

## TO DEFER OR NOT TO DEFER: RESPA, HUD, AND THE SECTION 8(B) CIRCUIT SPLIT

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*As the United States' economy struggles in the wake of the recent residential real estate market implosion, scholars, commentators, and average citizens alike continue to debate the relative blameworthiness of uninformed consumers, overzealous lenders, and lackluster federal regulation as contributing causal factors. In light of the backlash in the national media against predatory lending practices, it might be surprising to some that there is still only one federal remedial statute that specifically regulates residential real estate settlements—the Real Estate Settlement Procedures Act of 1974. Perhaps even more surprising is that this Act, tailored to prevent abuses in the settlement process, contains blatant ambiguities that make it difficult in many cases to ascertain whether a service provider has violated its terms.*

*This Note analyzes those ambiguities and the resulting split of authority among the federal courts of appeals. The principle question explored in this Note is whether section 8(b) of the Real Estate Settlement Procedures Act of 1974 prohibits a single service provider from charging a purely unearned fee in connection with a federally related mortgage. There are several critical ancillary issues that must also be addressed in the search for a resolution that is faithful both to the language and intent of the statute as well as the analytical methodology mandated by the Supreme Court of the United States. Such issues include the degree of deference to accord the U.S. Department of Housing and Urban Development's (HUD) interpretations of the statute and whether the Act prohibits overcharging for services in the settlement process. To this end, the author identifies three types of unearned fees that could potentially be prohibited by the Act: purely unearned fees, markup fees, and overcharge fees.*

*After a detailed and critical analysis of the positions advanced by HUD and the courts of appeals, the author concludes that because the text of the statute is ambiguous and because neither the structure of the statute, its stated purposes, nor its legislative history are dispositive of the issue, courts should follow the guidance of Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc. and accord complete*

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*deference to HUD's interpretation, which advocates that a single service provider charging purely unearned fees violates the Act. The author urges, however, that overcharge fees, while arguably within the purview of the statute according to a plausible plain-language interpretation, are not proscribed by the Act based upon the clear legislative intent to avoid becoming price control regulation. Finally, the author concludes that whether markup fees violate section 8(b)'s prohibitions must be analyzed on a case-by-case basis, the standard being whether the markup fee was charged for services that were actually rendered.*

## I. INTRODUCTION

In light of the recent collapse of the American housing market,<sup>1</sup> advocates calling for federal action abound.<sup>2</sup> Currently, the Real Estate Settlement Procedures Act of 1974 (RESPA) stands as the only federal remedial statute specifically addressing residential real estate settlements.<sup>3</sup> Although it is impossible to pinpoint the exact cause of the housing market collapse, many factors undoubtedly played a vital role.<sup>4</sup> It is irrelevant whether blame is placed on predatory lending and the widespread availability of sub-prime loans by mortgage lenders, or on the greed of overzealous homebuyers.<sup>5</sup> The fact remains that the current housing market disaster may have been mitigated if homebuyers had been better informed and if lenders had been more cautious.<sup>6</sup> As RESPA is the only federal statute addressing residential real estate settlements, its proper interpretation is a particularly salient point for both homebuyers and financial lenders.

A circuit split currently exists as to the proper interpretation of section 8(b) of RESPA.<sup>7</sup> The main point of contention between the courts

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1. See Richard E. Mendales, *Collateralized Explosive Devices: Why Securities Regulation Failed to Prevent the CDO Meltdown, and How to Fix It*, 2009 U. ILL. L. REV. 1359, 1392–99 (explaining the “bubble” that developed in the U.S. housing market from 2004–2006 and its subsequent “burst”).

2. See, e.g., *id.* at 1406–13 (calling for new SEC regulations and federally mandated standards for ratings agencies).

3. 12 U.S.C. §§ 2601–2617 (2006).

4. See, e.g., Mendales, *supra* note 1 (explaining how the relaxed standards of mortgage lenders and brokers played a role in the collapse of the American housing market).

