempted monopolization, or conspiracy or combination to monopolize."
It prohibits any agreement that has the effect of restraining trade, including conspiracies.

- The *Sherman Act* prohibits monopolies.
- The *Sherman Act* prohibits unreasonable restraint of trade.

A key word from above is <u>unreasonable</u>. Not every restraint of trade is expressly prohibited – only those that are unreasonable. For example, an agreement between two individuals to create a partnership restrains trade – but not unreasonably so.

The *Sherman Act* sets forth two elements for a Section 1 violation:
(1) a contract, combination or conspiracy that
(2) restrains trade.

How is a conspiracy defined?

According to the *United States Department of Justice Antitrust Manual*, the most common violations and those most likely to be prosecuted criminally fall under Section 1and are for price fixing, bid rigging, and territorial or customer allocation among competitors ("horizontal agreements").

***Per se* Offenses**

Some actions are so harmful to competition that they are almost always illegal. These actions include
arrangements between competitors to:

- Fix prices.
- Rig bids.
- Divide markets (horizontal agreements).
- Boycott as a group.
- Enter into tying arrangements.

For additional information, see *United States v. Topco Associates, Inc., 405 U.S. 596 (1972)*

These have been determined by the U.S. Supreme Court as *per se* violations.

What exactly is a *per se* violation?

The following citation from the U.S. Supreme Court identifies those practices that are per se offenses:

U.S. Supreme Court

NORTHERN PAC. R. CO. v. UNITED STATES, 356 U.S. 1 (1958)

356 U.S. 1

NORTHERN PACIFIC RAILWAY CO. ET AL. v. UNITED STATES.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON. No. 59.

Argued January 7-8, 1958.

Decided March 10, 1958.

However, there are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use. This principle of per se unreasonableness not only makes the type of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable - an inquiry so often wholly fruitless when undertaken. Among the practices which the courts have heretofore deemed to be unlawful in and of themselves are **price fixing**, United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 210 ; **division of markets**, United States v. Addyston Pipe & Steel Co., 85 F. 271, aff'd, 175 U.S. 211 ; **group boycotts**, Fashion Originators' Guild v. Federal Trade Comm'n, 312 U.S. 457 ; and **tying arrangements**, International Salt Co. v. United States, 332 U.S. 392 .

What are some examples of real estate-specific *per se* offenses?

The government has identified *per se* offenses in real estate to include commission

fixing, setting co-op splits, boycotting competitors for any reason, or setting “standard” time frames for listing contracts.

Real estate licensees need to know that if accused of a *per se* violation, they cannot present a defense that their actions did not damage another or were not in restraint of trade, they can only defend whether or not they committed the offense. [Per Se Antitrust Actions in the Real Estate Brokerage Business]

Restraints not deemed per se violations are reviewed under the

Price Fixing:

Price fixing is a *per se* violation of *Sherman* and is defined as **the practice of establishing prices between and among competitors for a product or service rather than letting the market determine the price.**

Price fixing is the most serious example of a *per se* violation under the *Sherman Act*. Under the act, it is immaterial whether the fixed prices are set at a maximum price, a minimum price, the actual cost, or the fair market price. It is also immaterial under the law whether the fixed price is reasonable.

Antitrust laws prohibit competing brokers from talking about their commission rates or level of commissions they offer competing brokers. [*The Real Estate Agent’s Field Guide*.]

In real estate, to avoid the appearance of price fixing, brokers and agents from competing firms should never discuss their commission rates.

Brokers must independently determine the commission rates or fees for their firm.

Commissions or rates of commission must be negotiable. “It is a violation of state and federal antitrust laws for brokers to set uniform commission rates.” [*Real Estate Principles*.]

