

No. 10-708

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IN THE  
**Supreme Court of the United States**

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FIRST AMERICAN FINANCIAL CORPORATION,  
SUCCESSOR IN INTEREST TO  
THE FIRST AMERICAN CORPORATION, AND  
FIRST AMERICAN TITLE INSURANCE COMPANY,  
*Petitioners,*

v.

DENISE P. EDWARDS, INDIVIDUALLY  
AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,  
*Respondent.*

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**On Writ of Certiorari  
to the United States Court of Appeals  
for the Ninth Circuit**

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**BRIEF FOR RESPONDENT**

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### QUESTION PRESENTED

Congress enacted Section 8 of the Real Estate Settlement Procedures Act of 1974 (“RESPA”), 12 U.S.C. §2607, to protect homebuyers from the conflicts of interest that arise when a real estate professional accepts kickbacks for referrals—conflicts that tend to increase the cost and decrease the quality of settlement services. Congress prohibited the payment or receipt of kickbacks, *id.* §2607(a), and authorized consumers to recover three times the settlement charge if they receive services in violation of that prohibition, *id.* §2607(d)(2). The question presented is:

Whether Section 8 of RESPA is a permissible exercise of Congress’s authority to enact “statutes creating legal rights, the invasion of which creates standing.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 578 (1992) (quotation marks omitted).

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IN THE  
**Supreme Court of the United States**

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No. 10-708

FIRST AMERICAN FINANCIAL CORPORATION,  
SUCCESSOR IN INTEREST TO  
THE FIRST AMERICAN CORPORATION, AND  
FIRST AMERICAN TITLE INSURANCE COMPANY,  
*Petitioners,*

v.

DENISE P. EDWARDS, INDIVIDUALLY  
AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,  
*Respondent.*

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**On Writ of Certiorari  
to the United States Court of Appeals  
for the Ninth Circuit**

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**BRIEF FOR RESPONDENT**

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**INTRODUCTION**

Congress enacted Section 8 of the Real Estate Settlement Procedures Act (“RESPA”) to protect homebuyers from specified conflicts of interest that tend to increase the cost and decrease the quality of settlement services. The right Congress recognized—to receive services free from kickbacks—has long been deemed legally protectable. RESPA thus falls comfortably within Congress’s authority to establish legal rights, the invasion of which supports standing. Ms. Edwards suffered an invasion of that right and has standing to sue, regardless of any impact on the price or quality of the services.

## STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Real Estate Settlement Procedures Act of 1974, as enacted, Pub. L. No. 93-533, 88 Stat. 1724, and as amended, 12 U.S.C. §§2601-2617, and Ohio Revised Code §§3935.01-.10 are set forth in the Appendix. App., *infra*, 1a-46a.

### STATEMENT

#### I. STATUTORY FRAMEWORK

Homebuyers and sellers ordinarily must purchase various settlement services, such as title insurance, appraisals, and inspections. See 12 U.S.C. §2602(3). They generally trust real estate professionals to decide who will provide those services. It became common for service providers to compete, not by offering consumers lower prices or better quality, but by paying kickbacks to professionals in exchange for referrals. The professionals, in turn, would pursue their own interests rather than their customers' by referring business to providers that paid kickbacks. Congress enacted Section 8 of RESPA to protect consumers from those abuses.

##### A. The Real Estate Settlement Procedures Act

1. Congress enacted RESPA in 1974 after years of hearings and study,<sup>1</sup> including an influential report by the Department of Housing and Urban Development and

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<sup>1</sup> See *Real Estate Settlement Costs, FHA Mortgage Foreclosures, Housing Abandonment, and Site Selection Policies: Hearings Before the Subcomm. on Housing of the H. Comm. on Banking and Currency*, 92d Cong. (Feb. 22-24, 1972) (“1972 House Hearings”); *Mortgage Settlement Costs: Hearings Before the Subcomm. on Housing and Urban Affairs of the S. Comm. on Banking, Housing and Urban Affairs*, 92d Cong. (Mar. 1-3, 1972) (“1972 Senate Hearings”); *Real Estate Settlement Costs: Hearings Before the Subcomm. on Housing of the H. Comm. on Banking and Currency*, 93d Cong. (Dec. 4-5, 1973 & Jan. 29-30, 1974) (“1973 House Hearings”).

the Veterans' Administration, *Mortgage Settlement Costs* (Mar. 1972) ("*HUD-VA Report*"), reprinted in *1972 House Hearings* 735-1324. That report emphasized that a homebuyer "seldom decides who will provide settlement services for him." *Id.* at 2. "If there is a choice, he usually depends upon advice of the broker, escrow agent, seller, or settlement attorney." *Id.* at 2-3. That consumer reliance produced a phenomenon now known as "reverse competition"—an "elaborate system of referral fees, kickbacks, rebates, commissions and the like" offered "as inducements to those firms and individuals who direct the placement of business." *Id.* at 3. "These practices are widely employed, rarely inure to the benefit of the home buyer, and generally increase total settlement costs." *Ibid.*

HUD's Secretary testified that service providers pay kickbacks rather than "cutting costs to the home buyer" because a buyer "will ordinarily accept the services—and prices—of whomever he is referred to." *1972 House Hearings* 21-22; see *1972 Senate Hearings* 14. Congress heard complaints that, "[a]lthough the home buyer pays the bill, his interests often come last"; the "pervasiveness of kickback-type arrangements by [real estate] lawyers" was attributed to the "[c]onflict-of-interest \* \* \* inherent in the work." *1972 House Hearings* 3, 8; see also *id.* at 621-622, 701; *1973 House Hearings* 52-53. The result was higher prices and lower quality—costs were inflated by "millions of dollars each year" in Washington, D.C., alone. *1972 House Hearings* 1-3.

Industry representatives concurred. The American Land Title Association ("ALTA") "agree[d] with the HUD study that kickbacks or rebates by title insurance companies increase closing costs" and acknowledged that, "[i]f kickbacks were prohibited, [that would] bring

down the costs.” *1972 Senate Hearings* 73-74; see also *1972 House Hearings* 332, 339. A Senate report concluded that kickbacks were widespread and “tend[ed] to increase the cost of settlement services without providing any benefits to the home buyer.” S. Rep. No. 93-866, at 6 (1974); see also H.R. Rep. No. 93-1177, at 7 (1974); 120 Cong. Rec. 23,551 (July 16, 1974) (Sen. Brock).

2. Congress enacted RESPA to combat those and other abuses. It considered price controls, but opted instead to “deal with th[e] problems and abuses directly” by banning kickbacks. S. Rep. No. 93-866, at 3-5. Congress sought to “eliminat[e] \* \* \* kickbacks or referral fees that tend to increase unnecessarily the costs of certain settlement services.” 12 U.S.C. § 2601(b)(2).

Section 8(a) imposes a duty on real estate professionals and settlement service providers to refrain from paying or receiving kickbacks for referrals in transactions involving “federally related” mortgage financing:

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.

12 U.S.C. § 2607(a).

Section 8(d)(2) granted consumers a corresponding right to recover for violations, authorizing disgorgement of three times the kickback:

[A]ny person or persons who violate the provisions of subsection (a) shall be jointly and severally liable to the person or persons whose business has been referred in an amount equal to three times the value or amount of the fee or thing of value \* \* \* .

Pub. L. No. 93-533, § 8(d)(2), 88 Stat. 1724, 1728 (1974). Congress explicitly authorized suit in federal court, 12 U.S.C. § 2614, rejecting a proposal to limit jurisdiction to state courts, H.R. Conf. Rep. No. 93-1526, at 14 (1974).

### **B. The 1983 Amendments**

After further study and hearings revealed widespread circumvention,<sup>2</sup> Congress amended RESPA to clarify its scope and strengthen enforcement.

1. The new hearings featured a report by the Department of Justice’s Antitrust Division, *The Pricing and Marketing of Insurance* (Jan. 1977) (“*DOJ Report*”), reprinted in part in *1981 House Hearings* 212-283. “While [RESPA] [wa]s designed to close the front door to rebates and kickbacks,” the report observed, “a loophole has appeared which may ultimately cause a problem worse than outright kickbacks.” *Id.* at 269. That “loop-hole” was referral arrangements between affiliates. *Ibid.* A real estate agent, for example, could purchase a title agent, direct business to it, and “[i]nstead of receiving a kickback \* \* \* receive corporate dividends.” *Id.* at 271.

The Justice Department found that those “controlled business arrangements” create the same conflicts of interest as traditional kickbacks. A professional’s “knowledge, experience, and business relationships” allow him to “control \* \* \* the placement” of services. *DOJ Report* 251-252. And ownership interests put the professional’s interests at odds with his client’s: Referrals “would be based on how much [the professional] would receive as compensation, not how much the policy will cost the pur-

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<sup>2</sup> See *Real Estate Settlement Procedures Act—Controlled Business: Hearings Before the Subcomm. on Housing and Community Development of the H. Comm. on Banking, Finance and Urban Affairs*, Ser. No. 97-24 (Sept. 15-16, 1981) (“*1981 House Hearings*”).



chaser.” *Id.* at 271-272. “[T]he purchaser is likely to end up (1) paying unreasonably high premiums, (2) accepting unusually poor service, or (3) accepting faulty title examinations and policies \* \* \* .” *Id.* at 273.

The title industry again agreed. In a comprehensive report entitled *The Controlled Business Problem in the Title Insurance Industry* (Nov. 1979) (“*ALTA Report*”), cited in *1981 House Hearings* 153, 161, ALTA observed:

Without exception, every federal and state agency that has examined the problem, and every knowledgeable observer of the industry who has written about the problem, has concluded that controlled business arrangements are detrimental to competition in the provision of title insurance services and are adverse to the interests of consumers of such services.

*Id.* at 49.

“[B]uyers and sellers of real estate,” ALTA explained, “generally rely on others—whom they perceive or assume to be in a fiduciary relationship with them—to recommend a title insurance service provider.” *ALTA Report* 16. “When the real estate professional making the recommendation or referral has no financial stake in the entity to which the title-related business is referred, it is likely that such a recommendation or referral will be made on the basis of that professional’s fiduciary responsibilities to consider the buyer’s or seller’s best interests.” *Id.* at 93. But where the entity is an affiliate, “referrals will almost inevitably be made on the basis of the [professional’s own] financial interests.” *Ibid.* Such arrangements “inevitably result in higher prices” and are “likely to result in a deterioration in the quality” of services. *Id.* at 52, 69.

ALTA's president similarly testified that real estate professionals perform a "critical and often fiduciary role." *1981 House Hearings* 152. One reason RESPA outlawed kickbacks was that they "prejudice the kind of disinterested advice \* \* \* the consumer deserves." *Id.* at 159. The Act thus addressed, in part, the "problem of insuring that the consumer will obtain the disinterested advice of the real estate professional." *Id.* at 153. But further legislation was needed to address "controlled business arrangements," which "are the functional and economic equivalent of kickbacks." *Id.* at 160, 165.

A former HUD official described the relationship between homebuyer and professional as the "same type of trusting or fiduciary relationship" as doctor and patient. *1981 House Hearings* 475. Others agreed: "[W]hen these people who make referrals hold themselves out as giving honest referrals," they have a "fiduciary responsibility or something like fiduciary responsibility \* \* \* ." *Id.* at 140 (FTC official); see also *id.* at 402, 441-442, 463, 470, 472. And "there is no logical basis whatsoever for distinguishing between kickbacks and controlled business arrangements." *Id.* at 476 (former HUD official). In either case, "it is doubtful that [the professional] will put the home buyer's interest first." *Id.* at 475.

As a House report summarized, where services are referred to an affiliate, "the advice of the person making the referral may lose its impartiality and may not be based on his professional evaluation of the quality of service." H.R. Rep. No. 97-532, at 52 (1982). Consequently, consumers are "likely to pay unreasonably high premiums, to accept poor service or to receive faulty title examinations." *Id.* at 51.

HUD-commissioned studies by Peat Marwick showed that even traditional kickbacks remained widespread.

See 2 Peat, Marwick, Mitchell & Co., *Real Estate Closing Costs: RESPA, Section 14a*, at XII.47 (Oct. 1980), cited in *1981 House Hearings* 4, 11; Peat, Marwick, Mitchell & Co., *Research on Real Estate Settlement Practices and Costs: Baseline Study of Title Insurance Industry*, at II.3 (Feb. 1980). Numerous professionals reported that kickbacks were still prevalent, an unsurprising result given the lack of enforcement. See 2 Peat, Marwick (Oct. 1980), *supra*, at XII.47.

2. Accordingly, Congress sought “to clarify that Section 8 of RESPA, the anti-kickback provision, applies in certain circumstances to referrals” among affiliates. H.R. Rep. No. 97-532, at 51. Some witnesses had opposed prohibiting such arrangements, urging that they sometimes benefit consumers. See, *e.g.*, *1981 House Hearings* 46-48. Congress sought a “reasonable reconciliation” that would permit such arrangements only “subject to certain limitations and safeguards that will protect consumers.” H.R. Rep. No. 97-532, at 52; see also H.R. Rep. No. 98-123, at 75-78 (1983).

The resulting amendments added a narrow exemption for certain “controlled business arrangements” (later renamed “affiliated business arrangements”). Pub. L. No. 98-181, § 461(a)-(b), 97 Stat. 1153, 1230 (1983) (codified as amended at 12 U.S.C. §§ 2602(7), 2607(c)(4)). That exemption permits referral payments among affiliates, but only if the arrangement is disclosed to the consumer, the consumer is not required to use the affiliate’s services, and the only thing of value exchanged between the affiliates is “a return on the ownership interest.” 12 U.S.C. § 2607(c)(4).

Congress also strengthened enforcement. The original statute had provided that consumers could recover three times the *kickback*. See pp. 4-5, *supra*. Congress

amended the Act to base recovery on the *settlement charge* paid:

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.

12 U.S.C. §2607(d)(2).

### **C. The Title Insurance Industry**

This case concerns title insurance, a settlement service that is a principal focus of RESPA. See, e.g., *HUD-VA Report* 9-10. The title insurance industry is highly concentrated; only a handful of firms control the market. See U.S. Gov't Accountability Office, *Title Insurance: Actions Needed To Improve Oversight of the Title Industry and Better Protect Consumers* 11-12 (Apr. 2007) (“GAO Report”). Kickbacks and referral fees remain widespread. See *id.* at 27-33; *Title Insurance: Cost and Competition: Hearing Before the Subcomm. on Housing and Community Opportunity of the H. Comm. on Financial Services*, Ser. No. 109-88, at 5-6, 30-31, 49, 185 (Apr. 26, 2006) (“2006 House Hearings”).

Title insurers typically sell policies through separate entities known as title agents. *GAO Report* 7. Title agents provide an array of closing services similar to those once provided exclusively by attorneys: They perform title searches, prepare closing documents, and hold funds in escrow. See *id.* at 9; *2006 House Hearings* 226-234. In at least one role—escrow agent—title agents are fiduciaries of the homebuyer. See, e.g., *Saad v. Rodriguez*, 506 N.E.2d 1230, 1233 (Ohio App. 1986). Because of

their role in closings, title agents are uniquely positioned to choose a title insurer for the homebuyer. See J.A. 143.

States generally permit title insurers to compete on price and quality. Only three—Florida, New Mexico, and Texas—prescribe rates, see NAIC Title Insurance Task Force, *Survey of State Laws Regarding Title Data and Title Matters* 8 (Mar. 22, 2010); two of those permit deviations with permission, Fla. Stat. § 627.783; N.M. Stat. § 59A-30-6(E). Most other States either have “file and use” systems that allow insurers to alter rates without prior approval, or do not regulate rates at all. See NAIC, *supra*, at 8. Most States require that rates not be “excessive, inadequate or unfairly discriminat[ory].” *Id.* at 9. State review, however, is widely criticized as ineffective. See, e.g., *HUD-VA Report 2* (“largely ineffective”); Peat, Marwick (Feb. 1980), *supra*, at IV.10-11 (“ineffectual” and sometimes “almost non-existent”); *GAO Report* 41-43.

Ohio does not fix or require uniformity in title insurance rates. Ohio law expressly provides that it “do[es] not prohibit or discourage reasonable competition, or prohibit or encourage uniformity in insurance rates.” Ohio Rev. Code § 3935.01. Although rates are subject to review to ensure they are not “excessive, inadequate, or unfairly discriminatory,” *id.* §§ 3935.03(B), 3935.04(A), rates are deemed approved if not rejected within 30 days of filing, *id.* § 3935.04(D). Ohio permits title insurers to join a private rating bureau that files rates on its members’ behalf. *Id.* § 3935.04(B). But insurers are not required to join. *Ibid.* Even if they do, they can depart from the bureau’s rate by submitting different rates for approval. *Id.* § 3935.07.

