Chapter 24:
Affiliated Business Arrangements

An * in the left margin indicates a change in the statute, rule or text since the last publication of the manual.

I. Introduction

Section 8 of the Real Estate Settlement Procedures Act of 1974 (RESPA) prohibits anyone from giving or receiving a fee, kickback, or any thing of value for the referral of settlement service business associated with a federally related mortgage loan. The purpose of this and similar laws is to protect consumers from unnecessary fees that increase the cost of real estate settlement services.

When several businesses that offer settlement services are owned or controlled by a common corporate parent, those businesses are considered "affiliates." Similarly, family members, partners, contractors, or other relationships used to refer settlement service business are considered affiliates. Real estate brokers, lenders, title insurance companies, or other settlement service providers must inform consumers of an existing "affiliated business arrangement" when making a referral during the settlement process. Generally, consumers are not required to use an affiliate and can shop for other service providers. If, however, a consumer chooses to use an affiliate, the only thing of value that may be received for the arrangement, except for services actually rendered, is a return on an ownership interest.

Although it is lawful to participate in an affiliated business arrangement that is in compliance with RESPA, such joint ventures must actually be providers of settlement services. The Department of Housing and Urban Development (HUD) issued Policy Statement 1996-2 to identify factors that HUD uses to determine whether a controlled business arrangement is a sham under RESPA or a bona fide provider of settlement services.

Colorado has implemented statutes concerning affiliated business arrangements and the Colorado Real Estate Commission has adopted a rule specifically addressing participation by licensees. Among other requirements, licensees must submit appropriate forms to disclose these arrangements to the Division of Real Estate and the Division of Insurance. Violations of laws and rules related to affiliated business arrangements carry serious consequences. Therefore, licensees should familiarize themselves with allowed business arrangements, disclosure requirements, and payment prohibitions set forth in the Real Estate Settlement Procedures Act (12 U.S.C. § 2601 et. seq.), Colorado Real Estate Statutes (§§ 12-61-113.2 and 10-11-124(2), C.R.S.), and Colorado Real Estate Commission Rules E-46 and E-22. Licensees who have questions about their affiliated business arrangements are encouraged to seek legal advice.

II. Real Estate Settlement Procedures Act (RESPA)

12 U.S.C. § 2607. Prohibition against kickbacks and unearned fees

(a) **Business referrals**

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

(b) **Splitting charges**

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

(c) **Fees, salaries, compensation, or other payments**

Nothing in this section shall be construed as prohibiting (1) the payment of a fee (A) to attorneys at law for services actually rendered or (B) by a title company to its duly appointed agent for services actually performed in the issuance of a policy of title insurance or (C) by a lender to its duly appointed agent for services actually performed in the making of a loan, (2) the payment to any person of a bona fide salary or compensation or other payment for goods or facilities actually furnished or for services actually performed, (3) payments pursuant to cooperative brokerage and referral arrangements or agreements between real estate agents and brokers, (4) affiliated business arrangements so long as (A) a disclosure is made of the existence of such an arrangement to the person being referred and, in connection with such referral, such person is provided a written estimate of the charge or range of charges generally made by the provider to which the person is referred (i) in the case of a face-to-face referral or a referral made in writing or by electronic media, at or before the time of the referral (and compliance with this requirement in such case may be evidenced by a notation in a written, electronic, or similar system of records maintained in the regular course of business); (ii) in the case of a referral made by telephone, [FN1] within 3 business days after the referral by telephone, (and in such case an abbreviated verbal disclosure of the existence of the arrangement and the fact that a written disclosure will be provided within 3 business days shall be made to the person being referred during the telephone referral); or (iii) in the case of a referral by a lender (including a referral by a lender to an affiliated lender), at the time the estimates required under section 2604(c) of this title are provided (notwithstanding clause (i) or (ii)); and any required written receipt of such disclosure (without regard to the manner of the disclosure under clause (i), (ii), or (iii)) may be obtained at the closing or settlement (except that a person making a face-to-face referral who provides the written disclosure at or before the time of the referral shall attempt to obtain any required written receipt of such disclosure at such time and if the person being referred chooses not to acknowledge the receipt of the disclosure at that time, that fact shall be noted in the written, electronic, or similar system of records maintained in the regular course of business by the person making the referral), (B) such person is not required to use any particular provider of settlement services, and (C) the only thing of value that is received from the arrangement, other than the payments permitted under this subsection, is a return on the ownership interest or franchise relationship, or (5) such other payments or classes of payments or other transfers as are specified in regulations prescribed by the Secretary, after consultation with the Attorney General, the Secretary of Veterans Affairs, the Federal Home Loan Bank Board, the Federal Deposit Insurance Corporation, the Board of Governors of the Federal Reserve System, and the Secretary of Agriculture. For purposes of the preceding sentence, the following shall not be considered a violation of clause (4)(B): (i) any arrangement that requires a buyer, borrower, or seller to pay