Agents’ Risk Reduction Tips

- Do use language that clearly informs the consumer that commissions or fees charged are what **your** firm charges. Do not compare them to any other firms' fees.
- Do be careful in written communication with individuals outside your firm when discussing rates, commissions, etc.
- Do **NOT** use forms with pre-printed commission rates.
- Do NOT use forms with pre-printed listing periods.
- Do NOT use forms with automatic renewal clauses.
- Do NOT discuss your firm's commission structure with competitors.
- Do **NOT** have conversations regarding firm's commission or fee structure unless you know with whom you are speaking. *Be especially careful on Social Media sites.*

Brokers' Risk Reduction Tips

- Do establish company's fees, splits, listing terms independently *by analyzing market conditions, transaction costs, income potential, etc.*
- *Do document this analysis by use of a spreadsheet, memo, etc.*
- Do discuss potential changes in fees, splits, etc. with your attorney prior to implementing.
- *Do document this discussion and keep in a secure location to protect attorney-client privilege.*
- Avoid even informal conversations with competitors about fees.
- Do monitor agents' compliance with company's antitrust policies.
- Do train agents on antitrust laws and the importance of not discussing pricing and commission with competitors.
- Do develop a written antitrust policy *that is distributed to all agents. Have each agent sign a document stating that they received a copy and keep that document in a secure file.*
- Do teach agents to emphasize their positive qualities and the positive qualities of their firm *rather than making negative remarks about a competitor.*
- Do **NOT** agree with another broker, either explicitly or implicitly to charge sellers a certain commission amount.
- Do **NOT** discuss your business model or practices at any place, time or circumstance with your competitors. *This includes casual meetings in restaurants, on the golf course, at church, etc. Be especially mindful to avoid "hallway" conversations or sidebar discussions at your association's meetings.*

Words or Phrases to Avoid

- Going rate.
- Normal fee.
- Standard commission.
- Recommended commission/rate.
- Prevailing commission/rate.
- This is the rate that everyone charges. . .
- The MLS won't accept less than *X* days listings.
- The Board's rule on commissions is. . .
- *X* is the standard rate for our area. . .

The Moral:
Practice safe speech by thinking before you speak. Diane Simpson, DREI

Bid Rigging

Brokers' and Agents' Risk Reduction Tip

- Do **NOT** become involved in agreements that suppress or restrain competition. Be especially careful when competitors approach you to work together in a non-competitive manner.

Horizontal Agreements/Allocation of Customers or Markets

What is an example of a real estate-related horizontal agreement/allocation of market?

Why is this considered to be anti-competitive?

Brokers' and Agents' Risk Reduction Tips

- Do document your decision to specialize with appropriate supporting materials such as marketing or demographic data.
- Do **NOT** agree with another broker or agent to divide or allocate territories or markets.

Group Boycott

A group boycott occurs when two or more entities conspire to not work with a third entity or to cooperate on less favorable terms in such a way as to reduce competition or injure the third entity.

Why would these actions be possible *Sherman Act* violations?

Agents' Risk Reduction Tips

- Do use positive language to emphasize your firm's experience or your personal expertise.
- Do **NOT** discuss your firm's business practices with competitors.

Brokers' Risk Reduction Tips

- Do make decisions to work or not work with another business on your own using your firm's goals, experiences, expectations, etc.
- Do **NOT** discuss one broker's business practice with other brokers.
- Do **NOT** agree with another broker to boycott or not use another entity.

Words or Phrases to Avoid

- "Before you decide to work with *X* firm, you need to know that nobody works on their listings."
- "That other firm isn't very professional. They allow part time agents."
- "If we reduce the commission rate on your listing none of the other salespeople

will show it."

- "We don't worry about Mary Smith. We just don't show her listings."

- "Something has to be done about Larry's company. Nobody can charge a flat rate like that and make a living."

Tie-In Arrangements (or Tying Arrangements)

A tie-in arrangement is an agreement to sell one product, but only on the condition that the buyers also purchase a different (or tied) product. The tied product is usually less desirable or unique than the other product.

Why might these types of arrangements be considered in restraint of trade?

What is an example of a real estate-specific tying arrangement?

Tying arrangements are closely scrutinized because they exploit market power in one product to expand market power in another product.

Conclusion and Review:

- Arizona licensees are subject to the *Sherman Act*.

- Several antitrust activities are identified as *per se* offenses.

- *Per se* offenses include: price fixing and bid rigging, group boycott, horizontal agreements/allocation of customers or market, and tying-in arrangements.