## II. PROCEEDINGS BELOW

### A. Background

1. This case concerns a scheme by petitioners First American Title Insurance Company and First American Financial Corporation (collectively “First American”) to pay title agents for referrals by combining those payments with purchases of minority equity stakes. As a former First American vice president explained, the company would purport to pay for an ownership share but would insist on an “Agency Agreement” that “required the title agent[] to refer title policies ‘exclusively’” to it. J.A. 132. First American’s “goal” was to secure those referrals. *Id.* at 130. The equity stakes “were not a primary consideration.” *Id.* at 131. Instead, First American was “interested only in acquiring the increased premiums generated by the exclusive agency agreement.” *Ibid.*

Discovery materials submitted on remand from the Ninth Circuit confirm that, while First American purported to buy equity stakes, it was primarily paying for referrals. See Appendix of Exhibits in Support of Plaintiff’s Motion for Class Certification (Mar. 20, 2011).<sup>3</sup> One internal memorandum explains that First American conducted only an abbreviated review of an agent’s financial statements because “the economics of this transaction are driven primarily by the agency relationship and the amount of policy remittances.” 1 *id.* at 7. Another states that “most of the value of this minority interest purchase \* \* \* is connected with the exclusive underwriting arrangement.” *Id.* at 10. A third states that “[o]ur goal is

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<sup>3</sup> This appendix is filed in redacted form at Dist. Ct. Dkt. #271-274 and publicly quoted at Dkt. #240-1. First American’s application to file the unredacted version under seal, Dkt. #306, was stayed pending this Court’s review, Dkt. #324; see also Dkt. #241-243, 275, 281. A copy is available to be lodged pursuant to this Court’s Rule 32.3.

to lock up the remittance stream.” *Id.* at 12. Yet another states that First American “spent little time analyzing” financial statements because “[p]rotecting [the] title premium remittances [is] far more important.” *Id.* at 14. First American routinely valued targets by computing the value of the equity stake and the value of the referrals and combining the two. *Id.* at 33. In at least one case, it paid for an acquisition even though the value of the ownership interest was *negative*. *Id.* at 33-34, 49.

2. One of First American’s acquisitions was an Ohio title agent, Tower City Title Agency, LLC. J.A. 62. Tower City had historically issued policies for multiple insurers. *Id.* at 133, 140-141. In 1998, however, First American paid it \$2 million for an agreement to issue policies “exclusively” for First American and a 17.5% ownership interest. *Id.* at 62, 65, 72, 92-93. That agreement allowed Tower City to issue a limited number of policies for Stewart Title and to issue policies for other insurers if a customer insisted. *Id.* at 72. In practice, however, Tower City “referred virtually all of its title insurance business to First American.” Pet. App. 53a; see J.A. 134. Once again, First American had “one primary objective” in the acquisition: “to increase [its] net premiums.” J.A. 135.

Respondent Denise Edwards contracted with Tower City to handle the closing on her 2006 purchase of a Cleveland home. See J.A. 88-90; Pet. App. 53a-54a, 57a. Tower City performed the title examination, prepared documents, and handled the escrow. See J.A. 89. Consistent with its exclusive referral agreement, Tower City referred the title insurance to First American, which issued owner’s and lender’s policies. Pet. App. 54a. Ms. Edwards paid \$455.43 for those insurance contracts. J.A. 89. Tower City also gave Ms. Edwards a “privacy policy” describing how it “safeguard[ed] customer information.”

*Id.* at 106-108. That policy mentioned an affiliation with First American, but not the fact that First American had paid Tower City for exclusive referrals. *Ibid.*

### **B. Proceedings in the District Court**

1. Ms. Edwards filed suit in the U.S. District Court for the Central District of California, where First American is headquartered. Pet. App. 48a-60a. “Congress,” the complaint explained, “enacted RESPA in 1974 to ensure consumers were ‘protected from unnecessarily high settlement charges’ that resulted from ‘abusive practices’ such as ‘kickbacks and referral fees.’” *Id.* at 49a ¶2. “Despite the law’s prohibitions,” First American had “embarked on a nationwide policy \* \* \* [of] paying large sums of money to individual title agencies \* \* \* in exchange for exclusive referral agreements \* \* \* .” *Id.* ¶3. It had “created undisclosed ‘Captive Title Insurance Arrangements,’ which are prohibited by RESPA precisely because of their potential for harm to consumers.” *Ibid.* When Ms. Edwards purchased her home, Tower City “referred the title insurance to First American” pursuant to one such arrangement. *Id.* at 53a-54a ¶¶22-25. Ms. Edwards sought to represent a class of similarly situated consumers. *Id.* at 49a ¶4.

Ms. Edwards alleged that First American had injured her by “denying [her] critical information about the cost of title insurance, in a way calculated—to quote Congress’s words from 1974—‘to increase unnecessarily the costs’ of title insurance.” Pet. App. 49a ¶5. She alleged she had “paid \$455.43” for the insurance. *Id.* at 53a-54a ¶24. She alleged she had received, not a disinterested referral, but a referral “[p]ursuant to [First American’s] Captive Title Insurance Arrangement.” *Id.* at 54a ¶25. And she alleged that First American “violated RESPA with respect to Plaintiff and the Class by giving, paying



or receiving fees, kickbacks or other things of value” for referrals. *Id.* at 57a-58a ¶39.

First American did not claim it qualified for RESPA’s “affiliated business arrangement” exception. To the contrary, it acknowledged that the exception was inapplicable because it lacked a sufficient ownership stake in Tower City. See J.A. 162-163 n.17. First American also failed to qualify because it did not disclose the referral agreement as required by 12 U.S.C. §2607(c)(4)(A). And the consideration paid under the arrangement was not limited to a “return on [an] ownership interest.” 12 U.S.C. §2607(c)(4)(C).

2. First American moved to dismiss, urging that Ms. Edwards lacked standing because she had not paid an “overcharge.” See Pet. App. 13a, 19a. Ms. Edwards responded that no overcharge was necessary because she had been denied “a right created by Congress and expressly protected by federal law: the right to purchase title insurance in a transaction that was not the result of an illegal kickback.” J.A. 44. The district court agreed and denied the motion. Pet. App. 19a, 21a.

Ms. Edwards moved to certify a nationwide class of consumers, Pet. App. 24a-25a, and a smaller class of Tower City customers, *id.* at 32a. The district court denied both motions. *Id.* at 25a-28a, 40a.

### **C. The Court of Appeals’ Decision**

Ms. Edwards appealed the denials of class certification under Federal Rule of Civil Procedure 23(f). See J.A. 14, 24. The court of appeals reversed the order denying certification of the Tower City class and remanded for discovery on the nationwide class. Pet. App. 8a-11a. In a separate opinion, it rejected First American’s arguments that Ms. Edwards lacked standing. *Id.* at 1a-7a.

The court of appeals first held, as a statutory matter, that “RESPA gives rise to a statutory cause of action whether or not an overcharge occurred.” Pet. App. 4a. The court then held that Ms. Edwards had constitutional standing. Quoting *Warth v. Seldin*, 422 U.S. 490, 500 (1975), it noted that “[t]he injury required by Article III can exist solely by virtue of ‘statutes creating legal rights, the invasion of which creates standing.’” Pet. App. 4a. The court found that principle applicable here. *Id.* at 4a-7a. Those holdings, it noted, were consistent with decisions of two other circuits. *Id.* at 7a (citing *Alston v. Countrywide Fin. Corp.*, 585 F.3d 753 (3d Cir. 2009); and *Carter v. Welles-Bowen Realty, Inc.*, 553 F.3d 979 (6th Cir. 2009)).

The court of appeals denied rehearing en banc. Pet. App. 41a. This Court granted review, limited to the constitutional question. J.A. 165.

### SUMMARY OF ARGUMENT

I. This Court has repeatedly recognized that the “injury required by Art[icle] III may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 578 (1992) (quotation marks omitted). While Article III limits Congress’s authority to create such rights, that authority at least extends to protecting interests sufficiently concrete and personal to have been deemed legally protectable at the time the Constitution was adopted. Petitioners agree that Congress can “‘elevat[e] to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law.’” Pet. Br. 15-16 (quoting *Lujan*, 504 U.S. at 578). Congress did exactly that here.

A.-B. For centuries, courts have recognized a party’s interest in receiving services free from kickbacks or

other conflicts of interest to be a concrete interest capable of legal protection, wholly apart from any economic harm. The longstanding rule—known today as the “no-further-inquiry rule”—is that courts will permit challenges to conflicted transactions without any inquiry into whether the conflict caused economic loss.

C. Congress followed that settled rule here. Recognizing that consumers repose trust in real estate professionals, Congress banned the kickbacks that place those professionals’ interests at odds with their clients’. Consistent with the traditional no-further-inquiry rule, Congress authorized consumers to seek redress for violations from the payer or recipient of the kickback without any proof of economic harm.

The no-further-inquiry rule rests on the presumption that conflicts of interest cause hard-to-detect economic harm. It also reflects the law’s determination that those in a position of trust should not profit from breaches of their duties. Both rationales apply fully to RESPA.

D. That Congress imposed a targeted duty to avoid particular conflicts rather than a broad fiduciary duty to avoid all conflicts does not undermine RESPA’s constitutionality. The scope of the duty and resulting legal protections affects neither the nature of the protected interest nor the injury that results from its invasion.

E. Petitioners’ economic-harm arguments are irrelevant. The whole point of the no-further-inquiry rule is to foreclose consideration of such matters. Besides, the claim that Ms. Edwards could not have suffered economic harm distorts both state law and economics.

II. RESPA is independently valid as an exercise of Congress’s broader power to “‘*define* injuries and articulate chains of causation that will give rise to a case or con-

troversy where none existed before.’” *Massachusetts v. EPA*, 549 U.S. 497, 516 (2007) (emphasis added).

A. Congress can create new legal rights and provide remedies for their violation. Thus, a housing-discrimination tester has standing to sue for violation of her statutory right to accurate housing information, even if she has no intention of purchasing a home. See *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373-374 (1982). Congress has enacted numerous statutes that similarly provide redress for infringement of new legal rights.

B. The principle that violations of personal legal rights give rise to justiciable controversies rests on firm historical ground. The law has long treated invasions of legal rights as cognizable injuries, redressable through nominal or statutory damages even absent further harm.

C. RESPA is a particularly modest exercise of Congress’s authority. It reflects a reasonable presumption of economic harm. It prevents unjust enrichment. And it provides redress only to specific consumers who paid money in a transaction. RESPA thus has firm roots in the law.

D. This Court should not rewrite constitutional standing principles to address asserted defects in class action litigation. Policy arguments for or against class actions are properly addressed to Congress.

### ARGUMENT

By limiting federal courts to deciding “Cases” or “Controversies,” U.S. Const. art. III, §2, the Framers confined the exercise of judicial power to “cases of a Judiciary Nature,” 2 *The Records of the Federal Convention of 1787*, at 430 (Farrand ed., 1911) (Madison). Consistent with that limitation, courts lack jurisdiction unless the plaintiff has standing: The plaintiff must show an “in-

vasion of a legally protected interest” that is “concrete and particularized” and “actual or imminent,” that is “fairly traceable to the challenged action,” and that is “likely \* \* \* [to] be redressed by a favorable decision.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992) (alterations and quotation marks omitted). By restricting the judiciary to “the traditional role of Anglo-American courts,” those requirements preserve “the proper—and properly limited—role of the courts in a democratic society.” *Summers v. Earth Island Inst.*, 129 S. Ct. 1142, 1148 (2009).

Although Article III’s injury-in-fact requirement is a “hard floor” that “cannot be removed by statute,” *Summers*, 129 S. Ct. at 1151, Congress plays a crucial role. The “injury required by Art[icle] III may exist solely by virtue of “statutes creating legal rights, the invasion of which creates standing.”” *Lujan*, 504 U.S. at 578 (quoting *Warth v. Seldin*, 422 U.S. 490, 500 (1975)). Because “legal injury is by definition no more than the violation of a legal right; and legal rights can be created by the legislature,” “standing[’s] \* \* \* existence in a given case is largely within the control of Congress.” A. Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk U. L. Rev. 881, 885 (1983). Whatever the full scope of Congress’s authority, all agree it encompasses the power to “elevat[e] to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law.” Pet. Br. 15-16 (quoting *Lujan*, 504 U.S. at 578).

That principle is sufficient to resolve this case. RES-PA does not authorize citizen suits based on undifferentiated concerns about proper administration of the law. It permits one party to a specific financial transaction to claim that his contractual counterparty breached a duty

owed to him to avoid a specific conflict of interest, and to recover money he paid to that other party. That is precisely the sort of concrete dispute that has been “the traditional concern of the courts at Westminster” since well before the Constitution’s framing. *Coleman v. Miller*, 307 U.S. 433, 460 (1939) (opinion of Frankfurter, J.).

For centuries, the law has recognized receipt of services encumbered by kickbacks or other conflicts of interest to be a concrete injury capable of judicial vindication, even without any resulting economic harm. In enacting RESPA, Congress recognized that consumers trust real estate professionals to make disinterested referrals, and granted them a right to receive services free from kickbacks that put those professionals’ interests at odds with their own. RESPA is thus a straightforward exercise of Congress’s authority to elevate *de facto* injuries to legal status. It also falls squarely within Congress’s broader power to define new injuries and provide redress. Ms. Edwards’ complaint alleges facts establishing that First American violated her legally protected rights in a specific financial transaction. See Pet. App. 48a-49a, 54a, 57a-58a (Compl. ¶¶1-5, 25, 39). Article III requires no more.

#### **I. RESPA VALIDLY EXTENDS LEGAL PROTECTION TO INTERESTS LONG RECOGNIZED TO BE PROTECTABLE**

“[H]istory is particularly relevant to the constitutional standing inquiry since \* \* \* Article III’s restriction of the judicial power to ‘Cases’ and ‘Controversies’ is properly understood to mean ‘cases and controversies of the sort traditionally amenable to, and resolved by, the judicial process.’” *Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 774 (2000). Indeed, history is often “well nigh conclusive.” *Id.* at 777; *Sprint Commc’ns Co. v. APCC Servs., Inc.*, 554 U.S. 269, 285

(2008). Petitioners concede that history is critical. See Pet. Br. 18. But they offer no analysis of whether the type of dispute at issue here—a suit over conflicts of interest in a transaction with no claim of economic loss—was “traditionally amenable to, and resolved by, the judicial process.” *Vermont Agency*, 529 U.S. at 774. Petitioners thus fail to address whether the purchaser in such a transaction traditionally had a “concrete, *de facto* injury” the law could “elevat[e]” to legal status. *Lujan*, 504 U.S. at 578. Apart from an isolated reference to James Madison (at 18), petitioners ignore history entirely.

There is good reason for that omission: More than 250 years of precedent refute their position. Courts have long allowed suits for breaches of duties to avoid conflicts of interest in a transaction. Courts did not merely refrain from inquiring into whether the conflict affected price or quality. They expressly held that no such inquiry was permitted. As this Court stated over 160 years ago, in “every relation in which there may arise a conflict between the duty which the vendor or purchaser owes to the person with whom he is dealing \* \* \* and his own individual interest,” the plaintiff may sue “without any further inquiry” into the transaction’s terms. *Michoud v. Girod*, 45 U.S. 503, 553, 559 (1846).

RESPA follows that settled tradition. Recognizing that kickbacks undermine the incentives of real estate professionals to obtain the best deal for their customers, Congress granted consumers a statutory right to receive settlement services free from kickbacks. Under long-established principles, the invasion of that legally protected interest is itself injury-in-fact, whether or not the consumer pays more or receives worse service.

**A. Framing-Era Courts Routinely Allowed Suits  
over Conflicted Transactions with No Further  
Inquiry into Economic Harm**

The law has long barred individuals occupying positions of trust from engaging in transactions that place their own interests at odds with the interests of those they serve. A trustee may not purchase property from his trust. See *Restatement (Second) of Trusts* §170 & cmt. b (1959). And an agent may not take bribes from third parties. See *Restatement (Second) of Agency* §388 (1958). The law has also long provided that those who ignore those duties may be forced to return fees, disgorge profits, or submit to other relief *with no further inquiry into whether the conflict of interest caused any additional harm*. That rule—known today as the “no-further-inquiry” rule—is fatal to petitioners’ position.

1. *English Law*

The no-further-inquiry rule was recognized in English precedents more than half a century before the Constitution’s framing. In *Keech v. Sandford*, Sel. Cas. t. King 61, 62, 25 Eng. Rep. 223, 223-224 (Ch. 1726), the Chancellor ordered a trustee to disgorge profits he had made by renewing for his own benefit a lease held by the trust, even though the trust itself could not have renewed the lease and thus suffered no loss. In *Whelpdale v. Cookson*, 1 Ves. Sen. 9, 27 Eng. Rep. 856 (Ch. 1747), the Chancellor allowed a suit against a trustee for self-dealing, even though he was “the best bidder \* \* \* at a public sale.” And in *Davison v. Gardner* (Ch. 1743), ms. rep. in 1 W. Cruise, *A Digest of the Laws of England Respecting Real Property* 551-552 (1804), the Chancellor held that a trustee could be sued for purchasing from a minor’s trust, “though the transaction be fair and honest, and as high or higher a price given than any other person would give.”



Framing-era English cases followed suit. In *Campbell v. Walker*, 5 Ves. Jun. 678, 678, 680, 31 Eng. Rep. 801, 801-802 (Ch. 1800), the court allowed a suit even though “the sales were perfectly fair and open” and there was “no evidence” the property was not “sold at the utmost value.” In *Ex parte James*, 8 Ves. Jun. 338, 347-348, 32 Eng. Rep. 385, 389 (Ch. 1803), the court allowed a challenge even though the price was “understood to be the full value” and there was “no reason to think, the sale was not fairly had.” In *Randall v. Errington*, 10 Ves. Jun. 424, 428, 32 Eng. Rep. 909, 911 (Ch. 1805), the court held: “The trustee cannot protect himself from the effect of the rule by saying, ‘You have got as good a price as you could have got from any other person.’ The [beneficiary] \* \* \* has a right to whatever profit or advantage the trustee has made by the purchase.”

