

HUD APPLICATION FOR NO-ACTION LETTER AND NO-ACTION LETTER TEMPLATE RELATED TO RESPA AND THE HUD HOUSING COUNSELING PROGRAM

SECTION I: HUD'S APPLICATION FOR A NO-ACTION LETTER ON BEHALF OF HOUSING COUNSELING AGENCIES PARTICIPATING IN HUD'S HOUSING COUNSELING PROGRAM

1. The identity of the entity or entities applying for the No-Action Letter

Pursuant to section 106 of the Housing and Urban Development Act of 1968 (12 U.S.C. 1701x) (Section 106), the U.S. Department of Housing and Urban Development (HUD) has authority to “provide or contract with public or private organizations to provide, information, advice, and technical assistance, including but not limited to...counseling and advice to tenants and homeowners with respect to property maintenance, financial management, and such other matters as may be appropriate to assist them in improving their housing conditions and in meeting the responsibilities of tenancy or homeownership.” Section 106 authorizes HUD to provide these services directly or to make grants to or contract with private and public organizations to make these services available. And Section 106 authorizes HUD to issue standards and guidelines for those who participate in the program.

Under this authority, HUD has developed the Housing Counseling Program (the Program) which includes regulations related to, among other things, eligibility requirements, standards for counseling curriculum content and quality, criteria to ensure counselors do not have conflicts of interest, certification of housing counselors, and monitoring and compliance procedures. The Program's comprehensive regulations are found at 24 CFR Part 214. HUD Handbook 7610.1 REV-5 (Handbook) along with HUD Mortgagee Letters and Housing Notices provide clarification of Program requirements. For housing counseling agencies that receive grants from HUD, the Notice of Funding Availability and grant agreement outline additional requirements.

HUD, as administrator of the Program, hereby submits an Application for a No-Action Letter (NAL) under Section A of the Bureau's Policy on No-Action Letters (NAL Policy) on behalf of the housing counseling agencies that currently and subsequently participate in the Program (Participating Counseling Agencies), to the extent they are in compliance with all requirements of the Program. Participating Counseling Agencies approved by HUD to participate in the Program must continue to comply with the requirements of 24 CFR Part 214, the Handbook, and any other applicable Program requirements and policies to remain eligible to participate in the Program. HUD emphasizes that submitting the NAL application and requesting the Bureau to exercise its discretion to grant the application “does not create or imply a warranty or endorsement by HUD of the approved [Participating Counseling Agency], or its employees, including [housing] counselors, to a prospective client or to any other organization or individual, nor does it represent a warranty of any housing counseling provided by the [Participating Counseling Agency]...”¹

¹ 24 CFR 214.100(a).

HUD seeks a NAL that would address certain aspects of private contracts between Participating Counseling Agencies and mortgage lenders that comply with 24 CFR Part 214, the Handbook, and Section 106 (Housing Counseling Funding Agreements), the terms of which must be reflected in a Memorandum of Understanding (MOU) between the parties.² Specifically, as described in more detail in Section I.5, HUD seeks a NAL that would cover any Participating Counseling Agency to the extent it includes and adheres to a provision in an MOU between the Participating Counseling Agency and a mortgage lender reflecting the terms of the Housing Counseling Funding Agreement that conditions the mortgage lender's payment for the housing counseling services on the consumer making contact or closing a loan with the mortgage lender.³

HUD also requests confirmation that, if its NAL application is granted, the HUD-approved housing counseling agencies listed on the HUD website, including those housing counseling agencies added subsequent to the NAL application, will be recognized as eligible Participating Counseling Agencies covered under the NAL. If a Participating Counseling Agency fails to comply with any Program requirement, HUD will remove the agency's information from HUD's website and from the database made available for the Bureau to use, e.g., to populate its housing counselor list. The Participating Counseling Agency data is maintained on a continuing basis.

HUD notes that it is aware of some interest on the part of mortgage brokers to enter into arrangements with Participating Counseling Agencies to provide funding for housing counseling services. However, HUD is not at this time applying for a NAL that would address any aspects of such arrangements. HUD will continue to engage with stakeholders to understand the level of interest in such arrangements and assess the applicability of its Housing Counseling Program requirements to such arrangements and may consider making a future request for Bureau compliance assistance regarding such arrangements.

2. A description of the consumer financial product or service in question, including (a) how the product or service functions, (b) the terms on which it will be offered, and (c) the manner in which it is offered or provided, including any consumer disclosures

Participating Counseling Agencies offer two services: one-on-one counseling, and group housing education. One-on-one counseling assists consumers in improving housing conditions

² See Handbook section 7-5 (“Once a housing counseling agency has decided to enter into a relationship with a particular lender, HUD requires that you enter into a Memorandum of Understanding, signed by both parties, to formalize your relationship.”).