for the services of an attorney, credit reporting agency, or real estate appraiser chosen by the lender to represent the lender's interest in a real estate transaction, or (ii) any arrangement where an attorney or law firm represents a client in a real estate transaction and issues or arranges for the issuance of a policy of title insurance in the transaction directly as agent or through a separate corporate title insurance agency that may be established by that attorney or law firm and operated as an adjunct to his or its law practice.

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

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

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

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

(4) The Secretary, the Attorney General of any State, or the insurance commissioner of any State may bring an action to enjoin violations of this section.

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

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

III. Colorado Real Estate Statutes

Colorado Revised Statutes § 12-61-113.2. Affiliated business arrangements – definitions – disclosures – enforcement and penalties – reporting – rules – investigation information shared with the division of insurance.

(1) As used in this section, unless the context otherwise requires:

(a) "Affiliated business arrangement" means an arrangement in which:

(I) a provider of settlement services or an associate of a provider of settlement services has either an affiliate relationship with or a direct beneficial ownership interest of more than one percent in another provider of settlement services; and

(II) a provider of settlement services or the associate of a provider directly or indirectly refers settlement service business to another provider of settlement services or affirmatively influences the selection of another provider of settlement services.

(b) "Associate" means a person who has one or more of the following relationships with a person in a position to refer settlement service business:

(I) a spouse, parent, or child of such person;

(II) a corporation or business entity that controls, is controlled by, or is under common control with such person;

(III) an employer, officer, director, partner, franchiser, or franchisee of such person, including a broker acting as an independent contractor; or

(IV) anyone who has an agreement, arrangement, or understanding with such person, the purpose or substantial effect of which is to enable the person in a position to

refer settlement service business to benefit financially from referrals of such business.

(c) "Settlement service" means any service provided in connection with a real estate settlement including, but not limited to, the following:

(I) title searches;

(II) title examinations;

(III) the provision of title certificates;

(IV) title insurance;

(V) services rendered by an attorney;

(VI) the preparation of title documents;

(VII) property surveys;

(VIII) the rendering of credit reports or appraisals;

(IX) real estate appraisal services;

(X) home inspection services;

(XI) services rendered by a real estate broker;

(XII) pest and fungus inspections;

(XIII) the origination of a loan;

(XIV) the taking of a loan application;

(XV) the processing of a loan;

(XVI) underwriting and funding of a loan;

(XVII) escrow handling services;

(XVIII) the handling of the processing; and

(XIX) closing of settlement.

(2) (a) An affiliated business arrangement is permitted where the person referring business to the affiliated business arrangement receives payment only in the form of a return on an investment and where it does not violate the provisions of section 12-61-113.

(b) If a licensee or the employing broker of a licensee is part of an affiliated business arrangement when an offer to purchase real property is fully executed, the licensee shall disclose to all parties to the real estate transaction the existence of the arrangement. The disclosure shall be written, shall be signed by all parties to the real estate transaction, and shall comply with the federal "Real Estate Settlement Procedures Act of 1974", as amended, 12 U.S.C. sec. 2601 et seq.