Many other authorities agreed.<sup>4</sup> As the House of Lords later ruled:

So strictly is this principle adhered to, that no question is allowed to be raised as to the fairness or unfairness of a contract so entered into. \* \* \* It may sometimes happen that the terms \* \* \* have been as good as could have been obtained from any other

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<sup>4</sup> See, e.g., *Crowe v. Ballard*, 3 Bro. C.C. 117, 120, 29 Eng. Rep. 443, 445 (Ch. 1790); *Ex parte Reynolds*, 5 Ves. Jun. 707, 707, 31 Eng. Rep. 816, 816 (Ch. 1800); *Ex parte Lacey*, 6 Ves. Jun. 626, 628, 31 Eng. Rep. 1228, 1229 (Ch. 1802); *Lister v. Lister*, 6 Ves. Jun. 631, 632-633, 31 Eng. Rep. 1231, 1231-1232 (Ch. 1802); *Ex parte Bennett*, 10 Ves. Jun. 382, 393-395, 32 Eng. Rep. 893, 897-898 (Ch. 1805); E. Sugden, *A Practical Treatise of the Law of Vendors and Purchasers of Estates* 293-308 (1805). A trustee could transact business with his beneficiary so long as he made full disclosure, the beneficiary was competent, and there was no overreaching. See *Coles v. Trecothick*, 9 Ves. Jun. 234, 246-248, 32 Eng. Rep. 592, 597-598 (Ch. 1804). A beneficiary could thus authorize an otherwise conflicted transaction.

person—they may even at the time have been better. But still so inflexible is the rule that no inquiry on that subject is permitted.

*Aberdeen Ry. Co. v. Blaikie Bros.*, 1 Macq. 461, 471-472, [1843-60] All E.R. Rep. 249, 252-253 (H.L. 1854).

## 2. *American Law*

Early American cases similarly allowed suits over conflicted transactions without proof of economic harm. In *Davoue v. Fanning*, 2 Johns. Ch. 252 (N.Y. Ch. 1816), Chancellor Kent allowed a devisee to sue an executor for selling estate property to his wife. It made no difference that the sale was “at public auction, and *bona fide*, and for a fair price.” *Id.* at 256. Tracing the rule back to Roman law, Chancellor Kent held that the plaintiff could sue “without showing actual injury” beyond the conflicted transaction itself. *Id.* at 257-271. Similar cases abound.<sup>5</sup>

Justice Story explained that a beneficiary could sue his trustee for self-dealing “without showing essential injury” from the transaction, “however innocent the purchase.” 1 J. Story, *Commentaries on Equity Jurispru-*

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<sup>5</sup> See, e.g., *Lessee of Lazarus v. Bryson*, 3 Binn. 54, 58, 62-64 (Pa. 1810); *Butler v. Haskell*, 4 Des. Eq. 651, 702-706 (S.C. Ch. 1817); *Currier v. Green*, 2 N.H. 225, 225-226 (Super. Ct. 1820); *Ryden v. Jones*, 1 Hawks 497, 499-501, 505 (N.C. 1821); *Harrod v. Norris' Heirs*, 11 Mart. (o.s.) 297, 298-300 (La. 1822); *Mills v. Goodsell*, 5 Conn. 475, 478-479 (1825); *Carter v. Harris*, 4 Rand. 199, 204-205 (Va. 1826); *Rogers v. Rogers*, 3 Wend. 503, 516-517 (N.Y. 1829); *Brackenridge v. Holland*, 2 Blackf. 377, 380-382 (Ind. 1830); *Boyd v. Hawkins*, 2 Dev. Eq. 195, 207-208 (N.C. 1832); *Ex parte Wiggins*, 1 Hill Eq. 353, 354-356 (S.C. Ch. 1833); *Campbell v. Pa. Life Ins. Co.*, 2 Whart. 53, 63-64 (Pa. 1837); *Walton v. Torrey*, Harr. 259, 263-264 (Mich. Ch. 1841); *Wade v. Pettibone*, 11 Ohio 57, 59-61 (1841); *Thorpe v. McCullum*, 1 Gilm. 614, 625-627 (Ill. 1844); *Creagh v. Savage*, 9 Ala. 959, 962-963 (1846); *White v. Trotter*, 14 S. & M. 30, 42-46 (Miss. 1850).

dence §322, at 318 (1836). “[T]he doctrine applies,” he observed, “not only to trustees strictly so called, but to other persons standing in like situations \* \* \* .” *Id.* §§ 322-323, at 318-319; see also 4 J. Kent, *Commentaries on American Law* 437-438 (3d ed. 1836). Likewise, an agent “forfeit[ed] his commissions” if he “act[ed] adversely to his [principal’s] interests.” J. Story, *Commentaries on the Law of Agency* §334, at 342 (1839).

By 1846, this Court had recognized the same rule. “[I]t makes no difference,” the Court held, whether “a sale was at public auction, *bona fide*, and for a fair price \* \* \* .” *Michoud v. Girod*, 45 U.S. 503, 557 (1846). Courts would allow challenges “without any further inquiry.” *Id.* at 553. That rule applied to “every relation in which there may arise a conflict between the duty which the vendor or purchaser owes to the person with whom he is dealing \* \* \* and his own individual interest.” *Id.* at 559. This Court has repeatedly reaffirmed that rule since. See, e.g., *Magruder v. Drury*, 235 U.S. 106, 118-120 (1914); *Woods v. City Nat’l Bank & Trust Co. of Chi.*, 312 U.S. 262, 267-268 (1941); see also *Wormley v. Wormley*, 21 U.S. 421, 463 (1823) (Johnson, J., concurring).

That remains black-letter law today. Beneficiaries may sue trustees for “any profit made” by self-dealing and any “commission or other compensation” received. *Restatement (Third) of Trusts: Prudent Investor Rule* §§ 205, 206 cmts. a, k (1992). “[U]nder the no-further-inquiry rule, it is immaterial” whether the trust received “a fair consideration.” *Restatement (Third) of Trusts* § 78 cmt. d (2007); see also 3 A. Scott *et al.*, *Scott and Ascher on Trusts* §17.2, at 1077-1136 (5th ed. 2007); G. Bogert & G. Bogert, *The Law of Trusts and Trustees* §543, at 217-269 (2d rev. ed. 1993). Similarly, an agent “forfeit[s] commissions and other compensation” for a

breach of fiduciary duty, and the principal can sue to recover amounts paid, “even though the principal cannot establish that the agent’s breach caused loss.” *Restatement (Third) of Agency* § 8.01 cmt. d(1)-(2) (2006); see also W. Seavey, *Handbook of the Law of Agency* § 155(E), (I), at 253-255 (1964).

More than two centuries of authority thus make clear that, where a defendant violates a duty to avoid conflicts in a transaction, the plaintiff may sue *without showing any further harm*. That rule reflected the law’s judgment that the interest in receiving services free from such influences was *itself* a concrete interest worthy of protection. And while the law protected that interest in part for instrumental reasons—to prevent likely but hard-to-detect economic harm, see pp. 28-29, *infra*—history leaves no doubt that the interest was protectable in its own right.

#### **B. The No-Further-Inquiry Rule Applies to Kickbacks**

Kickbacks represent paradigmatic conflicts of interest to which the no-further-inquiry rule applies. Such payments self-evidently tend to “introduce a selfish interest” into a transaction. Bogert & Bogert, *supra*, § 543(P), at 382-383. Even though “[i]t is often impossible to prove that the [recipient] has been influenced,” those payments foster “favor[] [for] the persons who make [them], regardless of merit.” *Id.* at 383. The recipient may be “tempted to place [business] with the company \* \* \* even though that might not be for the best interest of the beneficiary.” *Restatement (Second) of Trusts* § 170 cmt. o.

Accordingly, “[i]t is perfectly clear \* \* \* that a trustee \* \* \* who receives a bribe from a third person \* \* \* is accountable for the bribe.” 2A A. Scott & W. Fratcher, *The Law of Trusts* § 170.22, at 415 (4th ed. 1987). The benefi-

ciary can sue “even though no damage to the trust is shown.” Bogert & Bogert, *supra*, §543(P), at 382; see also *Restatement (First) of Restitution* §197 & cmt. c (1937); *Restatement (Second) of Agency* §403 & cmt. a.

It is equally clear that liability extends beyond the kickback’s recipient. The party paying the bribe is liable for procuring the breach; he too can be sued for disgorgement of any benefits received. See 3 A. Scott, *The Law of Trusts* §506, at 2429 (1939); *Restatement (First) of Restitution* §138(2); *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 254, 256 (1993).

This Court applied the no-further-inquiry rule to kickbacks a century ago in *United States v. Carter*, 217 U.S. 286 (1910). The government, it held, could sue for disgorgement of kickbacks that contractors paid to a federal officer whether or not the contractors charged more or did inferior work:

It is not enough for one occupying a confidential relation to another, who is shown to have secretly received a benefit from [a third] party, to say, “ \* \* \* [Y]ou cannot show that you have sustained any loss by my conduct.” Such an agent has the power to \* \* \* hide the injury done his principal. \* \* \* The larger interests of public justice will not tolerate, under any circumstances, that a public official shall retain any profit or advantage which he may realize through the acquirement of an interest in conflict with his fidelity as an agent.

*Id.* at 305-306.

### C. RESPA Follows the Traditional No-Further-Inquiry Rule

#### 1. *RESPA Invokes the No-Further-Inquiry Rule To Protect Homebuyers from Kickbacks*

RESPA falls squarely within that longstanding tradition. Because homebuyers trust real estate professionals, they “ordinarily accept the services—and prices—of whomever [they are] referred to.” *1972 House Hearings* 22 (HUD Secretary). Whether or not the professionals are fiduciaries under state law, homebuyers generally “*perceive or assume* [them] to be in a fiduciary relationship.” *ALTA Report* 16 (emphasis added). Professionals who “hold themselves out as giving honest referrals” thus have a “fiduciary responsibility or something like fiduciary responsibility.” *1981 House Hearings* 140 (FTC official); see also *ALTA Report* 93 (“fiduciary responsibilities”); *1981 House Hearings* 152 (“critical and often fiduciary role”); *id.* at 475 (“trusting or fiduciary relationship”); *id.* at 402, 441-442, 463, 470, 472.

Kickbacks betray that trust. Professionals taking kickbacks base referrals on “how much [they] would receive as compensation, not how much the policy will cost the purchaser.” *DOJ Report* 272. Kickbacks thus “prejudice the kind of disinterested advice \* \* \* the consumer deserves.” *1981 House Hearings* 159 (ALTA); see also H.R. Rep. No. 97-532, at 52 (1982) (referrals “may lose [their] impartiality”); *1981 House Hearings* 475 (professional unlikely to “put the home buyer’s interest first”); *1972 House Hearings* 3 (consumer’s “interests often come last”); *id.* at 621-622, 701; *ALTA Report* 93.

Accordingly, just as courts have long imposed a duty to forgo kickbacks on trustees, agents, and others occupying positions of trust, RESPA imposes that duty on real estate professionals. 12 U.S.C. §2607(a). Just as

courts traditionally allowed suits for violations of that duty without regard to economic harm, RESPA permits homebuyers to sue without proving economic harm. *Id.* §2607(d)(2). And just as courts allowed suits against the third party that paid the kickback for inducing the fiduciary’s breach, see p. 26, *supra*, RESPA allows suits against the settlement service provider that paid the kickback, 12 U.S.C. §2607(a), (d)(2).

Indeed, during the 1972 hearings, a witness specifically quoted *Magruder*—one of this Court’s leading no-further-inquiry precedents—in urging that “[i]t is a well-settled rule that a Trustee can make no profit out of its Trust’” and must “account to the trust estate for [any] commission” received. *1972 House Hearings* 621 (quoting 235 U.S. at 119). Congress thus did nothing more than “elevat[e]” to legal status the same “concrete, *de facto* injur[y]”—invasion of the interest in receiving kickback-free services—the law has long redressed in other relationships. *Lujan*, 504 U.S. at 578.

## 2. *The Rationales for the No-Further-Inquiry Rule Apply Here*

RESPA does not merely redress invasions of an interest long deemed legally protectable. It does so in a context where the traditional rationales for protection apply.

Courts articulated multiple rationales for the no-further-inquiry rule. First, conflicts of interest are likely to cause economic harm, but that harm is hard to detect. “[N]o Court is equal to the examination and ascertainment of the truth in much the greater number of cases,” so “the general interests of justice requir[e] [conflicted transactions] to be destroyed in every instance.” *James*, 8 Ves. Jun. at 345, 32 Eng. Rep. at 388; see also *Ex parte Bennett*, 10 Ves. Jun. 382, 385-386, 32 Eng. Rep. 893, 894 (Ch. 1805). “[T]he trustee [may have] made a bargain

advantageous to himself \* \* \* , and yet the party not have it in his power, distinctly and clearly, to show it.” *Davoue*, 2 Johns. Ch. at 260-261. To avert the “danger of imposition inaccessible to the eye of the court,” *Michoud*, 45 U.S. at 557, courts conclusively *presumed* economic harm due to its likelihood but difficulty of proof. Similar approaches recur throughout the law, from defamation to copyright. See pp. 47-49, *infra*.

Second, courts sought to prevent unjust enrichment. “[N]o trustee shall ever be permitted to gain an advantage by selling to himself \* \* \* .” *Campbell*, 5 Ves. Jun. at 680, 31 Eng. Rep. at 802; see also *Whichcote v. Lawrence*, 3 Ves. Jun. 740, 752, 30 Eng. Rep. 1248, 1254 (Ch. 1798). Disgorgement of profits or compensation was thus a customary remedy. See, *e.g.*, *Keech*, Sel. Cas. t. King at 62, 25 Eng. Rep. at 224. That rationale too reflects principles accepted throughout the law. See pp. 49-50, *infra*.

Those same rationales apply here. As in traditional fiduciary relationships, kickbacks paid to real estate professionals tend to increase prices and impair quality by undermining incentives to act in the customer’s best interests. See pp. 2-7, *supra*. For example, ALTA reported that, “[w]ithout exception, every federal and state agency that has examined the problem \* \* \* has concluded that controlled business arrangements are \* \* \* adverse to the interests of consumers,” that they “inevitably result in higher prices,” and that they are “likely to result in a deterioration in \* \* \* quality.” *ALTA Report* 49, 52, 69; see also A. Hofflander & D. Shulman, *The Distribution of Title Insurance*, 44 J. Risk & Ins. 435 (1977). The evidence continues to mount. See, *e.g.*, *GAO Report* 27-33; *2006 House Hearings* 6, 30, 31; B. Birnbaum, *An Analysis of Competition in the California Title Insurance and Escrow Industry* 27-60 (Dec. 2005).



Evidence also showed that such harm is hard to prove. See, e.g., *1972 House Hearings* 3 (“impossible to determine without an audit”); *id.* at 1236 (“lack of good data”); Peat, Marwick (Feb. 1980), *supra*, at III.1 (“inconsistent accounting practices, ambiguous categorizations, and a lack of an effective means of verifying the reported information”); *1981 House Hearings* 514-515. Even state regulators confess difficulty “determining the extent of potentially excessive costs.” *GAO Report* 42-43.

The second rationale—preventing unjust enrichment—similarly applies. RESPA directly tracks traditional disgorgement remedies. The Act originally based recovery on the amount of the kickback. Pub. L. No. 93-533, §8(d)(2), 88 Stat. 1724, 1728 (1974). That remedy reflected the longstanding rule that a fiduciary who accepts a bribe must forfeit the bribe to his principal. See, e.g., *Restatement (Second) of Agency* §403. Congress then amended the Act to base recovery on the settlement charge. 12 U.S.C. §2607(d)(2). That too reflects a longstanding rule—that a disloyal fiduciary forfeits his compensation. See, e.g., *Restatement (Second) of Agency* §469 & cmt. e.

RESPA provides for threefold recovery. 12 U.S.C. §2607(d)(2). But such remedies are well-established. See *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 580-581 & n.33 (1996). One Roman law provision Chancellor Kent cited in *Davoue* imposed a “fourfold penalty” for self-dealing. *The Digest of Justinian* bk. 18, tit. 1, ch. 46 (Watson trans., 1985), cited in 2 Johns. Ch. at 270. And a title industry model code imposed a *fivefold* penalty. *1972 House Hearings* 545. For defendants, RESPA is a bargain by comparison. Besides, as petitioners concede (at 38-39 n.19), merely increasing the *amount* of recovery cannot defeat standing. Although a plaintiff must “dem-

onstrate standing separately for each *form* of relief sought,” *Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs. (TOC), Inc.*, 528 U.S. 167, 185 (2000) (emphasis added), this Court has never tied the required showing to the *amount* sought. Given the longstanding tradition of requiring refunds, requiring a threefold payment cannot erase an injury that otherwise exists.

#### **D. Petitioners’ Attempts To Avoid the No-Further-Inquiry Rule Fail**

##### *1. Congress Properly Applied the No-Further-Inquiry Rule to All Participants in the Breach of a Targeted Duty To Avoid Particularly Egregious Conflicts*

Petitioners try to dismiss centuries of history on the theory that RESPA does not “establish an agency relationship or fiduciary duty running from settlement service providers to customers.” Pet. Br. 33. In other words, while Congress could impose a broad fiduciary duty to make referrals in a customer’s best interest and allow suits for violations of that duty absent economic harm, petitioners suggest that Congress is constitutionally forbidden from imposing a more modest duty to avoid particularly egregious conflicts—kickbacks—and applying the no-further-inquiry rule to *that* duty.