- To protect yourself and your firm, do not agree with another agent or broker to:
    - Fix commission rates or fees
    - Fix coop splits
    - Not cooperate or work with another brokerage
    - Divide or allocate a "territory"

Segment 4: Arizona Antitrust Law

The Arizona antitrust act is commonly cited as the uniform state antitrust act. (*A.R.S. §44-1413*)

A.R.S. §44-1402 provides that:

> "[a] contract, combination or conspiracy between two or more persons in restraint of, or to monopolize, trade or commerce, any part of which is within this state, is unlawful. "

A.R.S. §44-103 provides that:

> The establishment, maintenance or use of a monopoly or an attempt to establish a monopoly of trade or commerce, any part of which is within this state, by any person for the purpose of excluding competition or controlling, fixing or maintaining prices is unlawful.

What are some similarities between the Sherman Act and the Arizona Uniform State Antitrust Act?

Real estate licensees may be charged with either a state or federal violation of an antitrust act – or both.

Conclusion and Review

The *Arizona Uniform State Antitrust Act* is modeled after the federal antitrust acts. The Risk Reduction Tips offered under the segment on the *Sherman Act* also apply to the *Arizona Uniform State Antitrust Act*.

Any questions?

Segment 5: REALTORS® and Antitrust Law

Associations, REALTORS® and Antitrust Law

- Because REALTOR® associations and other, similar trade associations are groups of competitors who promote their common interests; they are particularly vulnerable to allegations of antitrust activities.

- MLSs, REALTOR® associations and other trade or professional organizations are not permitted to set fees or commission splits.

In United States vs. National Association of Real Estate Boards the Supreme Court decided that mandatory fee schedules created and enforced by a real estate board violated the Sherman Act. Since the 1950 case, NAR has gone to great lengths to ensure its member boards and MLSs do not set compensation.

NAR's MLS Policy provides: Boards and associations of REALTORS® and their MLSs shall not: "Fix, control, recommend, or suggest the commissions or fees charged for real estate brokerage services. (Interpretation 14).

NAR's MLS Policy also states: Boards and associations of REALTORS® and their MLSs shall not: "Fix, control, recommend, or suggest the cooperative compensation offered by listing brokers to potential cooperating brokers." [*NAR Handbook on Multiple Listing Policy*]

Despite these efforts, sellers filed civil lawsuits against NAR and brokerages claiming that NAR's rule requiring MLS participants to make an offer of compensation to cooperating buyer's agents was an illegal restraint on free trade. *Burnett vs. NAR*, the first case tried, resulted in a jury verdict against NAR and the brokerage defendants, and awarded the Missouri sellers $1.7B in damages. NAR was confident the verdict could be successfully appealed but dozens of copycat lawsuits were filed against its state and local associations, their owned MLSs, and their members' brokerages. The cost to defend all these lawsuits was overwhelming, so NAR agreed to a global settlement that resolved most all seller liability and promised to implement practice changes that should prevent anti-trust allegations in the future.

What's Happening Now: NAR Settlement FAQ excerpt

https://www.nar.realtor/the-facts/nar-settlement-faqs

What are the key terms of the Agreement?

- Release of liability: The agreement would release NAR, over one million NAR members, all state/territorial and local REALTOR® associations, all association-owned MLSs, and all brokerages with an NAR member as principal whose residential transaction volume in 2022 was $2 billion or below from liability for the types of claims brought in these cases on behalf of home sellers related to broker commissions.
- NAR fought to include all members in the release and was able to ensure more than one million members are included.
- Despite NAR's efforts, agents affiliated with HomeServices of America and its related companies—the last corporate defendant still litigating the Sitzer-Burnett case—are not released under the settlement, nor are employees of the remaining corporate defendants named in the cases covered by this settlement.
- The agreement provides a mechanism for nearly all brokerage entities that had a residential transaction volume in 2022 that exceeded $2 billion and MLSs not wholly owned by REALTOR® associations to obtain releases efficiently if they choose to use it.
    - Compensation offers moved off the MLS: NAR has agreed to put in place a new rule prohibiting offers of compensation on the MLS. Offers of compensation could continue to be an option consumers can pursue off-MLS through negotiation and consultation with real estate professionals. And sellers can offer buyer concessions on an MLS (for example—concessions for buyer closing costs). This change will go into effect in late July 2024.
    - Written agreements for MLS participants working with buyers: While NAR has been advocating for the use of written agreements for years, in this settlement we have agreed to require MLS participants working with buyers to enter into written agreements with their buyers. This change will go into effect in late July 2024.
    - Settlement payment: NAR will pay $418 million over approximately four years. This is a substantial sum, and it will be incumbent on NAR to use our remaining resources in the most effective way possible to continue delivering on our core mission. NAR will not raise membership dues for 2024 or 2025 because of this payment.
    - NAR continues to deny any wrongdoing: NAR has long maintained — and we continue to believe — that cooperative compensation and NAR's current policies are good things that benefit buyers and sellers. They promote access to property ownership, particularly for lower- and middle-income buyers who

can have a difficult-enough time saving for a down payment. With this settlement, NAR is confident it and its members can still achieve all those goals.