(c) A licensee shall not require the use of an affiliated business arrangement or a particular provider of settlement services as a condition of obtaining services from that licensee for any settlement service. For the purposes of this paragraph (c), "Require the use" shall have the same meaning as "required use" in 24 CFR 3500.2 (b).

(d) No licensee shall give or accept any fee, kickback, or other thing of value pursuant to any agreement or understanding, oral or otherwise, that business incident to or part of a settlement service involving an affiliated business arrangement shall be referred to any provider of settlement services.

(e) Nothing in this section shall be construed to prohibit payment of a fee to:

(I) an attorney for services actually rendered;

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

(III) a lender to its duly appointed agent for services actually performed in the making of a loan.

(f) Nothing in this section shall be construed to prohibit payment to any person of:

(I) a bona fide salary or compensation or other payment for goods or facilities actually furnished or for services actually performed;

(II) a fee pursuant to cooperative brokerage and referral arrangements or agreements between real estate brokers.

(g) It shall not be a violation of this section for an affiliated business arrangement:

(I) to require a buyer, borrower, or seller to pay for the services of any attorney, credit reporting agency, or real estate appraiser chosen by the lender to represent the lender's interest in a real estate transaction; or

(II) if an attorney or law firm represents a client in a real estate transaction and issues or arranges for the issuance of a policy of title insurance in the transaction directly as agent or through a separate corporate title insurance agency that may be established by that attorney or law firm and operated as an adjunct to his or her law practice.

(h) No person shall be liable for a violation of this section if such person proves by a preponderance of the evidence that such violation was not intentional and resulted from a bona fide error notwithstanding maintenance of procedures that are reasonably adopted to avoid such error,

(3) On and after July 1, 2006, a licensee shall disclose at the time the licensee enters into or changes an affiliated business arrangement, in a form and manner acceptable to the commission, the names of all affiliated business arrangements to which the licensee is a party. The disclosure shall include the physical location of the affiliated businesses.

(4) On and after July 1, 2006, an employing broker, in a form and manner acceptable to the commission, shall at least annually disclose the names of all affiliated business arrangements to which the employing broker is a party. The disclosure shall include the physical location of the affiliated businesses.

(5) The commission may promulgate rules concerning the creation and conduct of an affiliated business arrangement, including, but not limited to, rules defining what constitutes a sham affiliated business arrangement. The commission shall adopt the rules, policies, or guidelines issued by the United States Department of Housing and Urban Development concerning the federal "Real Estate Settlement Procedures Act of 1974", as amended, 12 U.S.C. sec. 2601 et seq. Rules adopted by the commission shall be at least as stringent as the federal rules and shall ensure that consumers are adequately informed about affiliated business arrangements. The commission shall consult with the insurance commissioner pursuant to section 10-11-124 (2), C.R.S., concerning rules, policies, or guidelines the insurance commissioner adopts concerning affiliated business arrangements. Neither the rules promulgated by the commissioner nor the real estate commission may create a conflicting regulatory burden on an affiliated business arrangement.

(6) The division may share information gathered during an investigation of an affiliated business arrangement with the division of insurance.

10-11-124. Affiliated business arrangements – rules – investigative information shared with the division of real estate

(1) (a) An affiliated business arrangement is permitted where the person referring business to the affiliated business arrangement receives payment only in the form of a return on an investment and where it does not violate the provisions of section 10-11-108(1).

(b) A title insurance company or a title insurance agent making a referral as part of an affiliated business arrangement shall disclose the affiliation in accordance with the federal "Real Estate Settlement Procedures Act of 1974", as amended, 12 U.S.C. sec. 2601 et seq.

(c) Neither a title insurance company nor a title insurance agent shall require the use of an affiliated business arrangement or a particular settlement producer as a condition of obtaining title insurance services from the company or agent. For the purposes of this paragraph (c), "require the use" shall have the same meaning as "required use" in 24 CFR 3500.2 (b).