That is nonsense. Congress can impose fiduciary duties. See, *e.g.*, Investment Company Act of 1940, 15 U.S.C. § 80a-35(b). But it is not required to protect an interest wholly or not at all—it need not resolve all problems “in one fell \* \* \* swoop.” *Massachusetts v. EPA*, 549 U.S. 497, 524 (2007). Here, Congress took a measured approach and imposed a duty to avoid the particularly egregious conflicts that arise from kickbacks. The same underlying “interest” is at stake: the consumer’s interest in receiving services free from conflicts of inter-

est. Whether the law prohibits all conflicts or just the most problematic determines when that interest is “legally protected,” so that the injury is “elevat[ed]” to legal status. *Lujan*, 504 U.S. at 560, 578. It does not and logically cannot alter the interest or injury itself.

Petitioners insist that, whatever the relationship between *Tower City* and Ms. Edwards, *First American* bears no resemblance to a fiduciary. Pet. Br. 33. But the law has long allowed suits against third parties that procure *another party’s* breach of fiduciary duty by paying bribes or kickbacks to it. See p. 26, *supra*. Congress thus could hold First American liable for procuring Tower City’s breach. Besides, decisions about which parties to hold liable have no bearing on whether the plaintiff suffered an injury. And Ms. Edwards was First American’s customer: She contracted with it and paid it (through its agent) for title insurance—a payment First American obtained by providing a prohibited kickback to the title agent handling her closing. See Pet. App. 53a-54a. First American’s relationship with Ms. Edwards could hardly be more direct.

Petitioners urge that Ms. Edwards did not “plead an injury based on a breach of special confidence and trust.” Pet. Br. 32. But Ms. Edwards alleged that she received settlement services in violation of her rights under a statute that prohibited kickbacks for her protection. See Pet. App. 48a-49a, 54a, 57a-58a (Compl. ¶¶ 1-5, 25, 39). A complaint need only set forth “general *factual* allegations of injury.” *Lujan*, 504 U.S. at 561 (emphasis added). It need not trace the pedigree of the congressionally established right back to the eighteenth century or defend

Congress's prerogative to recognize invasions as actionable injuries.<sup>6</sup>

Even if there were some difference between the interest protected here and the interest protected by the no-further-inquiry rule for 250 years, the invasion of the consumer's right to kickback-free services is no less "concrete" or "particularized." *Lujan*, 504 U.S. at 560. And the rationales for the no-further-inquiry rule are no less applicable. See pp. 28-30, *supra*. If Congress had imposed a broader fiduciary duty to avoid all conflicts, Justice Story and Chancellor Kent would not have thought twice about allowing suits for violations without any further showing of harm. Congress's more measured approach in RESPA cannot possibly be such a departure from judicial tradition that courts resolving such disputes are exercising something other than the judicial power.

## 2. RESPA Does Not Protect a Procedural Right in Vacuo

Petitioners insist that a purchaser's interest in receiving kickback-free services is a mere "'procedural right *in vacuo*'" that cannot support standing unless it affects some *other* "'concrete interest.'" Pet. Br. 36 (quoting *Summers*, 129 S. Ct. at 1151). But centuries of precedent make clear that a party may vindicate his substantive interest in receiving unconflicted services without any further showing of harm. See pp. 21-26, *supra*. The law deemed a party's interest in receiving such services a

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<sup>6</sup> Nor are petitioners correct that Ms. Edwards "did not claim that she paid \* \* \* for advice about title insurance or that she did not get what she paid for." Pet. Br. 35 n.17. The no-further-inquiry rule has never been limited to "advice" or to services that were "paid for"—originally, trustees were not paid *at all*. 3 *Scott et al.*, *supra*, § 17.2.8, at 1122. Ms. Edwards was entitled to receive settlement services free from kickbacks; she thus did not "get what she paid for."

“concrete interest” vindicable in its own right, not a mere “procedural right.” That interest does not become “procedural” merely because Congress enacted a more focused protection of it.

Conflicts of interest are *presumed* to entail economic harm, so conflicted services are in contemplation of law substantively worse than disinterested services. See pp. 28-29, *supra*. They also unjustly enrich the provider—again, a substantive difference. See p. 29, *supra*. Ultimately, it does not matter *why* the law deemed conflicted services themselves to be an actionable injury. It is clear the law *did* so, and that itself is “well nigh conclusive.” *Vermont Agency*, 529 U.S. at 777.

Besides, the right at issue here is not “*in vacuo*.” Congress banned kickbacks to protect homebuyers’ interests in the settlement services they receive, including their price and quality. Such concrete interests are precisely what the plaintiffs in *Summers* lacked. See 129 S. Ct. at 1151; *id.* at 1153 (Kennedy, J., concurring). Parties with an interest in a substantive result need not allege that different procedures would have produced a different outcome. This Court regularly deems the “inability to compete on an equal footing” sufficient, even absent any allegation that a plaintiff would have competed successfully. See, e.g., *Ne. Fla. Chapter of the Assoc. Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993). Likewise here, Ms. Edwards need not allege that a disinterested referral would have produced lower prices or better quality. It is sufficient that she suffered an invasion of a right designed to protect her concrete interests.

3. *Petitioners' ERISA Cases Do Not Cast Doubt on 250 Years of Precedent*

Citing a handful of lower-court ERISA cases, petitioners deny that a “violation of a fiduciary duty is injury in itself.” Pet. Br. 34-35. But nothing in ERISA contradicts the historic no-further-inquiry rule or the fact that the interests it protects are vindicable under Article III.

ERISA is “inform[ed]” by the law of trusts, but differs in important respects. *Varsity Corp. v. Howe*, 516 U.S. 489, 497 (1996). Among other things, some provisions distinguish between duties owed *to the plan* and duties owed *to beneficiaries*. See *id.* at 507-515. Aside from *Kendall v. Employees Retirement Plan of Avon Products*, 561 F.3d 112 (2d Cir. 2009)—which involved no conflict-of-interest allegations at all—the cases petitioners cite held only that beneficiaries cannot sue to vindicate duties owed *to the plan* if the indirect effects on them are speculative or nonexistent. See, e.g., *Loren v. Blue Cross & Blue Shield of Mich.*, 505 F.3d 598, 608-609 (6th Cir. 2007). Two of the cases expressly contrast breaches of fiduciary duties owed *to the claimants themselves*, which are “sufficient to establish injury-in-fact.” *Id.* at 610; see *Horvath v. Keystone Health Plan E., Inc.*, 333 F.3d 450, 455-456 (3d Cir. 2003); see also *Leigh v. Engle*, 727 F.2d 113, 121-122 (7th Cir. 1984). In any event, a handful of unreviewed lower-court decisions—none containing any historical analysis—cannot overcome 250 years of precedent.

**E. Economic Harm Was Likely Here, But Nonetheless Irrelevant Under the No-Further-Inquiry Rule**

Finally, petitioners’ repeated refrain about the purported absence of economic harm (at 26-29) is irrelevant. The proper response is the one courts have given for over

250 years: “[S]o inflexible is the rule that *no inquiry on that subject is permitted.*” *Aberdeen Ry.*, 1 Macq. at 472, [1843-60] All E.R. Rep. at 253 (emphasis added). Because the receipt of conflicted services is itself an injury, Article III does not require Congress to carve out exceptions based on a defendant’s claims about the economics of a particular case.

In any event, petitioners’ suggestion that Ohio’s regulatory regime *precludes* economic harm is incorrect. First, whatever the effects of *rate* regulation, kickbacks decrease *quality* by eliminating incentives to compete. The Justice Department found that kickbacks between affiliates are likely to cause “poor service” and “faulty title examinations and policies.” *DOJ Report 273*. ALTA warned of a “deterioration in \* \* \* quality” because, while “[h]igh quality service competition is ordinarily an important means” by which insurers compete, controlled business arrangements undermine their “incentive to compete by offering a better quality product or better service.” *ALTA Report 69-70, 75*; see also Hofflander & Shulman, *supra*, at 444-445. That potential impact on quality alone justifies Congress’s application of the no-further-inquiry rule.<sup>7</sup>

Second, petitioners’ efforts to dismiss *price* competition are baseless. Although the court below asserted that “Ohio law mandates that all title insurers charge the same price,” Pet. App. 4a, that is not true, Br. in Opp. 6 n.3, and petitioners no longer claim otherwise, cf. C.A. Br. 22, 26. Ohio law expressly states that it does not “encourage,” let alone mandate, “uniformity in insurance rates.” Ohio Rev. Code §3935.01. Title insurers can join

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<sup>7</sup> That those effects were not alleged in the complaint is irrelevant. See pp. 32-33, *supra*. The point is simply that it was not irrational for Congress to invoke the no-further-inquiry rule in RESPA.

a rating bureau and charge identical premiums at the bureau's rate. *Id.* §3935.04(B). But insurers are free to withdraw and file their own rates. *Id.* §3935.04(A), (B). They can also apply to deviate from the bureau's rate while remaining members. *Id.* §3935.07.

That insurers may currently *choose* not to compete on price does not undermine Congress's judgment that they are more likely to do so if kickbacks do not impede the comparison shopping that stimulates competition. See *Am. Needle, Inc. v. NFL*, 130 S. Ct. 2201, 2213-2214 (2010). Petitioners label that argument "speculative." Pet. Br. 27. But it is no different from arguments routinely made in antitrust cases. See, e.g., *Reiter v. Sonotone Corp.*, 442 U.S. 330, 342 (1979). Besides, the difficulty of proving those effects is one reason the no-further-inquiry rule exists. See pp. 28-29, *supra*.<sup>8</sup>

Petitioners prophesy that affirmance will open the floodgates to suits by plaintiffs who "fe[el] betrayed." Pet. Br. 33. To decide this case, however, the Court need only reaffirm (yet again) the no-further-inquiry rule that has applied to conflicted transactions for centuries. The

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<sup>8</sup> Nor does it matter that rates are subject to review by state regulators. Cf. Stewart Br. 12-13. The filed-rate doctrine bars certain challenges to rates approved by federal agencies. See *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409, 417 (1986). But "[i]t is absolutely clear that the filed rate doctrine simply does not apply" to RESPA suits because they "challenge [the defendant's] allegedly wrongful conduct" in paying or receiving kickbacks, "not the reasonableness or propriety of the rate." *Alston v. Countrywide Fin. Corp.*, 585 F.3d 753, 763-765 (3d Cir. 2009). Rating bureaus and state rate regulation were common (and widely criticized) when RESPA was enacted. See *DOJ Report* 261-268; *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 638-640 (1992); p. 10, *supra*. Overwhelming evidence nonetheless showed that prohibiting kickbacks would reduce rates. See pp. 2-8, *supra*.



floodgates have not opened during the past 250 years. There is no reason to expect them to open now.

## II. RESPA IS A VALID EXERCISE OF CONGRESS'S AUTHORITY TO DEFINE INJURIES

Even if RESPA went beyond interests courts have protected for centuries, it would still be a permissible exercise of Congress's authority.

### A. RESPA Creates Legal Rights, the Invasion of Which Constitutes an Injury

#### 1. *Congress Can Define New Injuries*

*Lujan* reaffirmed that the “injury required by Art[icle] III may exist solely by virtue of statutes creating legal rights.” 504 U.S. at 578 (quotation marks omitted). It identified as an “illustration” of that principle cases where Congress had “elevat[ed] \* \* \* *de facto* injuries” to legal status. *Ibid.* But it did *not* hold that that was the full extent of Congress's power. It expressly left that issue open. *Ibid.*

Justices Kennedy and Souter—whose votes were necessary to the majority—addressed that issue, stating that “Congress has the power to *define* injuries and articulate chains of causation that will give rise to a case or controversy where none existed before.” 504 U.S. at 580 (Kennedy, J., concurring in part) (emphasis added). They emphasized that new rights need not “have clear analogs in our common-law tradition.” *Ibid.* The Court endorsed their conclusion in *Massachusetts*: “Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before.” 549 U.S. at 516.

In *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), for example, a housing-discrimination “tester” claimed standing based on a violation of her “statutorily

created right to truthful housing information.” *Id.* at 374. Invoking the principle that the “injury required by Article III may exist solely by virtue of statutes creating legal rights,” the Court held that “Section 804(d) [of the Fair Housing Act], which \* \* \* establishes an enforceable right to truthful information concerning the availability of housing, is such an enactment.” *Id.* at 373 (quotation marks omitted). “A tester who has been the object of a misrepresentation made unlawful under § 804(d) has suffered injury in precisely the form the statute was intended to guard against, and therefore has standing”—even if he had no “intention of buying or renting a home” and “fully expect[ed] that he would receive false information.” *Id.* at 373-374.

Petitioners err in describing the injury in *Havens Realty* as “racial insult and stigma” resulting from the false information. Pet. Br. 15, 30-31. The *only* “specific injury” the Court relied on was the plaintiff’s “injury to her statutorily created right to truthful housing information.” 455 U.S. at 369, 373-374. Indeed, elsewhere in its opinion, the Court *declined* to base standing on lost “social, professional, and economic benefits,” remanding because those allegations were too vague. *Id.* at 375-378.<sup>9</sup>

Congress has enacted an array of statutes that authorize statutory damages or other relief for violations of new legal rights.<sup>10</sup> Although some statutes condition recovery

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<sup>9</sup> In other cases, the Court has mentioned both the denial of information and its impact. See, e.g., *FEC v. Akins*, 524 U.S. 11, 21 (1998). Such impacts may strengthen a claim of standing, but they do not prove that misinformation alone is insufficient when it invades a statutory right. *Havens Realty* also answers petitioners’ quibble that the governing principle was only a “dictum” in *Warth*. Pet. Br. 22 n.9. In *Havens Realty*, it was a holding. See 455 U.S. at 373-374.

<sup>10</sup> See, e.g., Expedited Funds Availability Act, 12 U.S.C. § 4010(a); Homeowners Protection Act of 1998, 12 U.S.C. § 4907(a); Anticoun-

on additional harm, see, *e.g.*, *Doe v. Chao*, 540 U.S. 614, 620-623 (2004), many do not.<sup>11</sup> While petitioners’ *amici* portray those statutes as evidence of a broader problem, see, *e.g.*, Experian Br. 4-5, they actually prove the opposite: that Congress routinely exercises well-accepted authority to define new legal rights. Petitioners’ position would work a revolution in the law.

## 2. *The Injury Congress Defined in RESPA Is Consistent with Article III*

There is “an outer limit to the power of Congress to confer rights of action.” *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring in part). “Congress must at the very least identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring

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terfeiting Consumer Protection Act of 1996, 15 U.S.C. § 1117(c); Anticybersquatting Consumer Protection Act, 15 U.S.C. § 1125(d); Truth in Lending Act, 15 U.S.C. § 1640(a); Fair Credit Reporting Act, 15 U.S.C. § 1681n(a); Equal Credit Opportunity Act, 15 U.S.C. § 1691e; Fair Debt Collection Practices Act, 15 U.S.C. § 1692k(a); Electronic Fund Transfer Act, 15 U.S.C. § 1693m(a); Electronic Communications Privacy Act of 1986, 18 U.S.C. § 2707(c); Video Privacy Protection Act of 1988, 18 U.S.C. § 2710(c); Driver’s Privacy Protection Act of 1994, 18 U.S.C. § 2724(b); Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. § 1854(c)(1); Worker Adjustment and Retraining Notification Act, 29 U.S.C. § 2104(a); Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227(b)(3); Cable Communications Policy Act of 1984, 47 U.S.C. §§ 551(f)(2), 605(e)(3).

<sup>11</sup> See, *e.g.*, *Beaudry v. TeleCheck Servs., Inc.*, 579 F.3d 702, 705-707 (6th Cir. 2009) (Fair Credit Reporting Act); *Robey v. Shapiro, Marianos & Cejda, LLC*, 434 F.3d 1208, 1211-1212 (10th Cir. 2006) (Fair Debt Collection Practices Act); *Alvarez v. Longboy*, 697 F.2d 1333, 1338 (9th Cir. 1983) (Farm Labor Contractor Registration Act); *Dryden v. Lou Budke’s Arrow Fin. Co.*, 630 F.2d 641, 647 (8th Cir. 1980) (Truth in Lending Act); *Pure Power Boot Camp, Inc. v. Warrior Fitness Boot Camp, LLC*, 759 F. Supp. 2d 417, 427-428 (S.D.N.Y. 2010) (Stored Communications Act).

suit.’” *Massachusetts*, 549 U.S. at 516. That limitation ensures courts do not “entertain citizen suits to vindicate the public’s nonconcrete interest in the proper administration of the laws.’” *Id.* at 516-517.

RESPA easily satisfies that standard. Congress identified an “injury”—the receipt of settlement services encumbered by kickbacks. See 12 U.S.C. §2607(a), (d)(2). And it “relate[d] the injury to the class of persons entitled to bring suit”—the customer “charged for the settlement service involved in the violation.” *Id.* §2607(d)(2). In *Havens Realty*, the Court deemed it sufficient that Congress had prohibited misrepresentations “to *any person*” and “creat[ed] \* \* \* an explicit cause of action” in favor of those “‘persons.’” 455 U.S. at 373. Congress was no less precise here.