³ Some Housing Counseling Funding Agreements might include provisions to pay for services other than housing counseling for federally related mortgage loans. For example, some mortgage lenders might enter into agreements with housing counseling agencies to provide services to individuals who are not seeking a federally related mortgage loan, or for support for general education services. HUD regulates the content of those arrangements, requiring disclosures to clients and prohibiting steering and conflicts of interest. This NAL application only applies to the aspects of Housing Counseling Funding Agreements that involve compensation for housing counseling services for federally related mortgage loans.

or meeting a particular housing goal.⁴ Pre-purchase counseling assistance and all other approved one-on-one counseling types are required to be compliant with the Program standards.⁵ Pre-purchase counseling assistance often includes, but is not limited to, advice and guidance regarding the following topics: readiness and preparation for homeownership, budgeting and credit, loan products and features comparison, fair housing and predatory lending, the homebuying process and what to consider when shopping for a home, document preparation and review prior to closing, obligations of the borrower and avoiding foreclosure, and homeowner maintenance and repair costs.

Group housing education consists of formal classes, with an established curriculum and instructional goals. Each group education session must be documented in a separate confidential file and must contain the course description, instructors, disclosure statements, and fees, if any.⁶ Participating Counseling Agencies may only offer group education in the same subjects in which they offer one-on-one counseling. Participating Counseling Agencies may issue certificates of completion for one-on-one and group education sessions.

HUD reporting requirements include not only providing data of group education and counseling activities conducted each quarter, but also outcomes associated with those activities, such as the number of clients who gained access to housing resources (such as downpayment assistance) as a result of housing counseling.⁷ HUD also collects results of counseling, including the number of families with sustainable budgets or improved access to housing resources as a result of housing counseling.⁸

Participating Counseling Agencies may charge consumers reasonable and customary fees for housing counseling services if the cost does not create a financial hardship for the consumer.⁹ Agency fee schedules must be addressed in a HUD-approved workplan, included in a disclosure to the counseling client, prominently displayed in the counseling office, and communicated to all potential counseling and education recipients prior to the provision of services. Participating Counseling Agencies are not permitted to charge counseling fees for mortgage delinquency, default, or homeless counseling.¹⁰

Housing counseling services must be provided by Participating Counseling Agencies. Standards for approval of Participating Counseling Agencies, either directly by HUD or indirectly through an intermediary or State Housing Finance Agency, are governed by 24 CFR 214.103. Detailed information and additional requirements of the Housing Counseling Program

⁴ See 24 CFR 214.300(e) for examples of approved housing counseling services, education, and outreach topics. Participating Counseling Agencies receiving grants from HUD may have additional requirements regarding permitted services in the Notice of Funding Availability and/or the grant agreement. See <https://www.hudexchange.info/programs/housing-counseling/nofa/#fy-2019-nofa>.

⁵ To classify a client as counseled under HUD's Housing Counseling Program for any of the approved housing counseling topics, including pre-purchase counseling, Participating Counseling Agencies must meet the requirements of Handbook section 3-5 and document all requirements in each consumer's file.

⁶ See Handbook section 1-4(G) for a definition of education.

⁷ See HUD Form-9902.

⁸ <https://www.hudexchange.info/programs/housing-counseling/9902-quarterly-reports/>

⁹ See Handbook section 7-6 and 24 CFR 214.313.

¹⁰ See Handbook section 7-6.

are provided in 24 CFR Part 214 and the Handbook. Specifically, the following items must be provided at the application stage:

- A document that identifies any other jobs or activities apart from the housing counseling agency, an employee, volunteer or board member of the agency performs that could result in a potential conflict of interest as identified in the Handbook.
- A list of additional housing programs or activities, other than housing counseling services, that the agency and its branches, sub-grantees or affiliates offer including items such as administering down payment assistance programs, developing housing projects, managing apartment buildings, rehabilitating and reselling HUD homes and selling real estate. Further, Participating Counseling Agencies must provide the office location for each additional program referenced.
- A copy of the agency Conflict of Interest Policy and Procedures involving personnel and board members.
- A copy of the Disclosure Statement(s) provided to clients that explicitly describes the various types of services or products provided by the agency and any financial relationships as identified in the Handbook. The disclosure must clearly state that the “client is not obligated to receive any other services offered by the organization or its exclusive partners” in order to receive housing counseling services. Furthermore, the agency must provide information on alternative services, programs, and products.”¹¹

Participating Counseling Agencies providing housing counseling services are required to comply with 24 CFR 214.303(g) and 214.313(e), Handbook sections 6-1(G), 6-2, and 7-5 if they are to enter into a Housing Counseling Funding Agreement with a mortgage lender. In recognition of the importance of consumer disclosures under RESPA,¹² HUD provides the following support:

- 24 CFR 214.303(g) requires agencies to provide all clients a disclosure statement that describes the agency’s services, any financial relationships between the agency and other industry partners and must clearly state that the client is not obligated to receive any other services offered by the agency or its exclusive partners. This specifically includes agencies that have entered into a formalized relationship with a lender. The regulation also requires that “the agency must provide information on alternative services, programs, and products.”
- 24 CFR 214.313(e) states in part that lenders may pay agencies for counseling services, through a lump sum or on a case-by-case basis, provided the level of payment does not exceed a level that is commensurate with the services provided and is reasonable and customary for the area. These transactions and relationships must be disclosed to the client.

¹¹ 24 CFR 214.303(g).

¹² *See, e.g.*, 12 U.S.C. 2601(b)(1).

- Participating Counseling Agencies must comply with Program conflicts of interest provisions in 24 CFR Part 214. Specifically, Participating Counseling Agencies have an affirmative obligation to notify HUD if a conflict of interest exists. The regulation requires disclosure to HUD when a counseling agency has identified a conflict of interest and the counseling agency must take corrective action to immediately cure the conflict.¹³ This should mitigate any risk that Participating Counseling Agencies would steer the consumer based on something other than what is in the best interest of the consumer.¹⁴ Handbook section 7-5 similarly requires the agency to disclose any real or apparent conflicts of interest and describe how these conflicts will be mitigated, including any disclosures that will be provided to clients.¹⁵ Disclosures are typically provided prior to the initial counseling session or at the beginning of the counseling session. Consumers must sign and date the disclosure statement. During performance reviews, HUD verifies that the disclosure statement is part of the case file.
- In addition, the Office of Housing Counseling publishes resources, such as Housing Counseling Funding Agreements and Fee Structures, which provide technical assistance to Participating Counseling Agencies about the basic components in lender-funded funding agreements and disclosure statements.¹⁶

3. An explanation of the potential consumer benefits of the product or service

Consumers benefit from widespread access to housing counseling services and Housing Counseling Funding Agreements are a useful vehicle to meet consumer needs. HUD summarizes independent research about the benefits of housing counseling on its website.¹⁷

According to a recent report by the Treasury Department, “[HUD-approved] Housing counselors play a key role in supporting consumers throughout the home buying and foreclosure prevention processes. Housing counselors assist consumers by reviewing the consumer’s entire income, expense, credit and debt profile, and providing them with information to make sound decisions about sustainable home buying and foreclosure prevention options. There is consistent and increasing evidence that suggests that housing counseling can be beneficial in many ways. Pre-purchase housing counseling can help a potential homebuyer to, among other things, increase savings, reduce debt, and improve credit scores.”¹⁸

¹³ See 24 CFR 214.303(f)(5).

¹⁴ See also Handbook sections 6-1(G) and 6-2.

¹⁵ Section 7-5 of the Handbook incorrectly identifies 24 CFR 214.303(e) as the conflict of interest regulation. The correct citation is 24 CFR 214.303(f).

¹⁶ See <https://www.hudexchange.info/resource/4941/housing-counseling-model-funding-agreements-and-fee-structures/>. The Model Funding Agreement, located in Appendix A of the above resource, is one example, but not the only example, of a lender-funded model funding agreement that would address MOU payments conditioning the mortgage lender payment for the counseling services on the consumer making contact or closing a loan with the lender.

¹⁷ <https://www.hudexchange.info/programs/housing-counseling/research/>.

¹⁸ Federal Financial Literacy Reform: Coordinating and Improving Financial Literacy Efforts (U.S. Dept of the Treasury, July 2019) p. 38.

HUD housing counseling is beneficial to lenders as well as consumers. Pre-purchase housing counseling and education saves the lender time and money by helping the borrower prepare for the loan process. Lenders use housing counseling agencies as a source for borrowers who receive denials, to help improve their credit and income profiles. Prospective borrowers who have received counseling are aware of how to shop for a home and a loan and should be better prepared to avoid scams that might make the home or the loan unsustainable. Research indicates that lenders face fewer defaults with counseled borrowers than with similar, uncounseled borrowers.¹⁹ The Housing Counseling Federal Advisory Committee has prioritized public-private revenue models as an area of interest.²⁰ Several government and private mortgage programs require, incentivize, or recommend HUD-approved housing counseling as a part of public or private lending.²¹

HUD recognizes that Federal grant funding does not cover the Participating Counseling Agencies' costs of providing housing counseling services to consumers. Program policies, as evidenced by HUD's Comprehensive Housing Counseling Notice of Funding Availability grant applications, envision substantial leveraging of non-Federal funding through client fees and agreements with private lenders, corporations, and foundations.²²