(2) The commissioner may promulgate rules concerning the creation and conduct of an affiliated business arrangement, including, but not limited to, rules defining what constitutes a sham affiliated business arrangement. Nothing in this subsection (2) shall be construed to increase a fee or create a licensure program for affiliated business arrangements. The commissioner shall adopt the rules, policies, or guidelines issued by the United States department of housing and urban development concerning the federal "Real Estate Settlement Procedures Act of 1974", as amended, 12 U.S.C. sec. 2601 et seq. Rules adopted by the commissioner shall be at least as stringent as the federal rules and shall ensure that consumers are adequately informed about affiliated business arrangements. The commissioner shall consult with the real estate commission pursuant to section 12-61-113.2(5), C.R.S., concerning rules the real estate commission may promulgate concerning affiliated business arrangements. Neither the rules promulgated by the commissioner nor the real estate commission may create a conflicting regulatory burden on an affiliated business arrangement.

(3) The division may share information gathered during an investigation of an affiliated business arrangement with the division of real estate.

IV. Colorado Real Estate Commission Rules

E-22. Inducements from settlement producers prohibited

A. In addition to the provisions of section 12-61-113.2, C.R.S., and the federal Real Estate Settlement Procedures Act, 12 U.S.C. sec. 2601 et seq., no licensed real estate broker, whether or not engaged in a prohibited affiliated business arrangement, shall pay, furnish, impose, or agree to pay or furnish or impose, or accept, agree to accept or arrange to accept, either directly or indirectly, any incentive, disincentive, remuneration, commission, fee or other thing of value to or from another person or entity in any form in connection with any past, present, or future title insurance business, any closing and settlement services or any other title insurance business except for "services actually rendered" as defined in section 12-61-113.2 (2) (e), C.R.S., to or on behalf of any of the following:

1. Any "settlement producer" as defined in section 10-11-102(6.5), C.R.S., or a person that provides settlement services as defined in section 12-61-113.2 (1) (c), C.R.S.
2. Any owner or prospective owner, lessee or prospective lessee of real property or any interest in the real property;
3. Any obligee or prospective obligee of any obligation secured or to be secured either in whole or in part by real property or any interest in the real property; or,
4. Any person who is acting as or who is in the business of acting as agent, representative, attorney or employee of any of the persons described in 1, 2 or 3 above, or any other party to the instant transaction.

B. The factors the Commission will consider when determining whether incentive, disincentive, remuneration, commission, fee or other thing of value for the referral of title insurance business exists or will exist include, but are not limited to:

1. Whether the costs of any settlement producer are being or will be defrayed by the licensee's actions;
2. Whether the remuneration is being or will be given to a discrete settlement producer as opposed to a bona fide association of settlement producers;
3. Whether a pattern or practice of referrals to the real estate broker exists or will exist; and
4. Consideration of the advertising value of the incentive, disincentive, remuneration, commission, fee or other thing of value.

C. Bona fide advertising, marketing, or other acts in furtherance of maintenance and development of client relationships are not prohibited unless such conduct otherwise constitutes violation of the statutes or rules applicable to licensed real estate brokers.

D. Section 12-61-113.2 (2)(a), C.R.S., permits an affiliated business arrangement where the person referring the business to the affiliated business arrangement receives payment only in the form of a return on an investment and where it does not violate section 12-61-113, C.R.S.