Like the statute in *Havens Realty*, RESPA establishes a right because it imposes mandatory and unambiguous duties designed to protect a particular party’s interests. See *Blessing v. Freestone*, 520 U.S. 329, 340-341 (1997). Congress vested a right to sue in a specific person—the consumer who paid for the services involved in the violation. 12 U.S.C. §2607(d)(2). It declared its intent to protect *those consumers* from kickbacks that tend to increase the amount *they pay*. *Id.* §2601(b)(2). And it enacted RESPA against a centuries-old backdrop of prohibitions on kickbacks—prohibitions consistently associated with actionable rights.

Petitioners insist that *Havens Realty* is irrelevant because RESPA “does not create any right to information.” Pet. Br. 31. To be sure, because petitioners failed to qualify for the “affiliated business arrangement” exemption for multiple reasons, their scheme would be unlawful even if disclosed, which it was not. See p. 14, *supra*. But RESPA’s constitutionality does not depend on whether

the right is “informational.” RESPA confers a right to kickback-free services, and denials of that right are no less concrete or particularized than denials of the right to truthful information in *Havens Realty*.

RESPA thus addresses a quintessential “concrete and personal” injury. *Lujan*, 504 U.S. at 581 (Kennedy, J., concurring in part). Congress could have required settlement service providers to warrant contractually that no referral fee was paid and allowed homebuyers to sue for nominal or liquidated damages for any breach. See pp. 44-46, 48-49, *infra*. Congress did not violate Article III by creating a statutory right and remedy instead.

This is not a “citizen suit[.]” by a plaintiff whose only interest is in “seeing that the law is obeyed.” Pet. Br. 37-38. Nor is Ms. Edwards suing merely because she “purchased title insurance from a specific First American agent, [while] most of the U.S. population did not.” *Id.* at 38. What differentiates *her* injury is that *she* purchased insurance as a result of a prohibited conflict that created incentives to disregard *her* best interests. First American may have sold insurance to a lot of people. But each customer who purchased it in a conflicted transaction suffered a distinct injury, and a concrete injury is not inadequate merely because it is “widely shared.” *FEC v. Akins*, 524 U.S. 11, 24-25 (1998).

### 3. *RESPA Does Not Merely Create a Right to Lower Prices*

Citing RESPA’s statement of purpose, petitioners and their *amici* insist that, even if Congress did “identify [an] injury it s[ought] to vindicate and relate the injury to the class of persons entitled to bring suit,” *Massachusetts*, 549 U.S. at 516, the “injury” Congress identified was higher costs, not kickbacks or conflicts of interest. Pet. Br. 40-41; ALTA Br. 17-25. But the goal RESPA’s

statement of purpose identifies is to “eliminat[e] \* \* \* kickbacks or referral fees that *tend to increase*” costs, not just kickbacks *proven in a particular case* to have increased costs. 12 U.S.C. §2601(b)(2) (emphasis added). And the legislative record is full of evidence—including statements from petitioners’ *amici*—that one reason Congress prohibited kickbacks was that they “prejudice the kind of disinterested advice \* \* \* the consumer deserves.” *1981 House Hearings* 159 (ALTA); see pp. 2-7, *supra*.

Besides, the right a statute secures is determined by its substantive provisions, not its statement of purpose. Congress sought to reduce costs, among other goals, but it did so by conferring a right to kickback-free referrals. 12 U.S.C. §2607(a), (d)(2). Petitioners improperly “abstract[] from the right to its purposes, and then eliminate[] the right.” *United States v. Gonzalez-Lopez*, 548 U.S. 140, 145 (2006). Had Congress wanted to protect only a right to lower prices, it would have conditioned recovery on an overcharge. But every court of appeals that has definitively addressed the issue, including the court below, has agreed that it did not. See p. 15, *supra*; U.S. Cert. Br. 13-15. And this is not an appropriate case in which to address that issue given that the Court denied review on the statutory question. J.A. 165.<sup>12</sup>

Congress often protects a right to advance additional goals. Congress created the right to truthful housing information in *Havens Realty* because false information promotes segregation. 455 U.S. at 374 n.14. Because Congress established a right to truthful information *it-*

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<sup>12</sup> Because this case arises out of Ms. Edwards’ Rule 23(f) appeal, this Court can address only subject-matter jurisdiction and class certification; it lacks jurisdiction to decide the scope of the statutory cause of action. See U.S. Cert. Br. 18-19.

*self*, however, the plaintiff could sue even though she had no “intention of buying or renting a home.” *Id.* at 374.

Here, Congress was concerned about *both* conflicts *and* costs because it recognized the relationship between them: Kickbacks cause conflicts, and conflicts tend to increase costs. Congress addressed *both* concerns by attacking the root of the problem—kickbacks. Ms. Edwards was not merely “*potentially* vulnerable to an injury.” Pet. Br. 38. She suffered an invasion of the right Congress protected—the right to kickback-free settlement services. Had those kickbacks increased cost or decreased quality, that would have been *another* injury. But a plaintiff only needs one injury-in-fact, not two.

### **B. The Law Has Long Recognized Invasion of a Legal Right Itself To Be an Injury**

*Havens Realty* was no innovation. For centuries, courts have held that a violation of personal legal rights, with no other ensuing harm, is sufficient to permit a suit.

#### 1. *Nominal Damages*

English courts long ago held that a plaintiff could sue for an invasion of his legal rights without any further harm. In *Ashby v. White*, 2 Ld. Raym. 938, 92 Eng. Rep. 126 (K.B. 1703), Lord Holt declared that a plaintiff denied his right to vote could sue even though his vote would not have affected the election’s outcome. He stated:

[E]very injury imports a damage, though it does not cost the party one farthing, and it is impossible to prove the contrary; for a damage is not merely pecuniary, but an injury imports a damage, when a man is thereby hind[er]ed of his right.

*Id.* at 955, 92 Eng. Rep. at 137; see also *ibid.* (injury actionable when it is “peculiar to [the plaintiff]” and not

“general and common to all”).<sup>13</sup> Blackstone thus wrote: “[I]t is a general and indisputable rule, that where there is a legal right, there is also a legal remedy, by suit or action at law, whenever that right is invaded.” 3 W. Blackstone, *Commentaries on the Laws of England* 23 (1768), quoted in *Marbury v. Madison*, 5 U.S. 137, 163 (1803); see also, e.g., *Taylor v. Henniker*, 12 Ad. & E. 489, 492, 113 Eng. Rep. 897, 898 (Q.B. 1840) (unlawful notice was a “wrongful act” that constituted “legal damage” even though “no real damage was sustained”).

The law commonly redresses such violations through nominal damages. In *Whittemore v. Cutter*, 29 F. Cas. 1120 (C.C.D. Mass. 1813), Justice Story ruled that a patentholder could recover nominal damages from a defendant who made, but never used or sold, an infringing machine. “Every violation of a right imports some damage,” he explained, “and if none other be proved, the law allows a nominal damage.” *Id.* at 1121. Similarly, in *Webb v. Portland Manufacturing Co.*, 29 F. Cas. 506 (C.C.D. Me. 1838), Justice Story held that a mill owner could sue for a wrongful but otherwise harmless diversion of water. “[W]henever there is a clear violation of a right,” he stated, “it is not necessary in an action of this sort to show actual damage \* \* \*.” *Id.* at 509. “The law tolerates no farther inquiry than whether there has been the violation of a right. If so, the party injured is entitled to maintain his action for nominal damages \* \* \*.” *Id.* at 508.

This Court similarly held long ago that contracting parties could recover “nominal damages” for a breach that caused no financial harm. See *Wilcox v. Plummer’s Executors*, 29 U.S. 172, 181-182 (1830). Early treatises

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<sup>13</sup> Lord Holt spoke in dissent, but the House of Lords reversed and adopted his position. See 2 Ld. Raym. at 958, 92 Eng. Rep. at 138.



confirmed that, “[w]herever the invasion of a right is established, the English law infers some damage to the plaintiff, and if no evidence is given of any particular amount of loss, it awards what it terms nominal damages.” T. Sedgwick, *A Treatise on the Measure of Damages* 53 (1847); see also 2 T. Parsons, *The Law of Contracts* 452, 492-494 (1855); J. Chitty, *A Practical Treatise on the Law of Contracts* 685 (2d ed. 1834); T. Fessenden, *An Essay on the Law of Patents* 292 (2d ed. 1822).

That rule endures today. “Nominal damages can be awarded when the defendant has invaded an interest of the plaintiff protected against nonharmful conduct,” even if “no harm has been proved.” *Restatement (Second) of Torts* § 907 cmt. b (1979); see also *Restatement (Second) of Contracts* § 346(2) (1981). Thus, a “denial of procedural due process [is] actionable for nominal damages without proof of actual injury.” *Carey v. Piphus*, 435 U.S. 247, 266 (1978). By awarding such damages, “the law recognizes the importance to organized society that those rights be scrupulously observed.” *Ibid.*

## 2. Statutory Damages

Courts have also long vindicated invasions of legal rights through statutory damages. The first Copyright Act, for example, required infringers to “pay the sum of fifty cents for every sheet,” half to the owner and half to the government, without requiring proof of loss. Act of May 31, 1790, ch. 15, § 2, 1 Stat. 124, 124-125.<sup>14</sup> Early state copyright statutes similarly provided for statutory damages. See *Copyright Enactments of the United States, 1783-1906*, at 11-31 (Solberg 2d rev. ed. 1906); see

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<sup>14</sup> Although that remedy superficially resembles *qui tam* statutes, the theory was different. Copyright owners were “su[ing] for damages on both their own and the United States’ behalf.” *Vermont Agency*, 529 U.S. at 776 n.5 (emphasis added).

also 17 U.S.C. § 504(a)-(c) (owner can elect either “actual damages and profits” or “statutory damages”); *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 347-352 (1998).

Sedgwick thus observed more than 150 years ago: “There is a large class of cases where the legislature \* \* \* has endeavored to put a stop to all inquiry into the actual damages by fixing an arbitrary sum as the measure of relief.” Sedgwick, *supra*, at 571. An array of modern provisions follow suit. See pp. 39-40 n.10, *supra*. In *Beaudry v. TeleCheck Services, Inc.*, 579 F.3d 702 (6th Cir. 2009), for example, the court allowed a consumer to seek statutory damages under the Fair Credit Reporting Act, 15 U.S.C. § 1681n(a), even though no economic harm ensued. The “injury” was the invasion of her statutory right to accurate reports, not the economic consequences of the violation. 579 F.3d at 705. As Judge Sutton explained, the defendants’ contrary argument amounted to a claim that a party must prove “consequential damages” in addition to direct injury. *Ibid.* The law may *permit recovery* of consequential damages, but it hardly *requires* them. So long as there is an adequate connection between the legal violation and the individual plaintiff, “[n]o Article III (or prudential) standing problem arises.” *Id.* at 707 (citing *Havens Realty*, 455 U.S. at 373). Petitioners’ contrary position would upend centuries of precedent and reams of previously unquestioned federal statutes.

### **C. RESPA Represents a Modest Exercise of Congress’s Authority**

RESPA represents a particularly restrained exercise of Congress’s power to define new rights.

#### *1. Presumed Damages*

RESPA closely tracks the longstanding remedy of presumed damages. “[P]resumed’ damages \* \* \* [are]

traditionally part of the range of tort law remedies.” *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 310 (1986). The law provides such damages as a “substitute for ordinary compensatory damages” where “a plaintiff seeks compensation for an injury that is likely to have occurred but difficult to establish.” *Id.* at 310-311 (emphasis omitted).

For example, a plaintiff slandered in his trade or otherwise defamed *per se* could traditionally sue for “general damages.” *Restatement (First) of Torts* §§570, 621 (1938). The law required “no proof of actual injury whatever” and “entitle[d] the plaintiff to such amount as the jury s[aw] fit to give.” Sedgwick, *supra*, at 492. The “presumption of law” was that injury ensued as a “natural consequence.” *Pollard v. Lyon*, 91 U.S. 225, 227 (1876). The plaintiff thus could recover “without proving any particular damage to have happened, but merely upon the probability that it might happen.” 3 Blackstone, *supra*, at 124. That presumption was important because defamation’s effects are often “so subtle and indirect that [they are] impossible directly to trace.” *Restatement (First) of Torts* § 621 cmt. a.

Likewise, the law has long allowed contracting parties to presume damages by agreement, “stipulat[ing] for the payment of a certain sum as a liquidated satisfaction.” 2 S. Comyn, *A Treatise of the Law Relative to Contracts and Agreements Not Under Seal* 537 (1807). Such clauses represent an “‘estimate of the damages \* \* \* by a previous agreement between the parties.’” *Id.* at 538 (quoting *Orr v. Churchill*, 1 H. Bl. 227, 232, 126 Eng. Rep. 131, 134 (C.P. 1789)). Courts will not enforce the clauses if they are not reasonable forecasts of harm. See *Restatement (First) of Contracts* §339(1)(a) (1932). But in many jurisdictions, only *ex ante* reasonableness mat-

ters, and “no showing of pecuniary or other actual damages is required.” 22 Am. Jur. 2d *Damages* §528, at 467 (2003); see, e.g., *United States v. Bethlehem Steel Co.*, 205 U.S. 105, 118-121 (1907).

Statutory copyright damages are presumed damages: They “give the owner of a copyright some recompense for injury done him, in a case where the rules of law render difficult or impossible proof of damages.” *Douglas v. Cunningham*, 294 U.S. 207, 209 (1935). Similarly, in voting-rights cases, courts award “presumed damages for a nonmonetary harm that cannot easily be quantified.” *Memphis*, 477 U.S. at 311 n.14. Finally, the no-further-inquiry rule awards presumed damages for conflicted transactions. See pp. 28-29, *supra*.

RESPA is merely a contemporary example of that unbroken tradition. Overwhelming evidence shows that kickbacks tend to increase costs and impair quality, but those effects can be difficult to prove. See pp. 29-30, *supra*. Just as courts have long presumed damages in comparable contexts, Congress was entitled to do so here.

## 2. *Unjust Enrichment*

RESPA also rests on well-accepted principles of unjust enrichment. “[A]ncient remedies of accounting, constructive trust, and restitution have compelled wrongdoers to ‘disgorge’—i.e., account for and surrender—their ill-gotten gains for centuries.” *SEC v. Cavanagh*, 445 F.3d 105, 116-120 (2d Cir. 2006). Today, those remedies are known as restitution and unjust enrichment. See *Restatement (Third) of Restitution & Unjust Enrichment* (2011).

“Restitution is measured by the defendant’s unjust enrichment, not by the plaintiff’s loss.” 1 D. Dobbs, *Law of Remedies* §4.5(1), at 628 (2d ed. 1993); see D. Laycock,

*The Scope and Significance of Restitution*, 67 Tex. L. Rev. 1277, 1279 (1989). Thus, a plaintiff whose rights have been infringed may recover even if he “has not suffered a corresponding loss”—or, indeed, “any loss.” *Restatement (First) of Restitution* §1 cmt. e; see also 1 G. Palmer, *The Law of Restitution* §2.10, at 133 (1978) (“no economic loss”); 5 R. Pound, *Jurisprudence* 253 (1959) (“no loss at all”).

For example, a landowner can recover his land’s rental value from a trespasser who uses the land, “even if the plaintiff himself could not reach the land, did not intend to use it, and would not have rented it to others.” 1 Dobbs, *supra*, §5.8(2), at 788-792; see *Restatement (Second) of Torts* §931 cmt. b. Copyright and trademark owners can sue for disgorgement even if they allege no lost sales. See 17 U.S.C. §504(b); 15 U.S.C. §1117(a). Patent owners could too, until Congress withdrew that remedy in 1946. See *Gen. Motors Corp. v. Devex Corp.*, 461 U.S. 648, 654 (1983). The no-further-inquiry rule is another example. See *Restatement (First) of Restitution* §197 & cmt. c.

RESPA reflects those settled principles. Where an insurer obtains a homebuyer’s business by paying a kickback to her title agent, restitutionary remedies would allow the homebuyer to recover the kickback from the agent and her premium from the insurer, even if she otherwise got what she paid for. See *Restatement (First) of Restitution* §§138(2), 197 & cmt. c. The insurer and agent are unjustly enriched at the homebuyer’s expense, regardless of any economic harm, because they obtained money in violation of a duty owed to her. Nothing in Article III forecloses those well-accepted remedies.

### 3. *Payment of Money*

Finally, RESPA provides a right only to consumers who *paid money* in a transaction—“persons *charged* for the settlement service involved.” 12 U.S.C. §2607(d)(2) (emphasis added). Ms. Edwards, for example, paid \$455.43 for services as a result of First American’s kick-back scheme. Pet. App. 53a-54a (Compl. ¶¶24-25). A consumer has a concrete and individualized stake in recovering payments that she herself made in an unlawfully procured transaction.