5. See Mendales, *supra* note 1, at 1393–96.

6. See *id.*

7. See *Cohen v. JP Morgan Chase & Co.*, 498 F.3d 111, 124–26 (2d Cir. 2007) (applying *Chevron* analysis, deferring to HUD's interpretation, and holding that section 8(b) prohibits a single settlement service provider from charging an unearned fee); *Santiago v. GMAC Mortgage Group, Inc.*, 417 F.3d 384, 390 (3d Cir. 2005) (holding that section 8(b) prohibits a single lender from charging “markups,” but not from charging “overcharges”); *Kruse v. Wells Fargo Home Mortgage, Inc.*, 383 F.3d 49, 57, 61–62 (2d Cir. 2004) (holding that section 8(b) prohibits a single settlement service provider from charging unearned “mark-ups,” but not from charging “overcharges”); *Sosa v. Chase Manhattan Mortgage Corp.*, 348 F.3d 979, 981–83 (11th Cir. 2003) (holding that section 8(b) prohibits a single settlement service provider from charging an unearned fee); *Haug v. Bank of Am., N.A.*, 317 F.3d 832, 836 (8th Cir. 2003) (holding that an overcharge fee only violates section 8(b) if it is shared between two culpable parties); *Krzalic v. Republic Title Co.*, 314 F.3d 875, 879 (7th Cir. 2002) (refusing to accord *Chevron* deference to HUD's interpretation and holding that two culpable parties are necessary for a vi-

of appeals is whether section 8(b) proscribes the charging of an unearned fee by a single settlement service provider in relation to a federally related mortgage loan.<sup>8</sup> Specifically, this issue revolves around whether a violation of section 8(b) requires two culpable parties in relation to the giving and receiving of an unearned fee or whether a single culpable party charging an unearned fee constitutes a violation.<sup>9</sup> To further compound the issue, circuits holding that a single culpable party may violate section 8(b) disagree as to the level of deference that should be accorded to the various interpretations of the provision by the Department of Housing and Urban Development (HUD).<sup>10</sup> Specifically, the point of contention is whether section 8(b) proscribes only markup fees (the position of all circuits holding that a single culpable party may violate the provision) or both markup fees and overcharge fees (HUD's position).<sup>11</sup>

In analyzing and resolving these issues, Part II of this Note examines the historical background of RESPA's enactment, discusses the various types of fees that may possibly fall within section 8(b)'s proscriptions, and then lays a groundwork for the issues involved in the current circuit split regarding the proper interpretation of section 8(b). Part III analyzes HUD's interpretation of section 8(b), as well as the differing interpretations of the circuits that have currently weighed in on this issue. Finally, Part IV of this Note offers a recommendation for the proper interpretation and application of section 8(b).

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olation of section 8(b)); *Boulware v. Crossland Mortgage Corp.*, 291 F.3d 261, 268 (4th Cir. 2002) (refusing to defer to HUD's interpretation and holding that an overcharge fee only violates section 8(b) if it is shared between two culpable parties); *Echevarria v. Chi. Title & Trust Co.*, 256 F.3d 623, 627 (7th Cir. 2001) (holding that two culpable parties are necessary for a violation of section 8(b)). It is important to note that the Fifth Circuit has explicitly refrained from putting forth an opinion addressing whether section 8(b) prohibits undivided unearned fees. *Knighton v. Merscorp Inc.*, 304 F. App'x 285, 288 (5th Cir. 2008) ("We do not analyze the issue of whether a split in the fee is required because that answer does not control the outcome.").

8. Compare *Cohen*, 498 F.3d at 126 (holding that section 8(b) prohibits a single settlement service provider from charging an unearned fee), with *Krzalic*, 314 F.3d at 879 (holding that two culpable parties are necessary for a violation of section 8(b)).

9. See, e.g., *Cohen*, 498 F.3d at 126; *Krzalic*, 314 F.3d at 879.

10. See, e.g., *Cohen*, 498 F.3d at 126 (according *Chevron* deference to HUD's 2001 Policy Statement); *Kruse*, 383 F.3d at 57 (refusing to defer to HUD's interpretation regarding overcharges); see also *Krzalic*, 314 F.3d at 878-79 (suggesting that HUD's 2001 Policy Statement might be owed a varying degree of deference as it was not the product of a formal notice and hearing procedure). It is important to note that RESPA explicitly grants the Secretary of HUD the authority 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 [its] purposes." 12 U.S.C. § 2617 (2006).

11. See *infra* Part II.B (explaining the different types of unearned fees that may possibly fall within the proscriptions of section 8(b)). Compare *Santiago*, 417 F.3d at 390 (holding that section 8(b) prohibits a single lender from charging "markups" but not from charging "overcharges"), with Statement of Policy 2001-1, 66 Fed. Reg. 53,052, 53,052 (Oct. 18, 2001) [hereinafter 2001 Policy Statement] ("[I]t may violate Section 8(b) and HUD's implementing regulations: (1) [f]or two or more persons to split a fee for settlement services, any portion of which is unearned; or (2) for one settlement service provider to mark-up the cost of the services performed or goods provided by another settlement service provider without providing additional actual, necessary, and distinct services, goods, or facilities to justify the additional charge; or (3) for one settlement service provider to charge the consumer a fee where no, nominal, or duplicative work is done, or the fee is in excess of the reasonable value of goods or facilities provided or the services actually performed.").