4. An explanation of the potential consumer risks posed by the product or service, and how the applicant intends to mitigate such risks

¹⁹ See, e.g., Li, Wei, Bing Bai, Laurie Goodman, and Jun Zhu. 2016. NeighborWorks America's Homeownership Education and Counseling: Who Receives It and Is It Effective? Washington, DC: Urban Institute; Brown, Scott R. 2016. "The Influence of Homebuyer Education on Default and Foreclosure Risk: A Natural Experiment," *Journal of Policy Analysis and Management* 35 (1): 145–172; and Smith, Marvin M., Daniel Hochberg, and William H. Greene. 2014. The Effectiveness of Pre-Purchase Homeownership Counseling and Financial Management Skills. A special report by the Community Development Studies and Education Department of the Federal Reserve Bank of Philadelphia. Philadelphia: Federal Reserve Bank of Philadelphia.

²⁰ See *meeting minutes from the Housing Counseling Federal Advisory Committee Meetings*, May 22, 2018: <https://files.hudexchange.info/resources/documents/HCFAC-Meeting-Minutes-5-22-18.pdf> and May 22, 2019: <https://files.hudexchange.info/resources/documents/HCFAC-Meeting-Minutes-5-22-19.pdf>.

²¹ See, e.g., Bureau of Consumer Financial Protection High-Cost Mortgage and Homeownership Counseling Amendments to the Truth in Lending Act (Regulation Z) and Homeownership Counseling Amendments to the Real Estate Settlement Procedures Act (Regulation X) Final Rule, 78 FR 6856 (Jan. 31, 2013); Home Equity Conversion Mortgage program requirements at 24 CFR 206.41; Making Home Affordable; FHA pamphlets. Several mortgage products incentivize housing counseling and education meeting HUD standards. For example, from Fannie Mae's HomeReady mortgage product: "Housing counselors are committed to providing unbiased, high-quality advice early in the home-buying process, before critical decisions are made – such as when to buy, which house to buy, or which mortgage is best suited to their financial situation. Housing counselors empower consumers to make informed decisions about their home purchase and to move forward with confidence. Working with a counselor can help prepare borrowers for success and improve loan performance for lenders and investors." <https://www.fanniemae.com/content/faq/home-buyer-education-policies-faqs.pdf>.

²² See 24 CFR 214.313(e) which states: "Lenders may pay agencies for counseling services, through a lump sum or on a case-by-case basis, provided the level of payment does not exceed a level that is commensurate with the services provided, and is reasonable and customary for the area, and does not violate requirements under the Real Estate Settlement Procedures Act (12 U.S.C. 2601 *et seq.*). These transactions and relationships must be disclosed to the client as required in 24 CFR 214.303(g)." See also Handbook sections 7-5 and 7-6; and prior years Comprehensive Housing Counseling NOFAs available at <https://www.hudexchange.info/programs/housing-counseling/nofa/#fy-2019-nofa>.

In theory, and without guardrails in place, funding relationships between mortgage lenders and housing counseling agencies where mortgage lender payments are conditioned on a consumer's contact or closing a loan with the lender could create a steering risk for consumers. These types of agreements could incentivize the housing counseling agencies to refer consumers only to mortgage lenders with whom the housing counseling agencies have a funding relationship, or to mortgage lenders in such a funding relationship that pay the highest counseling fee or are most likely to close a transaction with the consumer—rather than to mortgage lenders that would offer the most suitable product given the consumer's circumstances. These are the types of risks to consumers that RESPA section 8 is intended to guard against.

However, HUD strongly believes that, specifically with respect to Housing Counseling Funding Agreements that involve Participating Counseling Agencies, the steering risks described above are theoretical and do not manifest for a number of reasons. HUD is the Federal government agency with a mandate to promulgate and enforce requirements to which housing counseling agencies must adhere to participate in HUD's Housing Counseling Program. HUD originally drafted the requirements to address RESPA steering and similar concerns at the time RESPA was under HUD's jurisdiction, to assure that the payments related to housing counseling services are at an appropriate level for the services provided. HUD's regulatory and program requirements cumulatively impose a variety of controls on Participating Counseling Agencies with regard to the costs of delivery of housing counseling services, steering, disclosure, and conflicts of interest, and, specifically, as to Housing Counseling Funding Agreements.