“[T]he expenditure of funds” is “the most mundane of injuries in fact.” *Amnesty Int’l USA v. Clapper*, 638 F.3d 118, 133 (2d Cir. 2011). Courts often allow consumers to sue for refunds of money paid for unauthorized services, even if the services are otherwise unaffected. If a lay bankruptcy petition preparer gives unauthorized legal advice, the debtor can sue for (among other things) “twice the amount paid \* \* \* for the preparer’s services.” 11 U.S.C. §110(e)(2), (i)(1)(B). Courts uniformly allow recovery even absent any other harm. See, e.g., *Wynns v. Adams*, 426 B.R. 457, 465-466 (E.D.N.Y. 2010), aff’d, No. 10-2138, 2011 WL 2519550 (2d Cir. Jun. 27, 2011); cf. 15 U.S.C. §1640(a)(2)(A) (authorizing suit for refund of “twice the amount of any finance charge”); 2 Comyn, *supra*, at 3, 109 (action for “money had and received”).

Under New Mexico law, “an unlicensed contractor may not retain payments made pursuant to a contract,” “no matter how expertly [the work is] performed.” *Mascarenas v. Jaramillo*, 806 P.2d 59, 62-63 (N.M. 1991). California authorizes “a person who utilizes the services of an unlicensed contractor [to] bring an action \* \* \* to

recover all compensation paid.” Cal. Bus. & Prof. Code § 7031(b). Several other States take the same approach.<sup>15</sup>

Those remedies derive from the principle that “[u]nlicensed persons who contract to provide services for which a license is required for the purpose of regulation and protection may not recover,” even if “the contract has been complied with in all respects.” 53 C.J.S. *Licenses* § 117, at 589 (2005); cf. *Weil v. Neary*, 278 U.S. 160, 173-174 (1929). Because unlicensed contractors have no right to payment, a customer who *has* paid suffers injury: He has paid money unnecessarily for something for which no payment was due. Ms. Edwards suffered that injury here. Having provided services in violation of prohibitions enacted for her protection, First American was not entitled to payment. Ms. Edwards was injured by paying \$455.43 when she owed nothing.

#### **D. The Court Should Not Rewrite Article III To Address Purported Class Action Abuses**

Petitioners and their *amici* repeatedly stress that this is a class action. See, *e.g.*, Pet. Br. 42-44; Facebook Br. 14-17. But that is irrelevant. “That a suit may be a class action \* \* \* adds nothing to the question of standing \* \* \*.” *Simon v. E. Ky. Welfare Rights Org.*, 426

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<sup>15</sup> See, *e.g.*, N.Y. Real Prop. Law § 442-e(3); Utah Code § 61-2f-405(4); *Marzullo v. Molineaux*, 651 A.2d 808, 809-811 (D.C. 1994); *Rubin v. Douglas*, 59 A.2d 690, 691 (D.C. 1948); *Cooper v. Paris*, 413 So. 2d 772, 773-774 (Fla. Dist. Ct. App. 1982); *Kowalski v. Cedars of Portsmouth Condo. Ass’n*, 769 A.2d 344, 347-348 (N.H. 2001); *Rodolitz Org. v. Secondary Mortg. Res., Inc.*, 572 N.Y.S.2d 729, 730 (App. Div. 1991); cf. *Hittson v. Browne*, 3 Colo. 304, 309 (1877). Most States allow suits to recover amounts already paid only when provided for by statute, regulation, or public policy considerations. See *Remsen Partners, Ltd. v. Stephen A. Goldberg Co.*, 755 A.2d 412, 415-421 (D.C. 2000). But the fact that the law may not provide redress does not mean such payments are not injuries.

U.S. 26, 40 n.20 (1976). Nor does it subtract anything. If Ms. Edwards has standing to bring an individual claim, she cannot be denied standing merely because she *also* seeks to represent similarly situated consumers. Petitioners speculate about her motives for not alleging an overcharge. Pet. Br. 42-43. But the rule they seek would apply equally to individual claimants—including those who cannot prove an overcharge simply because they cannot afford an economist to litigate a \$500 lawsuit.

One great irony of this case is that, while petitioners and their *amici* purport to be vindicating separation-of-powers principles, they devote inordinate energy to policy arguments about class action “reform” properly directed to the political branches. Petitioners complain that statutory-damages class actions “take advantage of the *in terrorem* effect to pursue a settlement,” Pet. Br. 43, but that same argument is made about *all* class actions, see, e.g., G. Priest, *Procedural Versus Substantive Controls of Mass Tort Class Actions*, 26 J. Legal Stud. 521, 522 (1997). The contrary arguments are no less compelling. Consumers like Ms. Edwards could rarely recover *anything* individually because the costs of litigation far exceed the amount at stake (even accounting for an uncertain fee award). See *Eisen v. Carlisle & Jacqueline*, 417 U.S. 156, 161 (1974). Whatever the merits of such arguments, *ad hoc* policy concerns should not distort constitutional principles that apply to all cases.

First American’s real complaint is not about class action *procedure*, but about the prospect of having to pay the statutorily prescribed amount of damages to all the consumers whose rights it violated. If damages should be limited in class actions, that must be done by Congress, not this Court. See 28 U.S.C. §2072(b). Other provisions of RESPA adjust the amount of damages for



class actions. See 12 U.S.C. §2605(f). Congress simply chose not to write the kickback provision that way.

RESPA is not a private attorney general statute that infringes on the Executive's prerogatives. It simply allows private parties to particular transactions to demand a treble refund when their counterparty violates their *own* statutory rights. Ms. Edwards is not asking this Court to invade the authority of the political branches by superintending public enforcement of the law. She is asking the Court to *uphold* Congress's authority to establish legal rights for her protection. Because doing so respects the traditional role of the political branches without improperly expanding the judiciary's, petitioners' arguments should be rejected.

#### CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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## APPENDIX A

The Real Estate Settlement Procedures Act of 1974, as amended, 12 U.S.C. §§ 2601-2617, provides as follows:

### Chapter 27—Real Estate Settlement Procedures

#### § 2601. Congressional findings and purpose

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

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

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

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

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

(1a)

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

## § 2602. Definitions

For purposes of this chapter—

(1) the term “federally related mortgage loan” includes any loan (other than temporary financing such as a construction loan) which—

(A) is secured by a first or subordinate lien on residential real property (including individual units of condominiums and cooperatives) designed principally for the occupancy of from one to four families, including any such secured loan, the proceeds of which are used to prepay or pay off an existing loan secured by the same property; and

(B)(i) is made in whole or in part by any lender the deposits or accounts of which are insured by any agency of the Federal Government, or is made in whole or in part by any lender which is regulated by any agency of the Federal Government, or

(ii) is made in whole or in part, or insured, guaranteed, supplemented, or assisted in any way, by the Secretary or any other officer or agency of the Federal Government or under or in connection with a housing or urban development program administered by the Secretary or a housing or related program administered by any other such officer or agency; or

(iii) is intended to be sold by the originating lender to the Federal National Mortgage Association, the Government National Mortgage Association, the Federal Home Loan Mortgage Corporation, or a financial institution from which it is to be

purchased by the Federal Home Loan Mortgage Corporation; or

(iv) is made in whole or in part by any “creditor”, as defined in section 1602(f) of title 15, who makes or invests in residential real estate loans aggregating more than \$1,000,000 per year, except that for the purpose of this chapter, the term “creditor” does not include any agency or instrumentality of any State;

(2) the term “thing of value” includes any payment, advance, funds, loan, service, or other consideration;

(3) the term “Settlement services” includes any service provided in connection with a real estate settlement including, but not limited to, the following: title searches, title examinations, the provision of title certificates, title insurance, services rendered by an attorney, the preparation of documents, property surveys, the rendering of credit reports or appraisals, pest and fungus inspections, services rendered by a real estate agent or broker, the origination of a federally related mortgage loan (including, but not limited to, the taking of loan applications, loan processing, and the underwriting and funding of loans), and the handling of the processing, and closing or settlement;

(4) the term “title company” means any institution which is qualified to issue title insurance, directly or through its agents, and also refers to any duly authorized agent of a title company;

(5) the term “person” includes individuals, corporations, associations, partnerships, and trusts;

(6) the term “Secretary” means the Secretary of Housing and Urban Development;

(7) the term “affiliated business arrangement” means an arrangement in which (A) a person who is in a position to refer business incident to or a part of a real estate settlement service involving a federally related mortgage loan, or an associate of such person, has either an affiliate relationship with or a direct or beneficial ownership interest of more than 1 percent in a provider of settlement services; and (B) either of such persons directly or indirectly refers such business to that provider or affirmatively influences the selection of that provider; and

(8) the term “associate” means one who has one or more of the following relationships with a person in a position to refer settlement business: (A) a spouse, parent, or child of such person; (B) a corporation or business entity that controls, is controlled by, or is under common control with such person; (C) an employer, officer, director, partner, franchisor, or franchisee of such person; or (D) 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 business to benefit financially from the referrals of such business.

#### **§ 2603. Uniform settlement statement**

(a) The Secretary, in consultation with the Administrator of Veteran’s Affairs, the Federal Deposit Insurance Corporation, and the Director of the Office of Thrift Supervision, shall develop and prescribe a standard form for the statement of settlement costs which shall be used (with such variations as may be necessary to reflect differences in legal and administrative requirements or practices in different areas of the country) as the standard real estate settlement form in all transactions in the United States which involve federally related mortgage

loans. Such form shall conspicuously and clearly itemize all charges imposed upon the borrower and all charges imposed upon the seller in connection with the settlement and shall indicate whether any title insurance premium included in such charges covers or insures the lender's interest in the property, the borrower's interest, or both. The Secretary may, by regulation, permit the deletion from the form prescribed under this section of items which are not, under local laws or customs, applicable in any locality, except that such regulation shall require that the numerical code prescribed by the Secretary be retained in forms to be used in all localities. Nothing in this section may be construed to require that that part of the standard form which relates to the borrower's transaction be furnished to the seller, or to require that that part of the standard form which relates to the seller be furnished to the borrower.

(b) The form prescribed under this section shall be completed and made available for inspection by the borrower at or before settlement by the person conducting the settlement, except that (1) the Secretary may exempt from the requirements of this section settlements occurring in localities where the final settlement statement is not customarily provided at or before the date of settlement, or settlements where such requirements are impractical and (2) the borrower may, in accordance with regulations of the Secretary, waive his right to have the form made available at such time. Upon the request of the borrower to inspect the form prescribed under this section during the business day immediately preceding the day of settlement, the person who will conduct the settlement shall permit the borrower to inspect those items which are known to such person during such preceding day.



**§ 2604. Special information booklets****(a) Distribution by Secretary to lenders to help borrowers**

The Secretary shall prepare and distribute booklets to help persons borrowing money to finance the purchase of residential real estate better to understand the nature and costs of real estate settlement services. The Secretary shall distribute such booklets to all lenders which make federally related mortgage loans.

**(b) Form and detail; cost elements, standard settlement form, escrow accounts, selection of persons for settlement services; consideration of differences in settlement procedures**

Each booklet shall be in such form and detail as the Secretary shall prescribe and, in addition to such other information as the Secretary may provide, shall include in clear and concise language—

(1) a description and explanation of the nature and purpose of each cost incident to a real estate settlement;

(2) an explanation and sample of the standard real estate settlement form developed and prescribed under section 2603 of this title;

(3) a description and explanation of the nature and purpose of escrow accounts when used in connection with loans secured by residential real estate;

(4) an explanation of the choices available to buyers of residential real estate in selecting persons to provide necessary services incident to a real estate settlement; and

(5) an explanation of the unfair practices and unreasonable or unnecessary charges to be avoided by

the prospective buyer with respect to a real estate settlement.

Such booklets shall take into consideration differences in real estate settlement procedures which may exist among the several States and territories of the United States and among separate political subdivisions within the same State and territory.

**(c) Estimate of charges**

Each lender shall include with the booklet a good faith estimate of the amount or range of charges for specific settlement services the borrower is likely to incur in connection with the settlement as prescribed by the Secretary.

**(d) Distribution by lenders to loan applicants at time of receipt or preparation of applications**

Each lender referred to in subsection (a) of this section shall provide the booklet described in such subsection to each person from whom it receives or for whom it prepares a written application to borrow money to finance the purchase of residential real estate. Such booklet shall be provided by delivering it or placing it in the mail not later than 3 business days after the lender receives the application, but no booklet need be provided if the lender denies the application for credit before the end of the 3-day period.

**(e) Printing and distribution by lenders of booklets approved by Secretary**

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

**§ 2605. Servicing of mortgage loans and administration of escrow accounts**

**(a) Disclosure to applicant relating to assignment, sale, or transfer of loan servicing**

Each person who makes a federally related mortgage loan shall disclose to each person who applies for the loan, at the time of application for the loan, whether the servicing of the loan may be assigned, sold, or transferred to any other person at any time while the loan is outstanding.

**(b) Notice by transferor of loan servicing at time of transfer**

**(1) Notice requirement**

Each servicer of any federally related mortgage loan shall notify the borrower in writing of any assignment, sale, or transfer of the servicing of the loan to any other person.

**(2) Time of notice**

**(A) In general**

Except as provided under subparagraphs (B) and (C), the notice required under paragraph (1) shall be made to the borrower not less than 15 days before the effective date of transfer of the servicing of the mortgage loan (with respect to which such notice is made).

**(B) Exception for certain proceedings**

The notice required under paragraph (1) shall be made to the borrower not more than 30 days after the effective date of assignment, sale, or transfer of the servicing of the mortgage loan (with respect to which such notice is made) in any case in which the

assignment, sale, or transfer of the servicing of the mortgage loan is preceded by—

(i) termination of the contract for servicing the loan for cause;

(ii) commencement of proceedings for bankruptcy of the servicer; or

(iii) commencement of proceedings by the Federal Deposit Insurance Corporation or the Resolution Trust Corporation for conservatorship or receivership of the servicer (or an entity by which the servicer is owned or controlled).

**(C) Exception for notice provided at closing**

The provisions of subparagraphs (A) and (B) shall not apply to any assignment, sale, or transfer of the servicing of any mortgage loan if the person who makes the loan provides to the borrower, at settlement (with respect to the property for which the mortgage loan is made), written notice under paragraph (3) of such transfer.

**(3) Contents of notice**

The notice required under paragraph (1) shall include the following information:

(A) The effective date of transfer of the servicing described in such paragraph.

(B) The name, address, and toll-free or collect call telephone number of the transferee servicer.

(C) A toll-free or collect call telephone number for (i) an individual employed by the transferor servicer, or (ii) the department of the transferor servicer, that can be contacted by the borrower to answer inquiries relating to the transfer of servicing.

10a

(D) The name and toll-free or collect call telephone number for (i) an individual employed by the transferee servicer, or (ii) the department of the transferee servicer, that can be contacted by the borrower to answer inquiries relating to the transfer of servicing.

(E) The date on which the transferor servicer who is servicing the mortgage loan before the assignment, sale, or transfer will cease to accept payments relating to the loan and the date on which the transferee servicer will begin to accept such payments.

(F) Any information concerning the effect the transfer may have, if any, on the terms of or the continued availability of mortgage life or disability insurance or any other type of optional insurance and what action, if any, the borrower must take to maintain coverage.

(G) A statement that the assignment, sale, or transfer of the servicing of the mortgage loan does not affect any term or condition of the security instruments other than terms directly related to the servicing of such loan.

**(c) Notice by transferee of loan servicing at time of transfer**

**(1) Notice requirement**

Each transferee servicer to whom the servicing of any federally related mortgage loan is assigned, sold, or transferred shall notify the borrower of any such assignment, sale, or transfer.

**(2) Time of notice****(A) In general**

Except as provided in subparagraphs (B) and (C), the notice required under paragraph (1) shall be made to the borrower not more than 15 days after the effective date of transfer of the servicing of the mortgage loan (with respect to which such notice is made).

**(B) Exception for certain proceedings**

The notice required under paragraph (1) shall be made to the borrower not more than 30 days after the effective date of assignment, sale, or transfer of the servicing of the mortgage loan (with respect to which such notice is made) in any case in which the assignment, sale, or transfer of the servicing of the mortgage loan is preceded by—

(i) termination of the contract for servicing the loan for cause;

(ii) commencement of proceedings for bankruptcy of the servicer; or

(iii) commencement of proceedings by the Federal Deposit Insurance Corporation or the Resolution Trust Corporation for conservatorship or receivership of the servicer (or an entity by which the servicer is owned or controlled).

**(C) Exception for notice provided at closing**

The provisions of subparagraphs (A) and (B) shall not apply to any assignment, sale, or transfer of the servicing of any mortgage loan if the person who makes the loan provides to the borrower, at settlement (with respect to the property for which

the mortgage loan is made), written notice under paragraph (3) of such transfer.

**(3) Contents of notice**

Any notice required under paragraph (1) shall include the information described in subsection (b)(3) of this section.

**(d) Treatment of loan payments during transfer period**

During the 60-day period beginning on the effective date of transfer of the servicing of any federally related mortgage loan, a late fee may not be imposed on the borrower with respect to any payment on such loan and no such payment may be treated as late for any other purposes, if the payment is received by the transferor servicer (rather than the transferee servicer who should properly receive payment) before the due date applicable to such payment.

**(e) Duty of loan servicer to respond to borrower inquiries**

**(1) Notice of receipt of inquiry**

**(A) In general**

If any servicer of a federally related mortgage loan receives a qualified written request from the borrower (or an agent of the borrower) for information relating to the servicing of such loan, the servicer shall provide a written response acknowledging receipt of the correspondence within 20 days (excluding legal public holidays, Saturdays, and Sundays) unless the action requested is taken within such period.