E. Prohibited acts, practices, incentives, disincentives, remuneration, commissions, fees or other things of value include, but are not limited to, the following:

1. Affiliated business arrangements prohibited by section 12-61-113.2, C.R.S., that mandate the referral of title insurance business. Prohibited arrangements include, but are not limited to the following:
    a. Arrangements in which the amount of the return on the ownership interest is in some fashion conditioned on the number of or premium volume of referrals made, such as where owners or stockholders receive dividends or bonuses based on the number of referrals generated or achievement of certain referral plans or goals;
    b. Arrangements in which the ownership interests themselves are conditioned on the referrals, such as where the stock certificates are distributed based on the number of or premium volume of the referrals made in the past or to be made in the future;
    c. Arrangements in which owners or stockholders receive anything of value that is directly tied to the referral of business; and
    d. Arrangements in which the cost of the ownership opportunity is not equivalent for all investors.
2. "Sham" affiliated business arrangements as defined in Commission Rule E-46.
3. Receiving, attempting to receive, or arranging for, from a settlement producer, discounts primarily based on the volume of business the broker refers to the provider of settlement services.
4. Violation of Commission Rule E-36 regarding "good funds".
5. Except as otherwise permitted in Section 38-35-125 (2), C.R.S., arranging for the disbursement of closing and settlement services funds before all necessary conditions of the transaction have been met.
6. Arranging for or accepting a title commitment without charge or at a reduced charge, unless, within a reasonable time after the date of issuance, appropriate title insurance coverage is issued for which the scheduled rates and fees are paid. Any title commitment charge must have a reasonable relation to the cost of production of the commitment and cannot be less than the minimum rate or fee for the type of policy applied for, as set forth in the insurer's current schedule of rates and fees. This provision does not apply where a title commitment is furnished in good faith in furtherance of a bona fide sale, purchase or loan transaction that for good reason is not consummated.
7. Accepting or arranging for any portion of the following:
    a. Advertising or promotional material or activity, including, but not limited to, any obligation, product, service, seminar, convention or publication for the benefit of

any settlement producer, or ostensibly for the benefit of the real estate broker, the end result of which is the substantial subsidization of an obligation, product, service, seminar, convention or publication of any settlement producer. This prohibition applies to ads placed in subdivision or tract brochures, multiple listing services or books, exchange bulletins, newsletters, information sheets, programs, announcements and periodicals or similar matter associated with meetings, seminars or conventions of such settlement producers as well as registers and directories of such persons;

b. The cancellation fee for a title report or other fee before or after inducing such settlement producer to cancel an order with another title entity;

c. Furniture, equipment, office supplies, telephones, or automobiles, including any portion of the cost of renting, leasing, operating or maintaining the above-mentioned items, unless such provider of settlement services pays no more than its allocable share of the actual costs for such goods and services commensurate with the actual usage of such goods services, and facilities actually furnished;

d. Rent to or from any settlement producer for premises wherever situated, regardless of the purpose, at a rent that is materially in excess of or materially below market value when compared with the amount paid per square foot for comparable space in the geographic area;

e. Incentives, gifts, prizes, retreats, transportation and vacations, including, but not limited to other similar things of value;

f. Salary, compensation or services, except for services actually rendered, including, but not limited to:

   i. All or any part of the time or productive effort of any employee or affiliate of the real estate broker (e.g., office manager, secretary, clerk, messenger) to any settlement producer at less than the fair market value of the services;

   ii. Compensation of a settlement producer or associate of a settlement producer;

   iii. The salary or any part of the salary of a relative of any settlement producer which payment is in excess of the reasonable value of the work actually performed by such relative on behalf of the real estate broker; and

   iv. Services by any settlement producer which services are required to be performed by such settlement producer in his or her professional capacity, and for which the settlement producer would not normally charge the real estate broker.

8. Paying a settlement producer or other person described in Section A of this rule to make an inspection and appraisal of property, except for services actually rendered.

9. Any transaction in which any person receives, or is to receive, securities of the settlement producer or its affiliates at prices below the normal market price, or bonds or debentures that guarantee a higher than normal interest rate, whether or not the consummation of such transaction is directly or indirectly related to the number of closing and settlement services or title orders coming to the title entity through the efforts of such person.

10. Accepting or arranging for less than the scheduled rate or fee for a specified real estate or closing and settlement service, or for a policy of title insurance.