HUD believes that 24 CFR Part 214, the Housing Counseling Program governing regulations, and the following specific provisions mitigate these risks:

- 24 CFR 214.303(f). This regulation defines conflicts of interest and prohibits a wide range of activities. Neither Participating Counseling Agencies nor anyone associated with them in an official capacity or a relative may engage in activities that create a real or apparent conflict of interest.
 - Specifically, agencies may not have an employee, officer, director, agent or contractor maintain a relationship with an entity with whom he or she is negotiating future employment, has a direct interest in the client (as a landlord, broker, or creditor, or originator), has a financial interest in, services, or underwrites a mortgage on the client's property, owns or purchases a property that the client seeks to rent or purchase, or serves as a collection agent for the client's mortgage lender, landlord, or creditor.
 - Further a director, employee, officer, contractor, or agent of a participating agency shall not refer clients to mortgage lenders, brokers, builders, or real estate sales agents or brokers in which the officer, employee, director, his or her spouse, child, or general partner has a financial interest, nor may director, employee, officer, contractor, or agent of an agency or any member of his or her immediate family engage in any action that might result in, or create the appearance of, administering the housing counseling operation for personal or private gain; providing preferential treatment to any organization or person; or

undertaking any action that might compromise the agency's ability to ensure compliance with HUD's Conflict of Interest requirements and serve the best interests of its clients.

- The regulation gives HUD the authority to investigate agency practices and permits HUD to take action to inactivate or terminate the agency's approval or participation in the Housing Counseling Program.
- Agencies must notify HUD of conflicts of interest not later than 15 calendar days after the conflict occurred and report to HUD on the corrective action taken to cure the immediate, and avoid future, conflicts.
- 24 CFR 214.303(g). The regulation states that agencies must provide to all clients a disclosure statement that explicitly describes the various types of services provided by the agency and any financial relationships between this agency and any other industry partners. The disclosure must clearly state that the client is not obligated to receive any other services offered by the organization or its exclusive partners. Furthermore, the agency must provide information on alternative services, programs, and products.
- 24 CFR 214.313(e). This regulation permits mortgage lender funding of counseling services on a lump-sum or case-by-case basis subject to certain conditions, including that "the level of payment does not exceed a level that is commensurate with the services provided, and is reasonable and customary for the area..."
- Handbook provisions such as:
 - Section 7-5, which specifically allows Participating Counseling Agencies to receive mortgage lender funding of housing counseling services subject to certain conditions. *See also* Handbook section 7-6.²³
 - Sections 6-1(G) and 6-2. These Handbook provisions state that Participating Counseling Agencies must comply with conflicts-of-interest provisions identified in the Handbook and in the Program regulations. This helps to mitigate any risk that Participating Counseling Agencies would steer based on something other than what is in the best interest of the consumer.
 - HUD's requirements for Housing Counseling Funding Agreements include certain anti-steering provisions. Notably, any list of mortgage lenders provided to the consumer at the conclusion of counseling must include at least three mortgage lenders. Moreover, if the consumer is provided information about a specific service, program, feature, or product, the consumer must also be provided information on relevant alternatives. And the Handbook requires that the MOU between the Participating Counseling Agency and the mortgage

²³ *See, e.g.*, "Model Funding Agreements and Fee Structures," section 4 ("Roles and Responsibilities") and section 5 ("Client Cost Analysis").

lender include the following terms: 1) the client will choose between comparable products from at least 3 different lenders; and 2) the fee income is based on services rendered, not on the amount of the loan. These program requirements help mitigate the risk that a consumer would be directed to one particular mortgage lender or that the consumer would not be provided meaningful information about alternatives.²⁴

- Participating Counseling Agencies must provide disclosures to consumers that describes financial relationships between the agency and an industry partner.²⁵
- 24 CFR 214.307. This regulation governs the housing counseling performance review process. HUD reviews the Participating Counseling Agency's compliance with all program requirements and conducts reviews in accordance with 24 CFR 214.307 and section 6-3 of the Handbook. The HUD Form-9910, Performance Review Checklist, is the monitoring tool utilized by HUD staff when conducting and recording the results of the performance review.
 - The form directs the HUD reviewer to ask Participating Counseling Agencies about the receipt of funding from lenders for counseling services, and where applicable, to review the lender agreement.²⁶ HUD Staff reviews the types of services the lender compensates the Participating Counseling Agency for and determines whether (1) the compensation is commensurate with services provided; (2) the agency is compensated for referring a client to a lender; (3) the agency is compensated for closing loans with a specific lender; (4) the fee income is based on services rendered and not on the amount of the loan; and (5) the agreement states that the agency will provide information on comparable products from at least three different lenders. The HUD Form-9910 also directs reviewers to review disclosure forms in each client and group education file and confirm that the required elements of the disclosure form are present.²⁷
 - HUD also reviews financial statement audits of Participating Counseling Agencies, providing another avenue to evaluate their income and resources.
- 24 CFR 214.309. This regulation outlines HUD's options in cases where performance reviews are conducted on Participating Counseling Agency. Based on the performance review, HUD may renew the approval unconditionally or conditionally, temporarily change the Participating Counseling Agency's status to inactive, or terminate approval of participation of the agency.

