

## RESPA DO'S AND DON'TS FOR CO-MARKETING, SOCIAL MEDIA, & OTHER WEB-BASED MARKETING TOOLS

Real estate brokers and agents are subject to the Real Estate Settlement Procedures Act (RESPA) when engaging in transactions involving federally related mortgage loans. RESPA generally prohibits any person from giving or receiving any “thing of value” in exchange for the referral of settlement service business. Liabilities for RESPA violations may be severe, ranging from significant fines to imprisonment. Below are some guidelines for real estate professionals when engaging in co-marketing activities via social media and other web-based marketing tools:

### DO

- Do ensure that each co-marketing party pays its proper share of the advertisement.
  - Each party’s share should be based on the proportionate split of the fair market value for any and all services in connection with the advertisement (e.g., creation, design, distribution, etc.); and
  - Each party’s share should be equal to each advertised settlement service provider’s prominence in the advertising.
- Do ensure that the agreed upon marketing is actually performed and that any payment made in connection with such services is the fair market value for the services performed.
  - Remember—just because a social media platform is “free” for users to join or post in, it does not mean that all uses of the platform are offered at no cost or that there are no costs associated with the development of the advertisement.
  - Be aware of what may constitute a thing of value, and remember it does not require a transfer of money. Any benefit or concession (a “quid pro quo”) may be a “thing of value.”
- Do include the word “Advertisement” in a prominent location on each party’s information included on the co-marketing materials.
- Do document procedures to calculate co-marketing charges and/or create a standardized rate sheet for the fair market value of such marketing.
- Do consider maintaining written agreements of the co-marketing arrangement to demonstrate compliance with RESPA Section 8 as well as federal and state laws and regulations governing your co-marketing efforts, including those regarding advertising, privacy, and licensing requirements, as applicable.
- Do ensure that the advertisements are distributed to the general public, such as publicly-facing, broadly-reaching websites, and cannot be viewed as “targeting” specific consumers.
- Do ongoing oversight of the co-marketing arrangement that may be required by either or both co-marketing participants.

## DO NOT

- DO NOT enter into the arrangement with a co-marketing party without getting the necessary corporate authorization for such arrangement for yourself or for your co-marketing party.
- DO NOT directly or indirectly defray expenses that would otherwise be incurred by anyone in a position to refer settlement services or business to you, by use of a co-marketing arrangement.
  - Payments by settlement services providers to third party real estate listing aggregator sites that reduce your advertising costs can create a direct RESPA violation.
- DO NOT exchange any “thing of value” with anyone for a referral, no matter how small the “thing of value” is. RESPA does NOT have an exception for minimal “kickback” amounts and even a small amount (i.e., \$5 coffee giftcard) is considered a “thing of value” under the law.
- DO NOT require or allow your co-marketing party to endorse you, exclusively or otherwise, or vice versa, e.g.:
  - Do not allow either co-marketing party to refer to the other as a “preferred” service provider, or a “partner,” or some other similar designation.
  - Beware of any perceived endorsements, such as “likes,” follows, re-postings, tagged pictures with one another, and other favorable commentary on referral sources’ pages, whether such activity is conducted from your personal or your business accounts. Remember that promotion of business activities generally should be conducted from business accounts/pages, not personal ones.
- DO NOT enter into co-marketing arrangements before considering the implications of any other concurrent relationship with the co-marketing party (e.g., lead sales, desk rentals, etc.).
- DO NOT direct any of the co-marketing efforts to specific consumers with whom either co-marketing party has a relationship or over whom either party has the ability to influence the selection of a settlement service provider (as compared to marketing of general distribution).
- DO NOT evaluate or adjust the compensation paid under an arrangement based on “capture rate,” which is the percentage of referrals that convert to actual clients or customers.
- DO NOT allow one party to act as a “gatekeeper” when dealing with a third-party marketing company. Both parties should have a separate agreement with third-party marketing firms.
- DO NOT perform services for the other co-marketing party that are outside the terms of the agreement. For example, if a real estate agent and a lender are co-marketing, the lender should not “incubate” or cull leads on behalf of the real estate agent as that is outside the terms of the co-marketing agreement and is not a compensable service.
- DO NOT share the cost of leads generated through websites or arrangements. Each party must pay the fair market value of the leads they purchase.

*Disclaimer: This document is provided for informational/instructional purposes only and does not constitute the giving of legal advice by NAR. Consult with a RESPA attorney to make sure you understand and properly comply with any and all applicable laws. As a reminder, some state and local laws prohibit or otherwise restrict activities that may be permissible under RESPA.*