By changing the cooperative compensation policy, aren't you admitting that it was problematic?

- No. The settlement makes clear that NAR continues to deny any wrongdoing in connection with the Multiple Listing Service (MLS) cooperative compensation model rule (MLS Model Rule).
- NAR has long maintained — and we continue to believe — that cooperative compensation and NAR's current policies are good things that benefit buyers and sellers. They promote access to real property ownership, particularly for lower- and middle-income buyers who can have a difficult-enough time saving for a down payment. Real estate laws in many states authorize offers of compensation.
- With this settlement, NAR is confident it and its members can still achieve all those goals.

Why was prohibiting the publication of compensation offers in the MLS part of the settlement?

- While NAR has long maintained — and we continue to believe — that cooperative compensation and NAR's current policies are good things that benefit buyers and sellers, we also acknowledge that continuing to litigate would have hurt members and their small businesses, so NAR agreed to put in place a new rule prohibiting offers of compensation on the MLS.
- This is consistent with NAR's long-maintained position that prohibiting all offers of cooperative compensation entirely would harm consumers and be inconsistent with real estate laws in the many states that authorize them.
- We believe this agreement provides a path forward for our industry and NAR.

Is it possible for offers of compensation to be conveyed through channels other than the MLS?

Yes. Offers of compensation could continue to be an option consumers can pursue off-MLS through negotiation and consultation with real estate professionals. And sellers can offer buyer concessions on an MLS (for example—concessions for buyer closing costs).

Does the requirement to use a written agreement before showings apply to commercial transactions?

No. The settlement and the practice changes it requires are focused on residential transactions, not commercial transactions or leases.

How does the settlement affect home sellers and home buyers?
This settlement would preserve the choices consumers have regarding real estate services and compensation.

- After the new rule goes into effect, listing brokers and sellers could continue to offer compensation for buyer broker services, but such offers could not be communicated via the MLS.
- MLS participants acting for buyers would be required to enter into written agreements with their buyers before touring a home. These agreements can help consumers understand exactly what services and value will be provided, and for how much.

How will buyer brokers get paid now?

- We have long believed that it is in the interests of the sellers, buyers, and their brokers to make offers of compensation — but using the MLS to communicate offers of compensation will no longer be an option.
- Offers of compensation could continue to be an option consumers can pursue off-MLS through negotiation and consultation with real estate professionals.
- The types of compensation available for buyer brokers would continue to take multiple forms, depending on broker-consumer negotiations, including but not limited to:
    - Fixed-fee commission paid directly by consumers
    - Concession from the seller
    - Portion of the listing broker's compensation
- Compensation would continue to be negotiable and should always be negotiated between agents and the consumers they serve.

Brokers' and Agents' Risk Reduction Tips

- Avoid any discussions of commission rates, pricing, listing policies, or other business practices before, during or after meetings of your REALTOR® association or MLS. *This includes committee meetings and informal meetings that often occur during breaks and in hallways and parking lots.*
- If such a discussion starts a REALTOR® or broker should immediately suggest that the topic be changed immediately and if not successful in doing so, should promptly leave the meeting.
- If minutes are being taken, the REALTOR® or broker should insist that this departure is noted for record. These minutes could come in handy if the association or its members are charged with an antitrust violation. [*Antitrust and the Real Estate Brokerage Firm]*

Conclusion and Review

Members of REALTOR® Associations and/or the MLS should exercise caution when entering discussions of business practices, fees or commissions at association meetings. Such discussion, even with no apparent intent to commit an antitrust action, can be misunderstood and construed as a *Sherman Act* violation.