²⁴ See Handbook sections 6-1(J) and 7-5.

²⁵ See 24 CFR 214.313(b) and (e). See also

https://files.hudexchange.info/resources/documents/Housing_Counseling_Client_Disclosure_Toolkit.pdf.

²⁶ Review is done in accordance with 24 CFR 214.313 and Handbook sections 7-5 and 7-6.

²⁷ See 24 CFR 214.303(g).

The cumulative effect of HUD’s programmatic and regulatory requirements described above would mitigate the risk of any potential steering behavior. First, HUD determines whether housing counseling agencies are, and continue to be, eligible to participate in its Housing Counseling Program. Participating Counseling Agencies must comply with all other applicable laws, in addition to HUD’s program requirements. Failure to comply with any applicable requirement would potentially jeopardize their status as a participating agency and could make them ineligible for other grants and program benefits. This will serve to minimize the risk of bad behavior. Second, HUD’s regulatory and program requirements address policy values that are similar in some cases to those addressed by RESPA—steering, disclosure, cost and delivery of services, etc.

5. An identification of the statutory and/or regulatory provisions under which the applicant seeks a No-Action Letter and an explanation of why a No-Action Letter is needed, such as uncertainty or ambiguity regarding the application of the identified statutory and/or regulatory provisions to the product or service in question.

Summary: HUD understands that Participating Counseling Agencies and mortgage lenders perceive that entering into Housing Counseling Funding Agreements entails compliance risk with respect to RESPA section 8 and Regulation X, 12 CFR 1024.14, and are therefore seeking compliance assistance from the Bureau. In the absence of such assistance, eager Participating Counseling Agencies and potential mortgage lender partners are reluctant to enter into these agreements, leaving these alternative funding sources for Participating Counseling Agencies untapped as their traditional funding sources continue to diminish. This, in turn, inures to the detriment of consumers who would benefit greatly from enhanced provision of pre-purchase counseling services. Although HUD believes notice-and-comment rulemaking would address the issues that are the subject of this application in the most comprehensive way, HUD recognizes that a rulemaking would involve a lengthier and more complex process and that a RESPA section 8 rulemaking is not on the Bureau’s current or future rulemaking agenda.²⁸ Therefore, as a shorter-term option, a NAL would provide welcome clarification and immediate compliance assistance.

HUD notes that some Participating Counseling Agencies have expressed concerns that activities they conduct in the course of pre-purchase counseling may inadvertently trigger Regulation Z, 12 CFR 1026.36 (the Loan Originator Rule). However, HUD is not at this time applying for a NAL to address the application of the Loan Originator Rule to any aspects of Housing Counseling Funding Arrangements or to the activities of Participating Counseling Agencies more broadly. HUD will continue to engage with Participating Counseling Agencies to understand their particular concerns about the Loan Originator Rule and whether the types of activities they engage in present compliance challenges such that HUD may consider making a future request for Bureau compliance assistance to address such issues.

Background of RESPA Ambiguity/Uncertainty: The perceived uncertainty about the application of RESPA to Housing Counseling Funding Agreements relates to RESPA section 8

²⁸ See Bureau’s Spring 2019 regulatory agenda, at: <https://www.consumerfinance.gov/policy-compliance/rulemaking/regulatory-agenda/>.

(12 U.S.C. 2607) and the corresponding provisions of the Bureau’s Regulation X (12 CFR 1024.14).

- RESPA and Regulation X do not expressly address Housing Counseling Funding Agreements. Moreover, whether the provision of housing counseling services is covered by RESPA depends on the circumstances, including whether the mortgage lender or loan program require the counseling and whether the service is considered “business incident to” a federally related mortgage loan.²⁹
- HUD has received feedback from Participating Counseling Agencies and other stakeholders that a D.C. Circuit decision involving the Bureau has contributed to this ambiguity and uncertainty. At issue in *PHH Corp. v. CFPB (PHH case)*³⁰ was whether under RESPA sections 8(a) and 8(c)(2), a person could require another person to purchase services in exchange for mortgage insurance referrals. Mortgage lender funding of housing counseling services implicates interpretive questions about RESPA section 8(c)(2), including whether the mortgage lender may condition its payment for the housing counseling services on the consumer making contact or closing a loan with the mortgage lender.
- HUD understands that while the *PHH* case was on appeal to the full D.C. Circuit, the Bureau in early 2017 gave informal, oral guidance to a group of interested outside stakeholders (i.e., housing counseling intermediaries, mortgage lenders, and their outside counsel) on how RESPA section 8 applied to Housing Counseling Funding Agreements. HUD received feedback that the stakeholders did not believe the guidance alleviated the regulatory uncertainty because it did not directly address the key interpretive issues regarding application of RESPA section 8(c)(2), which the Bureau said it could not address while the *PHH* case was pending.