11. Accepting or arranging for waiver of all or any part of the title entity's established rate or fee for services that are not the subject of rates or fees filed with the Colorado Commissioner of Insurance required to be maintained on the entity's schedules of rates and fees.

12. Except as otherwise permitted by 12-61-113(1), C.R.S., and the rules and regulations of the Commission, accepting or arranging for information, including, but not limited to,

farm packages, appraisals, estimates of income production potential, information kits or similar packages containing information about one or more parcels of real property without a charge that is commensurate with the actual cost of the work performed and the material furnished, and making a good faith effort to collect payment in the amount of such charge.

13. Accepting or arranging for accumulation, credit or deferral of the charge for a title policy or closing and settlement services in order to "qualify" the charge for said policy and a later transaction for a lower rate, except to the extent that a properly filed and justified rate or fee is in place for a deferred rate.
14. Accepting or arranging for a guarantee, either directly or indirectly, of any loan to any settlement producer, regardless of the terms of the note or guarantee.
15. Accepting or arranging for a guarantee of the performance of closing and settlement services, or the performance of any other undertaking that are to be performed by any settlement producer.
16. Accepting or arranging for, either directly or indirectly, a "compensating balance" or deposit in a lending institution either for the express or implied purpose of influencing the extension of credit by such lending institution to any settlement producer, or for the express or implied purpose of influencing the placement or channeling of title insurance business by such lending institution.
17. Accepting or arranging for the payment of the fees or charges of an outside professional (e.g., an attorney, engineer, appraiser, or surveyor) whose services are required by any settlement producer to structure or complete a particular transaction.
18. Accepting or arranging for real estate broker services (e.g. computerized bookkeeping, forms management, computer programming, or any similar benefit) to or from any settlement producer at less than the fair market value of the services.
19. Accepting, or arranging for payment for, any business form provided to any settlement producer other than a form regularly used in the conduct of the real estate broker that form is furnished solely for the convenience of the real estate broker and does not constitute a direct monetary benefit to any settlement producer.
20. Accepting or arranging for the payment into escrow of any of the title entity funds or "closing short", except as provided in Section 38-35-125 (2), C.R.S.
21. Accepting or arranging for charges that are less than the actual cost of the closing and settlement service of the real estate broker.

F. To the extent the activities and information are provided on a nondiscriminatory basis, that such acts and practices have not been provided in a manner to circumvent the intent of this rule, and are in no way conditioned, directly or indirectly, upon prohibited referrals, prohibited acts, practices, incentives, disincentives, remuneration, commissions, fees or other things of value do not include, but may not be limited to, the following:

1. Accepting or arranging for, either orally or in writing, an ownership and encumbrance report ("O&E") or a copy of an instrument of public record, including but not limited to, a deed, deed of trust, mortgage, contract, map, plat, or declaration of covenants, conditions and restrictions. Any such report or instrument may be accepted without charge provided and to the extent that:
    a. All persons requesting such information are treated equally; and
    b. The information is provided as presented by the public records and nothing of material value is added to the information; and
    c. The information furnished contains no advertising or promotional material on behalf of the settlement producer to whom the information is provided.

d. Commission rules do not prohibit a real estate broker from imposing a reasonable charge for any and all of the above information, or for additional information, provided the charge is the same for all persons, and is assessed on a nondiscriminatory basis.

2. Accepting or arranging for an insured closing letter or closing protection letter that substantially conforms to an American Land Title Association ("ALTA") promulgated form.

3. Accepting or arranging for published or printing real estate industry related educational information or accepting or arranging for educational seminars for the benefit of settlement producers, as long as consistent with all other provisions of this rule.