Segment 6: Enforcement and Penalties

Federal Enforcement and Penalties

There are three main ways in which the federal antitrust laws are enforced:

The San Francisco Field Office of the Department of Justice is responsible for Arizona. The Field Office can be contacted at:

San Francisco Field Office
Antitrust Division, U.S. Dept. of Justice
450 Golden Gate Avenue, Room 10-0101
Box 36046
San Francisco, CA 94102-3478
415-436-6660

According to the Department of Justice's *Antitrust Primer*:

- Violation of the *Sherman Act* is a felony punishable by a fine of up to $10 million for corporations and a fine of up to $350,000- or 3-years imprisonment (or both) for individuals – if the offense was committed *before* June 22,2004.

- For offenses committed after June 22, 2004 – the maximum fine is $100 million for corporations and $1 million for individuals; maximum Sherman Act jail sentence is 10 years.

- In some instances, the maximum potential fine may be increased to 2x the gain (or loss) involved.

- Additional charges may be filed for collusion among competitors – including mail or wire fraud statutes, false statements statute, or other federal felony statutes – all of which the Antitrust Division prosecutes.

- In addition to a criminal sentence, corporations or individuals convicted of a *Sherman Act* violation may be ordered to make restitution. Victims of bid-rigging and price-fixing conspiracies may also seek civil recovery of up to 3x the amount of damages they suffered.

SCENARIO

John, Susan, and Bill are all real estate brokers; they entered into an agreement to rig bids on foreclosure auctions. They were found guilty under the Sherman Act. One of the banks that held the mortgage on one of the properties suffered a $90,000 loss because of their actions. If the bank brings a civil suit against the three conspiring brokers, what can it expect to recover?

(a) Nothing. Civil suits can't be brought for damages resulting from Sherman Action violations.

(b) Only $90,000 – the actual amount of damages.

(c) Actual damages plus fees and costs.

(d) Three times the damages plus fees and costs. ($270,000+plus costs/fees)
[Adapted from Modern Real Estate Practice in Pennsylvania]

Arizona Enforcement and Penalties

As with most states, the Arizona Attorney General's office is responsible for enforcing the *Arizona Uniform State Antitrust Act. (A.R.S. §44-1406)*

A.R.S. §44-1407 – Civil penalty and injunctive enforcement.

The attorney general or a county attorney with the permission or at the request of the attorney general may bring an action for appropriate injunctive or other equitable relief and civil penalties and as determined by the court, taxable costs, such other fees and expenses reasonably incurred and reasonable attorney fees, in the name of the state for a violation of this article. The court may assess for the benefit of the state a civil penalty of not more than one hundred fifty thousand dollars for each violation of this article.

A.R.S. §44-1408 (B) – Damages; injunctive relief.

> A person threatened with injury or injured in his business or property by a violation of this article may bring an action for appropriate injunctive or other equitable relief, damages sustained and, as determined by the court, taxable costs and reasonable attorney's fees. If the trier of fact finds that the violation is flagrant, it shall increase recovery to an amount not in excess of three times the damages sustained.

Conclusion and Review

- If found guilty of a Sherman antitrust violation criminal and civil penalties apply.
- If civil, the violator may be liable for 3x the plaintiff's actual damages plus reasonable attorney fees and court costs.
- If criminal, fines, prison terms and court supervision of the defendant's business for as long as 10 years.
- Similar penalties apply for violation of the *Arizona Uniform State Antitrust Act*.

Segment 7: Unit Conclusion

Real estate licensees need to be aware that, as with many other court cases, the outcome of an antitrust case may not rely solely on the facts but more on what the judge or jury believe happened. Most antitrust conspiracies are inferred from the actions of competitors. [Antitrust and the Real Estate Brokerage Firm]

To prevent antitrust allegations, real estate salespersons and brokers must make business decisions independently of their competitors; they must avoid situations – such as "hallway" conversations with competitors – that may be misconstrued.