Specific issue:

HUD permits mortgage lender payments to Participating Counseling Agencies for providing counseling services to consumers, through a lump sum or on a case-by-case basis, provided that the level of payment for the counseling services “does not exceed a level that is commensurate with the services provided” and “is reasonable and customary for the area.”³¹

HUD is seeking a NAL stating that: The Bureau will not make supervisory findings or bring a supervisory or enforcement action under RESPA section 8, 12 U.S.C. 2607, and Regulation X, 12 CFR 1024.14, against a Participating Counseling Agency for including and

²⁹ See 12 CFR 1024.2(b) defining “settlement service” as “any service provided in connection with a prospective or actual settlement” and including 15 non-exhaustive examples, the last of which is “provision of any other services for which a settlement service provider requires a borrower or seller to pay”; and 12 U.S.C. 2607(a) (“No person shall give and no person shall accept any fee, kickback, or thing of value pursuant to any agreement or understanding...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.” (emphasis added)).

³⁰ *PHH Corp. v. CFPB*, 839 F.3d 1 (D.C. Cir. 2016), *reh'g en banc granted, order vacated* (Feb. 16, 2017), *on reh'g en banc*, 881 F.3d 75 (D.C. Cir. 2018) (reinstating RESPA portion of panel opinion).

³¹ See 24 CFR 214.313(e); Handbook section 7-5.

adhering to a provision in the MOU between the Participating Counseling Agency and the mortgage lender reflecting the terms of the Housing Counseling Funding Agreement that conditions the mortgage lender's payment for the housing counseling services on the consumer making contact or closing a loan with the mortgage lender even if that provision or the parties' adherence thereto could be construed as a referral (as such term is used in RESPA section 8(a) and defined in Regulation X, 12 CFR 1024.14(f)), provided that, the level of payment for the housing counseling services "does not exceed a level that is commensurate with the services provided, and is reasonable and customary for the area."³²

HUD is not seeking a NAL on behalf of Participating Counseling Agencies with respect to how RESPA section 8 and Regulation X, 12 CFR 1024.14, apply to other aspects of the Housing Counseling Funding Agreements, including other MOU provisions.

6. If an applicant wishes to request confidential treatment under the Freedom of Information Act, the Bureau's rule on Disclosure of Records and Information, or other applicable law, this request and the basis therefor should be included in a separate letter and submitted with the application. An applicant should specifically identify the information for which confidential treatment is requested, and may reference the Bureau's intentions regarding confidentiality under Section G.

- N/A

7. If an applicant wishes the Bureau to coordinate with other regulators, the applicant should identify those regulators, including but not limited, to those that have been contacted about offering or providing the product or service in question.

- N/A

SECTION II: HUD'S APPLICATION FOR A NO-ACTION LETTER TEMPLATE APPLICABLE TO MORTGAGE LENDERS THAT ENTER INTO HOUSING COUNSELING FUNDING AGREEMENTS

1. The identity of the entity or entities applying for the No-Action Letter Template

HUD is submitting an application for a NAL Template under section E.1.a of the NAL Policy that could serve as the basis for NAL applications by mortgage lenders that intend to enter into Housing Counseling Funding Agreements with Participating Counseling Agencies.

HUD is concurrently applying for a NAL on behalf of Participating Counseling Agencies under section A of the NAL Policy (see Section I of the Application). HUD is submitting this Application for a NAL Template because it believes that a NAL issued to Participating Counseling Agencies will have limited effect unless and until the mortgage lenders potentially entering into Housing Counseling Funding Agreements with the Participating Counseling Agencies also are covered by a NAL with respect to their participation in a Housing Counseling Funding Agreement. HUD believes that the relatively small number of Housing Counseling

³² See 24 CFR 214.313(e); Handbook section 7-5.

Funding Agreements in the market today is due in large part to the uncertainty regarding compliance with RESPA section 8 and Regulation X, 12 CFR 1024.14. Therefore, HUD is not in a position to determine the identity of many of the mortgage lenders interested in entering into Housing Counseling Funding Agreements. If the Bureau issues a NAL Template in response to Section II of the Application, HUD expects that mortgage lenders will apply for NALs based on the NAL Template under section E.1.b of the NAL Policy.

2. A description of the consumer financial product or service in question, including (a) how the product or service functions, (b) the terms on which it will be offered, and (c) the manner in which it is offered or provided, including any consumer disclosures

- See Section I.2 of the Application

3. An explanation of the potential consumer benefits of the product or service

- See Section I.3 of the Application. In particular, HUD reemphasizes that the consumer benefits also manifest as benefits to mortgage lenders.