## II. BACKGROUND

### A. *The History of RESPA's Enactment*

Congress originally enacted RESPA in 1974.<sup>12</sup> As set out in the Senate Report of the Banking, Housing, and Urban Affairs Committee (Senate Report), its main purposes are “to provide for greater disclosure of the nature and costs of real estate settlement services, [and] to eliminate the payment of kickbacks and unearned fees in connection with settlement services provided in federally related mortgage[s].”<sup>13</sup> The seeds of RESPA’s enactment were sowed with a provision in section 701 of the Emergency Home Finance Act of 1970, which “directed the HUD Secretary and VA Administrator to undertake a joint study and make recommendations to Congress with respect to legislative and administrative actions which should be taken to reduce and standardize mortgage settlement costs.”<sup>14</sup> The report that resulted from this study, along with the subsequent hearings of the Housing Subcommittee, found that in order to keep settlement costs within reasonable bounds, three distinct issues had to be addressed:

- (1) Abusive and unreasonable practices within the real estate settlement process that increase settlement costs to home buyers without providing any real benefits to them;
- (2) The lack of understanding on the part of most home buyers about the settlement process and its costs . . . ; and
- (3) The basic complexities and inefficiencies in the present system for the recording of land titles on the public records . . . .<sup>15</sup>

In response to these findings, two different real estate settlement cost bills were introduced to the Senate and subsequently referred to the Banking, Housing, and Urban Affairs Committee.<sup>16</sup> One bill, introduced by Senator Proxmire (Proxmire Bill), took the approach of directly regulating closing costs by establishing maximum amounts that could be charged for real estate settlement services.<sup>17</sup> The other bill, introduced by Senator Brock (Brock Bill), took the more lenient approach of merely regulating “the underlying business relationships and procedures of

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12. Real Estate Settlement Procedures Act, Pub. L. No. 93-533, 88 Stat. 1724 (codified as amended at 12 U.S.C. §§ 2601–2617).

13. S. REP. NO. 93-866 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6546. It is important to note that the Senate Report is considered to be the most authoritative piece of legislative history concerning section 8(b) because “[t]he Senate bill was passed in lieu of the House bill, and the House Conference Report makes no mention of the provision that became § 8(b).” *Cohen*, 498 F.3d at 123 n.8 (citing S. REP. NO. 93-866; H.R. REP. NO. 93-1526 (1974) (Conf. Rep.), *reprinted in* 1974 U.S.C.C.A.N. 6569).

14. S. REP. NO. 93-866, *reprinted in* 1974 U.S.C.C.A.N. 6546.

15. *Id.*, *reprinted in* 1974 U.S.C.C.A.N. 6546, 6547.

16. *Id.*

17. *Id.*, *reprinted in* 1974 U.S.C.C.A.N. 6546, 6547–48. Senator Proxmire originally introduced S. 2288, which proposed “regulat[ing] closing costs directly,” and later introduced S. 3232, which “would require mortgage lenders to bear the expense of closing costs.” *Id.*, *reprinted in* 1974 U.S.C.C.A.N. 6546, 6548.

which the costs are a function.”<sup>18</sup> The Committee eventually chose to adopt the Brock Bill “without amendment.”<sup>19</sup> In so acting, the Committee noted its belief that “[b]y dealing directly with such problems as kickbacks [and] unearned fees . . . [the Brock Bill] will ensure that the costs to the American home buying public will not be unreasonably or unnecessarily inflated by abusive practices.”<sup>20</sup> The Brock Bill was eventually enacted as the Real Estate Settlement Procedures Act of 1974.<sup>21</sup>

To regulate the abusive practices that inflate settlement service costs for home buyers, section 8 of RESPA sets out its “[p]rohibition against kickbacks and unearned fees.”<sup>22</sup> Whereas section 8(a) proscribes kickbacks in relation to business referrals, section 8(b) addresses the giving and receiving of unearned fees.<sup>23</sup> Specifically, section 8(a), entitled “Business referrals,” provides that

[n]o 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.<sup>24</sup>

Furthermore, section 8(b), entitled “Splitting charges,” provides that “[n]o 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.”<sup>25</sup>

*B. The Different Types of Unearned Fees that May Possibly Fall Within the Prohibitions of Section 8(b)*

Before discussing and analyzing the circuit courts’ and HUD’s divergent interpretations of section 8(b), one must consider the different types of unearned fees that may possibly be prohibited by section 8(b). As an analytical aid, these unearned fees will be considered as belonging to one of three distinct categories: (1) purely unearned fees (i.e., fees for which no services at all have been rendered), (2) markup fees, and (3) overcharge fees. It is these last two categories that have proved troublesome for the circuit courts.<sup>26</sup>

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18. *Id.*, reprinted in 1974 U.S.C.C.A.N. 6546, 6548. Senator Brock originally introduced S. 2228 and later amended and reintroduced his proposal as S. 3164. *Id.*

19. *Id.*

20. *Id.*

21. Pub. L. No. 93-533, 88 Stat. 1724 (codified as amended at 12 U.S.C. §§ 2601–2617 (2006)).

22. 12 U.S.C. § 2607.