Appendix

- Arizona Fair Housing Laws
- NAR 23 Federal Laws That Apply to Real Estate
- Seller Financing Addendum
- Loan Assumption Addendum
- HUD Assistance Animals Regulation (2020)
- HUD Insurance Policy restrictions re Reasonable Accommodation (2006)

Arizona Fair Housing Laws

Arizona Revised Statute Reference	Title	Intent
A.R.S. §33-1317	Discrimination by landlord or lessor against tenant with children prohibited . . .	Prohibits discrimination by a landlord against a tenant with children
A.R.S. §33-303	Discrimination by landlord or lessor against tenant with children prohibited	Prohibits landlords from not renting to individuals with children. Also prohibits advertising for rental advertising that discriminates against families with children.
A.R.S. §20-1548	Underwriting discrimination	Prohibits discrimination in the issuance or extension of mortgage guaranty insurance
A.R.S. §41-1442	Discrimination in places of public accommodation	Prohibits discrimination in places of public accommodation. *Public accommodations include*

		restaurants, banks, hotels/motels, museums, parks, health care facilities, doctors' offices, theaters, grocery and department stores, health clubs, etc.
A.R.S. §41-1492.02	Prohibition of discrimination by public accommodations and commercial facilities	Prohibits discrimination by public accommodations and commercial facilities.
A.R.S. §32-2153(A)(19)	Grounds for denial, suspension or revocation of licenses . . .	Allows the Arizona Department of Real Estate to suspend or revoke a license, deny the issuance of a license or deny the renewal or right of renewal of a license for violating the federal fair housing law, the Arizona civil rights law or any

		local ordinance of a similar nature.

23 Federal Laws that Apply to Real Estate Sales

FEBRUARY 2012 | BY ROBERT FREEDMAN

Residential real estate has become more complex over the years as a result of laws enacted to protect consumers' welfare. Here are 23 federal laws that play a part in residential real estate. The list is not exhaustive, and some apply to more than one part of the transaction, but it provides an idea of how much of what you do falls under federal regulation. Laws that impact businesses generally, including laws governing truth in advertising, aren't included. Note: Each item links to a summary of the law. The summaries were current as of early 2012 but you can expect changes to them over time. For additional guidance on these regulations —and on laws in your state that apply to residential real estate—consult a qualified attorney.

1 PRE-TRANSACTION

PROSPECTING

Do Not Call Act, Junk Fax Prevention Act, CAN-SPAM Act
Regulate marketing to consumers.

MAP **Mortgage Acts and Practices**
Regulates information about lenders' loan products

PROMOTING

MARS **Mortgage Assistance Relief Services**
Regulates promotion of business involved in short sales or loan mods

LISTING & SHOWING

Residential Lead-Based Paint Hazard Reduction Act
Requires disclosure of lead-based paint

Title VIII of the Civil Rights Act (Fair Housing)
Prohibits discrimination in housing transactions

2 TRANSACTION

EARNEST MONEY

USA Patriot Act
Regulates reporting of earnest money deposits

APPRAISAL

Dodd-Frank Wall Street Reform and Consumer Protection Act
Prohibits coercion, requires disclosures, regulates compensation

FIRREA **Financial Institutions Reform, Recovery, and Enforcement Act**
Regulates appraisers and appraisal standards

INSURANCE

NFIP **National Flood Insurance Program**
Requires flood insurance in designated areas

LOAN

MRAPL **Mortgage Reform and Anti-Predatory Lending Act**
Governs lender compensation, requires risk-retention

SAFE **Secure and Fair Enforcement for Mortgage Licensing Act**
Regulates and requires mortgage licensing of loan originators

CRA **Community Reinvestment Act**
Requires banks to loan in all areas in which they collect deposits

RESPA **Real Estate Settlement Procedures Act**
Regulates disclosure of affiliated businesses and estimated costs

TILA **Truth in Lending Act**
Regulates disclosure of anticipated credit costs

ECOA **Equal Credit Opportunity Act**
Prohibits discrimination in credit transactions

FCRA **Fair Credit Reporting Act**
Makes free credit reports available, protects consumer privacy

HOEPA **Home Ownership and Equity Protection Act**
Prohibits equity stripping

3 POST-TRANSACTION

INCOME TAX

IRS Schedule C: Profit or Loss from Business
Requires business expense tracking by independent contractors

Mortgage Interest Deductions
Qualified taxpayers can deduct mortgage interest and real estate taxes

Capital Gains Exclusion
Qualified taxpayers pay no capital gains tax on sale if gain is under $500,000 (for a couple)

MORTGAGE

HMDA **Home Mortgage Disclosure Act**
Requires lender to report on loans made