4. An explanation of the potential consumer risks posed by the product or service, and how the applicant intends to mitigate such risks

- **Potential consumer risks:** See Section I.4 of the Application, which describes how Housing Counseling Funding Agreements without guardrails in theory could create a steering risk for consumers. HUD notes that to the extent this steering risk exists at all, it may be driven or exacerbated by mortgage lenders potentially encouraging or facilitating steering by the Participating Counseling Agencies.
- **Mitigation of risks:** See Section I.4 of the Application. HUD reiterates its belief that the steering risks described above are theoretical and do not manifest for a number of reasons. HUD's requirements would serve to manage and minimize the steering risks as to the delivery of housing counseling services by Participating Counseling Agencies. HUD also emphasizes that, although HUD's regulatory and program requirements do not apply directly to mortgage lenders that would be covered by NALs based on the NAL Template, these requirements nonetheless would impact the conduct of mortgage lenders indirectly. HUD's requirements for mortgage lender funding of housing counseling in 24 CFR 214.313(e) and Handbook section 7-5 mandate the inclusion of certain provisions within the terms of the Housing Counseling Funding Agreements to which mortgage lenders are counterparties. Thus, mortgage lenders with MOUs will have to comply indirectly with these HUD requirements.

5. An identification of the statutory and/or regulatory provisions as to which the applicant seeks a No-Action Letter and an explanation of why a No-Action Letter is needed, such as uncertainty or ambiguity regarding the application of the identified statutory and/or regulatory provisions to the product or service in question.

Summary/Background of RESPA Ambiguity/Uncertainty: See Section I.5 of the Application. HUD adds that it has received feedback that mortgage lenders in particular have been concerned with regulatory uncertainty and ambiguity, and thus compliance risk, with respect to RESPA section 8 and Regulation X, 12 CFR 1024.14. Further, HUD reemphasizes its strong policy interest in ensuring mortgage lender coverage under the NAL. This NAL Template application stems from a recognition that the full effectiveness of a NAL provided for Participating Counseling Agencies will depend on similar compliance assistance being provided to mortgage lenders that choose to enter into Housing Counseling Funding Agreements with the Participating Counseling Agencies.

Specific issue:

HUD permits mortgage lender payments to Participating Counseling Agencies for providing counseling services to consumers, through a lump sum or on a case-by-case basis, provided that the level of payment for the counseling services “does not exceed a level that is commensurate with the services provided” and “is reasonable and customary for the area.”³³ (See 24 CFR 214.313(e); Handbook section 7-5.) HUD is seeking a NAL Template that will serve as a basis for applications by mortgage lenders for NALs that will be similar to the NAL issued to HUD on behalf of Participating Counseling Agencies, assuming that the Bureau grants such a NAL in response to Section I of this Application.

More specifically, HUD envisions that such NALs issued to mortgage lenders based on the NAL Template will state that: The Bureau will not make supervisory findings or bring a supervisory or enforcement action under RESPA section 8, 12 U.S.C. 2607, and Regulation X, 12 CFR 1024.14, against a mortgage lender for including and adhering to a provision in the MOU between the Participating Counseling Agency and the mortgage lender reflecting the terms of the Housing Counseling Funding Agreement that conditions the mortgage lender’s payment for the housing counseling services on the consumer making contact or closing a loan with the mortgage lender even if that provision or the parties’ adherence thereto could be construed as a referral (as such term is used in RESPA section 8(a) and defined in Regulation X, 12 CFR 1024.14(f)), provided that the level of payment for the housing counseling services “does not exceed a level that is commensurate with the services provided, and is reasonable and customary for the area.”³⁴

HUD is not seeking a NAL Template that would serve as the basis for NAL applications by mortgage lenders regarding how RESPA section 8 and Regulation X, 12 CFR 1024.14, apply to other aspects of the Housing Counseling Funding Agreements, including other MOU provisions.

6. If an applicant wishes to request confidential treatment under the Freedom of Information Act, the Bureau’s rule on Disclosure of Records and Information, or other applicable law, this request and the basis therefor should be included in a separate letter and submitted with the application. An applicant should specifically

³³ See 24 CFR 214.313(e); Handbook section 7-5.

³⁴ See 24 CFR 214.313(e); Handbook section 7-5

identify the information for which confidential treatment is requested, and may reference the Bureau's intentions regarding confidentiality under Section G.

- *See* Section I.6 of the Application

7. **If an applicant wishes the Bureau to coordinate with other regulators, the applicant should identify those regulators, including but not limited, to those that have been contacted about offering or providing the product or service in question.**

- *See* Section I.7 of the Application