**(B) Qualified written request**

For purposes of this subsection, a qualified written request shall be a written correspondence, other than notice on a payment coupon or other payment medium supplied by the servicer, that—

(i) includes, or otherwise enables the servicer to identify, the name and account of the borrower; and

(ii) includes a statement of the reasons for the belief of the borrower, to the extent applicable, that the account is in error or provides sufficient detail to the servicer regarding other information sought by the borrower.

**(2) Action with respect to inquiry**

Not later than 60 days (excluding legal public holidays, Saturdays, and Sundays) after the receipt from any borrower of any qualified written request under paragraph (1) and, if applicable, before taking any action with respect to the inquiry of the borrower, the servicer shall—

(A) make appropriate corrections in the account of the borrower, including the crediting of any late charges or penalties, and transmit to the borrower a written notification of such correction (which shall include the name and telephone number of a representative of the servicer who can provide assistance to the borrower);

(B) after conducting an investigation, provide the borrower with a written explanation or clarification that includes—

(i) to the extent applicable, a statement of the reasons for which the servicer believes the ac-



count of the borrower is correct as determined by the servicer; and

(ii) the name and telephone number of an individual employed by, or the office or department of, the servicer who can provide assistance to the borrower; or

(C) after conducting an investigation, provide the borrower with a written explanation or clarification that includes—

(i) information requested by the borrower or an explanation of why the information requested is unavailable or cannot be obtained by the servicer; and

(ii) the name and telephone number of an individual employed by, or the office or department of, the servicer who can provide assistance to the borrower.

**(3) Protection of credit rating**

During the 60-day period beginning on the date of the servicer's receipt from any borrower of a qualified written request relating to a dispute regarding the borrower's payments, a servicer may not provide information regarding any overdue payment, owed by such borrower and relating to such period or qualified written request, to any consumer reporting agency (as such term is defined under section 1681a of title 15).

**(f) Damages and costs**

Whoever fails to comply with any provision of this section shall be liable to the borrower for each such failure in the following amounts:

**(1) Individuals**

In the case of any action by an individual, an amount equal to the sum of—

(A) any actual damages to the borrower as a result of the failure; and

(B) any additional damages, as the court may allow, in the case of a pattern or practice of noncompliance with the requirements of this section, in an amount not to exceed \$1,000.

**(2) Class actions**

In the case of a class action, an amount equal to the sum of—

(A) any actual damages to each of the borrowers in the class as a result of the failure; and

(B) any additional damages, as the court may allow, in the case of a pattern or practice of noncompliance with the requirements of this section, in an amount not greater than \$1,000 for each member of the class, except that the total amount of damages under this subparagraph in any class action may not exceed the lesser of—

(i) \$500,000; or

(ii) 1 percent of the net worth of the servicer.

**(3) Costs**

In addition to the amounts under paragraph (1) or (2), in the case of any successful action under this section, the costs of the action, together with any attorneys fees incurred in connection with such action as the court may determine to be reasonable under the circumstances.

**(4) Nonliability**

A transferor or transferee servicer shall not be liable under this subsection for any failure to comply with any requirement under this section if, within 60 days after discovering an error (whether pursuant to a final written examination report or the servicer's own procedures) and before the commencement of an action under this subsection and the receipt of written notice of the error from the borrower, the servicer notifies the person concerned of the error and makes whatever adjustments are necessary in the appropriate account to ensure that the person will not be required to pay an amount in excess of any amount that the person otherwise would have paid.

**(g) Administration of escrow accounts**

If the terms of any federally related mortgage loan require the borrower to make payments to the servicer of the loan for deposit into an escrow account for the purpose of assuring payment of taxes, insurance premiums, and other charges with respect to the property, the servicer shall make payments from the escrow account for such taxes, insurance premiums, and other charges in a timely manner as such payments become due.

**(h) Preemption of conflicting State laws**

Notwithstanding any provision of any law or regulation of any State, a person who makes a federally related mortgage loan or a servicer shall be considered to have complied with the provisions of any such State law or regulation requiring notice to a borrower at the time of application for a loan or transfer of the servicing of a loan if such person or servicer complies with the requirements under this section regarding timing, content, and procedures for notification of the borrower.

**(i) Definitions**

For purposes of this section:

**(1) Effective date of transfer**

The term “effective date of transfer” means the date on which the mortgage payment of a borrower is first due to the transferee servicer of a mortgage loan pursuant to the assignment, sale, or transfer of the servicing of the mortgage loan.

**(2) Servicer**

The term “servicer” means the person responsible for servicing of a loan (including the person who makes or holds a loan if such person also services the loan). The term does not include—

(A) the Federal Deposit Insurance Corporation or the Resolution Trust Corporation, in connection with assets acquired, assigned, sold, or transferred pursuant to section 1823(c) of this title or as receiver or conservator of an insured depository institution; and

(B) the Government National Mortgage Association, the Federal National Mortgage Association, the Federal Home Loan Mortgage Corporation, the Resolution Trust Corporation, or the Federal Deposit Insurance Corporation, in any case in which the assignment, sale, or transfer of the servicing of the mortgage loan is preceded by—

(i) termination of the contract for servicing the loan for cause;

(ii) commencement of proceedings for bankruptcy of the servicer; or

(iii) commencement of proceedings by the Federal Deposit Insurance Corporation or the

Resolution Trust Corporation for conservatorship or receivership of the servicer (or an entity by which the servicer is owned or controlled).

**(3) Servicing**

The term “servicing” means receiving any scheduled periodic payments from a borrower pursuant to the terms of any loan, including amounts for escrow accounts described in section 2609 of this title, and making the payments of principal and interest and such other payments with respect to the amounts received from the borrower as may be required pursuant to the terms of the loan.

**(j) Transition**

**(1) Originator liability**

A person who makes a federally related mortgage loan shall not be liable to a borrower because of a failure of such person to comply with subsection (a) of this section with respect to an application for a loan made by the borrower before the regulations referred to in paragraph (3) take effect.

**(2) Servicer liability**

A servicer of a federally related mortgage loan shall not be liable to a borrower because of a failure of the servicer to perform any duty under subsection (b), (c), (d), or (e) of this section that arises before the regulations referred to in paragraph (3) take effect.

**(3) Regulations and effective date**

The Secretary shall, by regulations that shall take effect not later than April 20, 1991, establish any requirements necessary to carry out this section. Such regulations shall include the model disclosure statement required under subsection (a)(2) of this section.

**§ 2606. Exempted transactions****(a) In general**

This chapter does not apply to credit transactions involving extensions of credit—

- (1) primarily for business, commercial, or agricultural purposes; or
- (2) to government or governmental agencies or instrumentalities.

**(b) Interpretation**

In prescribing regulations under section 2617(a) of this title, the Secretary shall ensure that, with respect to subsection (a) of this section, the exemption for credit transactions involving extensions of credit primarily for business, commercial, or agricultural purposes, as provided in subsection (a)(1) of this section shall be the same as the exemption for such credit transactions under section 1603(1) of title 15.

**§ 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, within 3 business days after the referral by telephone,<sup>1</sup> (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 tele-

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<sup>1</sup> So in original.

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phone 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.

**§ 2608. Title companies; liability of seller**

(a) No seller of property that will be purchased with the assistance of a federally related mortgage loan shall require directly or indirectly, as a condition to selling the property, that title insurance covering the property be purchased by the buyer from any particular title company.

(b) Any seller who violates the provisions of subsection (a) of this section shall be liable to the buyer in an amount equal to three times all charges made for such title insurance.

**§ 2609. Limitation on requirement of advance deposits in escrow accounts**

**(a) In general**

A lender, in connection with a federally related mortgage loan, may not require the borrower or prospective borrower—

(1) to deposit in any escrow account which may be established in connection with such loan for the purpose of assuring payment of taxes, insurance premiums, or other charges with respect to the property, in connection with the settlement, an aggregate sum (for such purpose) in excess of a sum that will be sufficient to pay such taxes, insurance premiums and other charges attributable to the period beginning on the last date on which each such charge would have been paid under the normal lending practice of the lender and local custom, provided that the selection of each such date constitutes prudent lending practice, and

ending on the due date of its first full installment payment under the mortgage, plus one-sixth of the estimated total amount of such taxes, insurance premiums and other charges to be paid on dates, as provided above, during the ensuing twelve-month period; or

(2) to deposit in any such escrow account in any month beginning with the first full installment payment under the mortgage a sum (for the purpose of assuring payment of taxes, insurance premiums and other charges with respect to the property) in excess of the sum of (A) one-twelfth of the total amount of the estimated taxes, insurance premiums and other charges which are reasonably anticipated to be paid on dates during the ensuing twelve months which dates are in accordance with the normal lending practice of the lender and local custom, provided that the selection of each such date constitutes prudent lending practice, plus (B) such amount as is necessary to maintain an additional balance in such escrow account not to exceed one-sixth of the estimated total amount of such taxes, insurance premiums and other charges to be paid on dates, as provided above, during the ensuing twelve-month period: *Provided, however,* That in the event the lender determines there will be or is a deficiency he shall not be prohibited from requiring additional monthly deposits in such escrow account to avoid or eliminate such deficiency.

**(b) Notification of shortage in escrow account**

If the terms of any federally related mortgage loan require the borrower to make payments to the servicer (as the term is defined in section 2605(i) of this title) of the loan for deposit into an escrow account for the purpose of assuring payment of taxes, insurance premiums, and other charges with respect to the property, the servicer

shall notify the borrower not less than annually of any shortage of funds in the escrow account.

**(c) Escrow account statements**

**(1) Initial statement**

**(A) In general**

Any servicer that has established an escrow account in connection with a federally related mortgage loan shall submit to the borrower for which the escrow account has been established a statement clearly itemizing the estimated taxes, insurance premiums, and other charges that are reasonably anticipated to be paid from the escrow account during the first 12 months after the establishment of the account and the anticipated dates of such payments.

**(B) Time of submission**

The statement required under subparagraph (A) shall be submitted to the borrower at closing with respect to the property for which the mortgage loan is made or not later than the expiration of the 45-day period beginning on the date of the establishment of the escrow account.

**(C) Initial statement at closing**

Any servicer may submit the statement required under subparagraph (A) to the borrower at closing and may incorporate such statement in the uniform settlement statement required under section 2603 of this title. The Secretary shall issue regulations prescribing any changes necessary to the uniform settlement statement under section 2603 of this title that specify how the statement required under subparagraph (A) of this section shall be incorporated in the uniform settlement statement.

**(2) Annual statement****(A) In general**

Any servicer that has established or continued an escrow account in connection with a federally related mortgage loan shall submit to the borrower for which the escrow account has been established or continued a statement clearly itemizing, for each period described in subparagraph (B) (during which the servicer services the escrow account), the amount of the borrower's current monthly payment, the portion of the monthly payment being placed in the escrow account, the total amount paid into the escrow account during the period, the total amount paid out of the escrow account during the period for taxes, insurance premiums, and other charges (as separately identified), and the balance in the escrow account at the conclusion of the period.

**(B) Time of submission**

The statement required under subparagraph (A) shall be submitted to the borrower not less than once for each 12-month period, the first such period beginning on the first January 1st that occurs after November 28, 1990, and shall be submitted not more than 30 days after the conclusion of each such 1-year period.

**(d) Penalties****(1) In general**

In the case of each failure to submit a statement to a borrower as required under subsection (c) of this section, the Secretary shall assess to the lender or escrow servicer failing to submit the statement a civil penalty of \$50 for each such failure, but the total amount imposed on such lender or escrow servicer for

all such failures during any 12-month period referred to in subsection (b)<sup>1</sup> of this section may not exceed \$100,000.

**(2) Intentional violations**

If any failure to which paragraph (1) applies is due to intentional disregard of the requirement to submit the statement, then, with respect to such failure—

(A) the penalty imposed under paragraph (1) shall be \$100; and

(B) in the case of any penalty determined under subparagraph (A), the \$100,000 limitation under paragraph (1) shall not apply.

**§ 2610. Prohibition of fees for preparation of truth-in-lending, uniform settlement, and escrow account statements**

No fee shall be imposed or charge made upon any other person (as a part of settlement costs or otherwise) by a lender in connection with a federally related mortgage loan made by it (or a loan for the purchase of a mobile home), or by a servicer (as the term is defined under section 2605(i) of this title), for or on account of the preparation and submission by such lender or servicer of the statement or statements required (in connection with such loan) by sections 2603 and 2609(c) of this title or by the Truth in Lending Act [15 U.S.C.A. 1601 et seq.].

**§§ 2611 to 2613. Repealed. Pub. L. 104-208, div. A, title II, § 2103(b), Sept. 30, 1996, 110 Stat. 3009-401**

**§ 2614. Jurisdiction of courts; limitations**

Any action pursuant to the provisions of section 2605, 2607, or 2608 of this title may be brought in the United

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<sup>1</sup> So in original. Probably should be subsection “(c)”.

States district court or in any other court of competent jurisdiction, for the district in which the property involved is located, or where the violation is alleged to have occurred, within 3 years in the case of a violation of section 2605 of this title and 1 year in the case of a violation of section 2607 or 2608 of this title from the date of the occurrence of the violation, except that actions brought by the Secretary, the Attorney General of any State, or the insurance commissioner of any State may be brought within 3 years from the date of the occurrence of the violation.

**§ 2615. Contracts and liens; validity**

Nothing in this chapter shall affect the validity or enforceability of any sale or contract for the sale of real property or any loan, loan agreement, mortgage, or lien made or arising in connection with a federally related mortgage loan.

**§ 2616. State laws unaffected; inconsistent Federal and State provisions**

This chapter does not annul, alter, or affect, or exempt any person subject to the provisions of this chapter from complying with, the laws of any State with respect to settlement practices, except to the extent that those laws are inconsistent with any provision of this chapter, and then only to the extent of the inconsistency. The Secretary is authorized to determine whether such inconsistencies exist. The Secretary may not determine that any State law is inconsistent with any provision of this chapter if the Secretary determines that such law gives greater protection to the consumer. In making these determinations the Secretary shall consult with the appropriate Federal agencies.

**§ 2617. Authority of Secretary****(a) Issuance of regulations; exemptions**

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

**(b) Liability for acts done in good faith in conformity with rule, regulation, or interpretation**

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

**(c) Investigations; hearings; failure to obey order; contempt**

(1) The Secretary may investigate any facts, conditions, practices, or matters that may be deemed necessary or proper to aid in the enforcement of the provisions of this chapter, in prescribing of rules and regulations thereunder, or in securing information to serve as a basis for recommending further legislation concerning real estate settlement practices. To aid in the investigations, the Secretary is authorized to hold such hearings, administer such oaths, and require by subpoena the attendance and testimony of such witnesses and production of such documents as the Secretary deems advisable.

(2) Any district court of the United States within the jurisdiction of which an inquiry is carried on may, in the case of contumacy or refusal to obey a subpoena of the Secretary issued under this section, issue an order re-



quiring compliance therewith; and any failure to obey such order of the court may be punished by such court as a contempt thereof.

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

**(1) In general**

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

(A) eliminate the exemption for payments by an employer to employees of such employer for referral activities which is currently codified as section 3500.14(g)(1)(vii) of such title 24; and

(B) replace such exemption with a more limited exemption in new clauses (vii), (viii), and (ix) of section 3500.14 of such title 24,

shall not take effect before July 31, 1997.

**(2) Continuation of prior rule**

The regulation codified as section 3500.14(g)(1)(vii) of title 24 of the Code of Federal Regulations, relating to employer-employee payments, as in effect on May 1, 1996, shall remain in effect until the date the amendment referred to in paragraph (1) takes effect in accordance with such paragraph.

**(3) Public notice of effective date**

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

**APPENDIX B**

Section 8 of the Real Estate Settlement Procedures Act of 1974, as enacted, Pub. L. No. 93-533, 88 Stat. 1724, 1727, provided as follows:

**PROHIBITION AGAINST KICKBACKS  
AND UNEARNED FEES**

SEC. 8. (a) No person shall give and no person shall accept any fee, kickback, or thing of value pursuant to any agreement or understanding, oral or otherwise, that business incident to or a part of a real estate settlement service involving a federally related mortgage loan shall be referred to any person.

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

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

(d)(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) In addition to the penalties provided by paragraph (1) of this subsection, any person or persons who violate

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the provisions of subsection (a) shall be jointly and severally liable to the person or persons whose business has been referred in an amount equal to three times the value or amount of the fee or thing of value, and any person or persons who violate the provisions of subsection (b) shall be jointly and severally liable to the person or persons charged for the settlement services involved in an amount equal to three times the amount of the portion, split, or percentage. In any successful action to enforce the liability under this paragraph, the court may award the court costs of the action together with a reasonable attorney's fee as determined by the court.

**APPENDIX C**

Title 39, Chapter 3935 of the Ohio Revised Code provides in relevant part as follows:

**Chapter 3935: RATING BUREAUS****3935.01 Effect of sections; liberal interpretation**

Sections 3935.01 to 3935.17, inclusive, of the Revised Code do not prohibit or discourage reasonable competition, or prohibit or encourage uniformity in insurance rates, rating systems, rating plans, or practices. Such sections shall be liberally interpreted to carry this section into effect.

**3935.02 Application of sections; exceptions**

Sections 3935.01 to 3935.17, inclusive, of the Revised Code apply to all kinds of insurance on risks located in this state which stock, mutual, reciprocal fire and marine insurers, and title insurance companies, as defined in division (C) of section 3953.01 of the Revised Code, except mutual protective associations organized under section 3939.01 of the Revised Code, may write.