4. Accepting or arranging for advertising or marketing in furtherance of the development of client relationships, when performed in the bona fide and legitimate promotion of the real estate broker's business, as long as consistent with all other provisions of this rule including, but not limited to:

   a. Things of reasonable value given to a bona fide trade or industry association.

   b. Advertising novelties and promotional gift items that bear the name of the real estate broker (but not the name of the recipient) to settlement producers, provided and to the extent that:

      i. The items constitute advertising directed impersonally at the general consumer public, and are provided to settlement producers on a non-discriminatory basis; and

      ii. The items are valued at no more than $10; and,

      iii. Distribution, if by mail, is made on a nonselective basis to all persons known or reasonably believed to be members of the business or professional group in the natural geographic area or political subdivision toward which the advertising effort is directed.

   c. Customer entertainment provided that:

      i. It is interactive, personal contact between a real estate broker representative who is physically present and a settlement producer; and

      ii. It is conducted to promote real estate products and services of the real estate broker; and

      iii. Any benefit conferred to a settlement producer is incidental to the promotion of the real estate broker's products and services; and

      iv. The expenditure bears a reasonable relationship to the benefit derived by the real estate broker from the activity.

5. Accepting or arranging for the use of office space or other accommodations within a settlement producer's office or business space, provided that rent is paid in accordance with this rule and the arrangement is consistent with the intent of this rule. In determining whether an office or accommodations sharing arrangement is permitted under this rule, the Commission shall consider the following factors, including, but not limited to:

   a. Whether written notice has been provided to the consumer disclosing that an office or accommodations sharing arrangement exists and that the consumer has the right to use another real estate broker;

   b. Whether the real estate broker's space is clearly and conspicuously identified separately from the settlement producer's space;

   c. Whether the real estate broker's space can be readily locked and secured independently from the settlement producer's space;

d. Whether the real estate broker's space is directly and easily accessible to the public without entering the settlement producer's primary workspace, such as where the real estate broker's entrance leads to or from a common area or the exterior of the premises; and

e. Whether the real estate broker, directly or indirectly pays for or subsidizes the settlement producer's expenses as proscribed by § 12-1-113.2, C.R.S.

G. Nothing herein shall be construed in a manner that conflicts with the provisions of §§ 10-11-108(2)(b) or 12-61-113.2, C.R.S. or the rules and regulations of the Colorado Real Estate Commission or the Colorado Division of Insurance.

H. For the purposes of this rule, "title entity" means a "title insurance company" as defined in section 10-11-102 (10), C.R.S., and a "title insurance agent" as defined in section 10-11-102 (9), C.R.S.

I. Noncompliance with this rule, whether defined or reasonably implied under this rule E-22, may result, after proper notice and hearing, in the imposition of any of the sanctions available in the Colorado statutes pertaining to the business of real estate brokers or other laws which include the imposition of fines and/or discipline of a license.

J. The following are hereby incorporated by reference as written on or before the effective date of this rule. This rule does not include later amendments to or editions of the incorporated material. A copy of these references may be examined at any state publications depository library. For additional information regarding how to obtain a copy please contact Rulemaking Coordinator, Colorado Division of Real Estate, 1560 Broadway Ste. 925, Denver, CO 80202.

1. The federal Real Estate Settlement Procedures Act, 12 U.S.C. sec. 2601 et seq.

2. The American Land Title Association (ALTA) Closing Protection Letter (rev. 3/27/97); the ALTA Closing Protection Letter – Regulatory (rev. 10-17-98); the ALTA Closing Protection Letter – Non-Residential Limitations (rev. 10-17-98); and the ALTA Closing Protection Letter – Single Transaction Limited Liability (rev. 10-17-98).

E-46. Affiliated Business Arrangements

A. This rule concerns creation and conduct of an "affiliated business arrangement" as defined in Section 12-61-113.2(1)(a). This rule governs real estate licensees and is not intended to extend the regulatory authority of the Commission or the Division to any person other than real estate licensees.

B. A "provider of settlement services" for purposes of Section 12-61-113.2 et seq includes but is not limited to brokers acting as agents or transaction brokers, real estate brokerage firms, and employing brokers.

C. A licensee or employing broker of a licensee shall disclose the existence of an affiliated business arrangement pursuant to Section 12-61-113.2(2)(b) by disclosing the affiliation to the party they are referring, either seller, buyer or both, by using and having that party sign the Affiliated Business Arrangement Disclosure Statement promulgated by HUD pursuant to the Real Estate Settlement Procedures Act. The disclosure shall be made prior to, but no later than, the referral of settlement services business.

D. A copy of the signed disclosure shall be retained in the file and a copy given to the referred party.

E. Sham affiliated business arrangements are prohibited.

1. In considering whether a real estate broker is a legitimate affiliated business arrangement or a "sham" affiliated business arrangement, the factors the Commission will consider include the following:

a. Whether the real estate broker operates in a manner that evidences a good faith effort to conform to applicable real estate laws;

b. Whether the title entity maintains a separate and distinct, verifiable physical location. In the event the real estate broker shares office space with another settlement service provider, the Commission may consider the factors set forth in paragraph F5 of Rule E22, inclusive, in determining compliance with this provision.

c. Whether the employees of the real estate broker are shared with other settlement service providers within the affiliated business arrangement. In determining whether an individual is an employee of the real estate broker, the Commission may consider the following factors:

i. Whether the real estate broker issues or causes to be issued an annual Internal Revenue Service Form W-2 to the employee;

ii. Whether the employee is subject to the real estate broker's supervision and control;

iii. Whether the employee devotes fixed periods of time exclusively to the business of the real estate broker or whether the employee is compensated on a fluctuating per hour basis or per transaction basis;

iv. Whether the employee is physically located in the office of the real estate broker.

d. Whether the real estate broker performs core title services, by and through its employees. In accordance with the HUD Statement of Policy 1996-4 the real estate broker shall not collect premiums for services not actually performed.

e. What, if any, the settlement services the real estate broker has contracted to other sources.

2. In addition to the above factors, the Commission will consider the guidelines set forth in the HUD statement of Policy 1996-2, Sham Controlled Business Arrangements (commonly referred to as the "HUD 10-Step Sham Test") and that statement is incorporated by reference. A copy of this document is available for public inspection at the office of the Division of Real Estate, 1560 Broadway, Ste. 925, Denver, CO, 80202, weekdays between 8 a.m. and 5 p.m.; excluding state observed holidays. The Commission may also consider any other relevant facts and circumstances relating to the above factors and to those elements set forth in the 10-Step Sham Test.

3. The disclosures to the Commission required by Section 12-61-113.2 (3) and (4) shall be made in a form or manner required by the Commission and shall be:

a. At the time of a new application for active licensure or at the time of activation of an inactive license, the licensee shall disclose to the Commission the names of all affiliated business arrangements to which the licensee is a party. The written disclosure shall include the physical location of the affiliated business.

b. Upon the transfer of an active license to another brokerage firm, the active licensee shall disclose to the Commission the names of all affiliated business arrangements to which the licensee is a party. The written disclosure shall include the physical location of the affiliated business.

c. On an annual basis, each employing broker shall disclose to the Commission the names of all affiliated business arrangements to which the employing broker is a party. The written disclosure shall include the physical location of the affiliated business.

F. Noncompliance with this rule, whether defined or reasonably implied under this rule E-46, may result, after proper notice and hearing, in the imposition of any of the sanctions available in the Colorado statutes pertaining to the business of real estate brokers or other laws which include the imposition of fines and/or discipline of a license.

G. The following are hereby incorporated by reference as written on or before the effective date of this rule. This rule does not include later amendments to or editions of the incorporated material. A copy of these references may be examined at any state publications depository library. For additional information regarding how to obtain a copy please contact Rulemaking Coordinator, Colorado Division of Real Estate, 1560 Broadway Ste. 925, Denver, CO 80202.

1. The HUD policy statement 1996-2, which is the Policy Statement on Sham Controlled Business Arrangements.
2. The HUD policy statement 1996-4, which is the Statement of Enforcement Standards: Title Insurance Practices in Florida; Final Rule.