Sections 3935.01 to 3935.17, inclusive, of the Revised Code do not apply:

- (A) To reinsurance, other than joint reinsurance to the extent stated in section 3935.13 of the Revised Code;
- (B) To insurance of vessels or craft, their cargoes, marine builders' risks, marine protection and indemnity, or other risks commonly insured under marine, as distinguished from inland marine, insurance policies;
- (C) To insurance of hulls of aircraft, including their accessories and equipment, or against liability arising out of the ownership, maintenance, or use of aircraft;

(D) To motor vehicles insurance, or to insurance against liability arising out of the ownership, maintenance, or use of motor vehicles;

(E) To casualty insurance, including fidelity, surety, and guaranty bonds whether or not fire insurance companies may write such kinds of insurance.

If any kind of insurance, subdivision or combination thereof, or type of coverage, subject to sections 3935.01 to 3935.17, inclusive, of the Revised Code, is also subject to regulation by other rate-regulatory sections of the Revised Code, an insurer to which both laws are otherwise applicable shall file with the superintendent of insurance a designation as to which of said rate-regulatory sections are applicable to it with respect to such kind of insurance, subdivision or combination thereof, or type of coverage.

### **3935.03 Rating regulations**

Rates shall be made as follows:

(A) Manual, minimum class rates, rating schedules, or rating plans shall be made and adopted, except in the case of specific inland marine rates on risks specially rated.

(B) Rates shall not be excessive, inadequate, or unfairly discriminatory.

(C) Consideration shall be given to:

(1) Past and prospective loss experience within and outside this state;

(2) Conflagration and catastrophe hazards;

(3) A reasonable margin for underwriting profit and contingencies;

(4) Dividends, savings, or unabsorbed premium deposits allowed or returned by insurers to their policyholders, members, or subscribers;

(5) Past and prospective expenses both country-wide and those specially applicable to this state;

(6) All other relevant factors within and outside this state;

(7) In the case of fire insurance rates, the experience of the fire insurance business during a period of not less than the most recent five year period for which such experience is available.

Except to the extent necessary to comply with division (B) of this section, uniformity among insurers in any matters within the scope of this section is neither required nor prohibited.

Rates made in accordance with this section may be used subject to sections 3935.01 to 3935.17, inclusive, of the Revised Code.

**3935.04 Filing of rates and schedules with superintendent; procedure**

As used in sections 3935.01 to 3935.17 of the Revised Code, “filing” or “filings” means the whole or any part thereof.

(A) Every insurer shall file with the superintendent of insurance, except as to inland marine risks which by general custom of the business are not written according to manual rates or rating plans, every form of a policy, endorsement, rider, manual, minimum class rate, rating schedule, or rating plan, and every other rating rule, and every modification of any of them, which it proposes to use. Every such filing shall state the proposed effective date thereof, and shall indicate the character and extent of the coverage contemplated. When a filing is not accompanied by the information upon which the insurer supports the filing, and the superintendent does not have sufficient information to determine whether the filing

meets the requirements of sections 3935.01 to 3935.17 of the Revised Code, he shall require the insurer to furnish the information upon which it supports the filing, and in such event the waiting period shall commence as of the date the information is furnished. The information furnished in support of a filing may include the experience or judgment of the insurer or rating bureau making the filing, its interpretation of any statistical data it relies upon, the experience of other insurers or rating bureaus, or any other relevant factors. A filing and any supporting information shall be open to public inspection after the filing becomes effective. Specific inland marine rates on risks specially rated, made by a rating bureau, shall be filed with the superintendent.

(B) An insurer may satisfy its obligation to make such filings by becoming a member of, or a subscriber to, a licensed rating bureau which makes such filings, and by authorizing the superintendent to accept such filings on its behalf, but sections 3935.01 to 3935.17 of the Revised Code do not require any insurer to become a member of, or a subscriber to, any rating bureau.

(C) The superintendent shall review filings as soon as reasonably possible after they have been made in order to determine whether they meet the requirements of sections 3935.01 to 3935.17 of the Revised Code.

(D) Subject to the exception specified in division (E) of this section, each filing shall be on file for a waiting period of thirty days before it becomes effective. Upon written application by such insurer or rating bureau, the superintendent may authorize a filing which he has reviewed to become effective before the expiration of the waiting period. A filing complies with sections 3935.01 to 3935.17 of the Revised Code unless it is disapproved by the superintendent within the waiting period.

(E) Specific inland marine rates on risks specially rated by a rating bureau become effective when filed and comply with sections 3935.01 to 3935.17 of the Revised Code until the superintendent reviews the filing and so long thereafter as the filing remains in effect.

(F) Notwithstanding Chapter 119. of the Revised Code, the superintendent may, by written order, without notice or hearing, suspend or modify the requirements of a filing as to any kind of insurance, subdivision or combination thereof, or classes of risks, the rates for which cannot practicably be filed before they are used. Such orders shall be made known to insurers and rating bureaus affected thereby. The superintendent may make such examinations as he deems advisable to ascertain whether any rates affected by such order meet the standards set forth in division (B) of section 3935.03 of the Revised Code.

(G) Upon the written application of the insured, stating his reasons therefor, filed with and approved by the superintendent, a rate in excess of that provided by a filing otherwise applicable may be used on any specific risk.

(H) No insurer shall make or issue a contract or policy except in accordance with the filings which are in effect for the insurer as provided in sections 3935.01 to 3935.17 of the Revised Code or in accordance with division (F) or (G) of this section. This division does not apply to contracts or policies for inland marine risks as to which filings are not required.

#### **3935.05 Processing of filings**

(A) If within the waiting period as provided in division (D) of section 3935.04 of the Revised Code, the superintendent of insurance finds that a filing does not meet the requirements of section 3935.01 to 3935.17 of the Revised



Code, he shall send to the insurer or rating bureau that made the filing, written notice of disapproval of the filing, specifying therein in what respects he finds the filing fails to comply with those sections and stating that the filing shall not become effective.

(B) If within thirty days after a specific inland marine rate on a risk specially rated by a rating bureau, subject to division (E) of section 3935.04 of the Revised Code has become effective, the superintendent finds that the filing does not comply with sections 3935.01 to 3935.17 of the Revised Code, he shall send to the rating bureau that made the filing written notice of disapproval of the filing, specifying therein in what respects he finds that the filing fails to comply with those sections and stating when, within a reasonable period thereafter, the filing shall be no longer effective. The disapproval shall not affect any contract made or issued prior to the expiration of the period set forth in the notice.

(C) If at any time subsequent to the applicable review period provided for in divisions (A) or (B) of this section, the superintendent finds that a filing does not comply with sections 3935.01 to 3935.17 of the Revised Code, he shall, after a hearing held upon not less than ten days' written notice, as provided in division (F) of this section, to every insurer and rating bureau that made the filing, specifying the matters to be considered at the hearing, issue an order specifying in what respects he finds that the filing fails to comply with those sections, and stating when, within a reasonable period thereafter, the filing shall be no longer effective. Copies of the order shall be sent to such insurer or rating bureau. The order shall not affect any contract or policy made or issued prior to the expiration of the period set forth in the order.

(D) Any person or organization aggrieved with respect to any filing that is in effect may make written application to the superintendent for a hearing thereon, provided that the insurer or rating organization that made the filing may not proceed under this division. The application shall specify the grounds to be relied upon by the applicant. If the superintendent finds that the application is made in good faith, that the applicant would be so aggrieved if his grounds are established, and that such grounds otherwise justify holding such a hearing, he shall, within thirty days after receipt of the application, hold a hearing upon not less than ten days' written notice to the applicant and, as provided in division (F) of this section, to every insurer and rating bureau that made such filing.

If, after the hearing, the superintendent finds that the filing does not comply with sections 3935.01 to 3935.17 of the Revised Code, he shall issue an order specifying in what respects he finds that the filing fails to comply with those sections, and stating when, within a reasonable period thereafter, the filing shall be no longer effective. Copies of the order shall be sent to the applicant and to such insurer or rating bureau. The order shall not affect any contract or policy made or issued prior to the expiration of the period set forth in the order.

(E) No manual, minimum class rate, rating schedule, rating plan, rating rule, or any modification of any of the foregoing, which has been filed pursuant to section 3935.04 of the Revised Code shall be disapproved if the rates thereby produced comply with sections 3935.01 to 3935.17 of the Revised Code.

(F) Every rating bureau or organization receiving a notice of hearing or copy of an order under division (C) or (D) of this section shall promptly notify all of its members

or subscribers that would be affected by the hearing or order. Notice to a rating bureau or organization of a hearing or order shall be deemed notice to its members or subscribers.

**3935.06 Licenses for rating bureaus; discrimination prohibited; review by superintendent**

A corporation, an unincorporated association, a partnership, or an individual, whether located within or outside this state, may make application to the superintendent of insurance for license as a rating bureau for such kinds of insurance, or subdivision or class of risk or a part or combination thereof, as are specified in its application and shall file the following therewith:

- (A) A copy of its constitution, of its articles of agreement or association or its certificate of incorporation, and of its bylaws, rules, and regulations governing the conduct of its business;
- (B) A list of its members and subscribers;
- (C) The name and address of a resident of this state upon whom notices or orders of the superintendent, or process affecting such rating bureau, may be served;
- (D) A statement of its qualifications as a rating bureau.

If the superintendent finds that the applicant is competent, trustworthy, and otherwise qualified to act as a rating bureau and that its constitution, its articles of agreement or association or certificate of incorporation, and its bylaws, rules, and regulations governing the conduct of its business conform to the law, he shall issue a license specifying the kinds of insurance, or subdivision or class of risk or part or combination thereof, for which the applicant is authorized to act as a rating bureau. Every such application shall be granted or denied in whole or in

part by the superintendent within sixty days of the date of its filing with him. Licenses issued pursuant to this section shall remain in effect for three years unless sooner suspended or revoked by the superintendent. The fee for said license shall be twenty-five dollars. Licenses issued pursuant to this section may be suspended or revoked by the superintendent, after hearing upon notice, in the event the rating bureau ceases to comply with this division. Every rating bureau shall notify the superintendent promptly of every change in any of the items described in divisions (A), (B), and (C) of this section.

Subject to rules and regulations which have been approved by the superintendent as reasonable, each rating bureau shall permit any insurer, not a member, to be a subscriber to its rating services for any kind of insurance, or subdivision or class of risk or a part or combination thereof, for which it is authorized to act as a rating bureau. Notice of proposed changes in such rules and regulations shall be given to subscribers. Each rating bureau shall furnish its rating services without discrimination to its members and subscribers. The reasonableness of any rule or regulation in its application to subscribers, or the refusal of any rating bureau to admit an insurer as a subscriber, shall at the request of any subscriber or any such insurer, be reviewed by the superintendent at a hearing held upon at least ten days' written notice to such rating bureau and to such subscriber or insurer. If the superintendent finds that such rule or regulation is unreasonable in its application to subscribers, he shall order that such rule or regulation is not applicable to subscribers. If the rating bureau fails to grant or reject an insurer's application for subscribership within thirty days after it was made, the insurer may request a review by the superintendent as if the application had been rejected. If the su-

perintendent finds that the insurer has been refused admittance to the rating bureau as a subscriber without justification, he shall order the rating bureau to admit the insurer as a subscriber. If he finds that the action of the rating bureau was justified, he shall make an order affirming its action.

No rating bureau shall adopt any rule which would prohibit or regulate the payment of dividends, savings, or unabsorbed premium deposits allowed or returned by insurers to their policyholders, members, or subscribers.

Co-operation among rating bureaus, or among rating bureaus and insurers, in rate making or in other matters covered by sections 3935.01 to 3935.17, inclusive, of the Revised Code, is authorized, provided the filings resulting from such co-operation are subject to all such sections which are applicable to filings generally. The superintendent may review such co-operative activities and practices and if, after a hearing, he finds that any such activity or practice is unfair, unreasonable, or otherwise inconsistent with such sections, he may issue a written order specifying in what respects such activity or practice is unfair, unreasonable, or otherwise inconsistent, and requiring the discontinuance of such activity or practice.

Any rating bureau may provide for the examination of policies, daily reports, binders, renewal certificates, endorsements, or other evidences of insurance, or the cancellation thereof, and may make reasonable rules governing their submission. Such rules shall contain a provision that, in the event any insurer does not within sixty days furnish satisfactory evidence to the rating bureau of the correction of any error or omission previously called to its attention by such rating bureau, the rating bureau

shall notify the superintendent thereof. All information submitted for such examination shall be confidential.

Any rating bureau may subscribe for or purchase actuarial, technical, or other services, and such services shall be available to all members and subscribers without discrimination.

#### **3935.07 Deviation from rates filed by bureau**

Every member of, or subscriber to, a rating bureau shall adhere to the filings made on its behalf by the bureau, except that any insurer who is such a member or subscriber may make written application to the superintendent of insurance for permission to file a deviation from the class rates, schedules, rating plans, or rules respecting any kind of insurance or class of risk within a kind of insurance, or combination thereof. Such application shall specify the basis for the modification, and a copy of the application shall be sent simultaneously to the rating bureau. The superintendent shall set a time and place for a hearing at which the insurer and the rating bureau may be heard, and shall give them not less than ten days' written notice thereof. If the superintendent is advised by the rating bureau that it does not desire a hearing, he may, upon the consent of the applicant, waive the hearing. In considering the application for permission to file the deviation, the superintendent shall give consideration to the available statistics and the principles for rate making as provided in section 3935.03 of the Revised Code. The superintendent shall issue an order permitting the deviation for such insurer to be filed if he finds it is justified, and it shall thereupon become effective. He shall issue an order denying such application if he finds that the resulting premiums would be excessive, inadequate, or unfairly discriminatory. Each deviation permitted to be filed shall be effective until terminated

with the approval of the superintendent or as may otherwise be permitted or required by law.

**3935.08 Appeal to superintendent from action of rating bureau**

Any member of, or subscriber to, a rating bureau may appeal to the superintendent of insurance from the action of such rating bureau in approving or rejecting any proposed change in, or addition to, the filings of such rating bureau. The superintendent shall, after a hearing held upon not less than ten days' written notice to the appellant and to such rating bureau, issue an order approving the action of such rating organization or directing it to give further consideration to such proposal. If such appeal is from the action of the rating bureau in rejecting a proposed addition to its filings, the superintendent may, if he finds that such action was unreasonable, issue an order directing the rating organization to make an addition to its filings on behalf of its members and subscribers, in a manner consistent with his findings and within a reasonable time after the issuance of such order.

**3935.09 Rate information furnished; right of review**

Every rating bureau and every insurer which makes its own rates shall, within a reasonable time after receiving written request therefor and upon the payment of such reasonable charge as it may make, furnish to any insured affected by a rate made by it, or to the authorized representative of such insured, all pertinent information as to such rate. Every rating bureau and every insurer which makes its own rates shall provide within this state reasonable means by which any person aggrieved by the application of its rating system may be heard, in person or by his authorized representative, on his written request to review the manner in which such rating system has been applied in connection with the insurance af-

forded him. If the rating bureau or insurer fails to grant or reject such request within thirty days after it is made, the applicant may proceed in the same manner as if his application had been rejected. Any party affected by the action of such rating bureau or such insurer on such request may, within thirty days after written notice of such action, appeal to the superintendent of insurance, who, after a hearing held upon not less than ten days' written notice to the appellant and to such rating bureau or insurer, may affirm or reverse such action.

**3935.10 Reporting loss and expense experience; interchange of data and co-operation with other states**

The superintendent of insurance shall promulgate rules and statistical plans, reasonably adopted to each of the rating systems on file with him, which may be modified from time to time and which shall be used thereafter by each insurer in the recording and reporting of its loss and country-wide expense experience, in order that the experience of all insurers may be made available at least annually in such form and detail as is necessary to aid the superintendent in determining whether rating systems comply with the standards set forth in section 3935.03 of the Revised Code. Such rules and plans may also provide for the recording and reporting of expense experience items which are specially applicable to this state and which are not susceptible of determination by a prorating of country-wide expense experience. In promulgating such rules and plans, the superintendent shall give due consideration to the rating systems on file with him and, in order that such rules and plans may be as uniform as is practicable among the several states, to the rules and to the form of the plans used for such rating systems in other states. No insurer need record or report its loss experience on a classification basis that is inconsistent



with the rating system filed by it. The superintendent may designate one or more rating bureaus or other agencies to assist him in gathering such experience and making compilations thereof, and such compilations shall be made available, subject to reasonable rules promulgated by the superintendent, to insurers and rating bureaus.

Reasonable rules and plans may be promulgated by the superintendent for the interchange of data necessary for the application of rating plans.

In order to further uniform administration of rate regulatory laws, the superintendent and every insurer and rating bureau may exchange information and experience data with insurance supervisory officials, insurers, and rating bureaus in other states and may consult with them with respect to rate making and the application of rating systems.

The superintendent may make reasonable rules and regulations necessary to effectuate sections 3935.01 to 3935.17, inclusive, of the Revised Code.

Sections 119.01 to 119.13, inclusive, of the Revised Code are applicable to the rule-making functions of the superintendent under sections 3935.01 to 3935.17, inclusive, of the Revised Code, including appeals from the order of the superintendent in adopting, amending, or rescinding rules.

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