23. *Id.* § 2607(a)–(b).

24. *Id.* § 2607(a).

25. *Id.* § 2607(b).

26. Compare *Santiago v. GMAC Mortgage Group, Inc.*, 417 F.3d 384, 390 (3d Cir. 2005) (holding that section 8(b) prohibits a single lender from charging “markups,” but not from charging “overcharges”), with *Boulware v. Crossland Mortgage Corp.*, 291 F.3d 261, 267 (4th Cir. 2002) (“If Congress

### 1. *Purely Unearned Fees*

Simply stated, a purely unearned fee is a fee charged in connection with real estate settlement services for which no services at all have been rendered—in HUD’s words, “a fee where no, nominal, or duplicative work is done.”<sup>27</sup> A simple example of this would be a settlement service provider charging a customer a fee for obtaining a credit report when in fact the service provider did not obtain the credit report. HUD interprets section 8(b) as proscribing purely unearned fees both when they are shared between two culpable parties *and* when they are charged by a single culpable party (i.e., an undivided fee),<sup>28</sup> but the courts of appeals disagree as to whether section 8(b) applies to the latter situation.<sup>29</sup>

### 2. *Markup Fees*

The most basic example of a markup fee is when one settlement service provider outsources a given service to a third-party service provider and subsequently charges the customer a greater amount of money than it paid the third party.<sup>30</sup> Thus, if a settlement service provider pays a third-party service provider \$50 to produce a credit report and subsequently charges a customer \$100 for this service, then the service provider has charged the customer a \$50 markup fee. To use HUD’s phrasing, a markup fee occurs when “one settlement service provider marks-up the cost of the services performed or goods provided by another settlement service provider without providing additional actual, necessary, and distinct services, goods, or facilities to justify the additional charge.”<sup>31</sup> Because the settlement service provider that collects the markup fee from the customer does not share or split it with a second party, a markup fee is a classic example of an undivided fee, which some circuits hold to be unearned.<sup>32</sup>

### 3. *Overcharge Fees*

An overcharge fee occurs when “the fee [charged by a settlement service provider] is in excess of the reasonable value of goods or facilities provided or the services actually performed.”<sup>33</sup> For example, if a settle-

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had intended § 8(b) to sweep as broadly as [Appellant] proposes, it could easily have written § 8(b) to state that ‘there shall be no markups or overcharges for real estate settlement services.’”)

27. 2001 Policy Statement, *supra* note 11.

28. *See id.*

29. *Compare* Cohen v. JP Morgan Chase & Co., 498 F.3d 111, 126 (2d Cir. 2007) (holding that section 8(b) prohibits a single settlement service provider from charging an unearned fee), *with* Krzalic v. Republic Title Co., 314 F.3d 875, 879 (7th Cir. 2002) (holding that two culpable parties are necessary for a violation of section 8(b)).

30. 2001 Policy Statement, *supra* note 11, at 53,053.

31. *Id.*

32. *See, e.g.,* Santiago v. GMAC Mortgage Group, Inc., 417 F.3d 384, 388–89 (3d Cir. 2005) (holding that section 8(b) prohibits a single lender from charging “markups”).

33. 2001 Policy statement, *supra* note 11, at 53,057.

ment service provider utilizes an in-house apparatus for running credit checks on its customers that costs it \$10 per credit check and subsequently charges a customer \$75 for this service, an overcharge has occurred. Again, because the settlement service provider that collects this fee from the customer has not shared or split it with a second party, an overcharge fee is an undivided fee. Whereas HUD interprets section 8(b) as prohibiting overcharge fees,<sup>34</sup> no court of appeals has concurred to date.<sup>35</sup>

*C. The Current Circuit Split Regarding the Proper Interpretation of Section 8(b)*

As noted above, the different interpretations of section 8(b) that comprise the current circuit split involve one overriding main issue and an underlying sub-issue.<sup>36</sup> The overriding main issue concerns whether a violation of section 8(b) requires two culpable parties to split or share an unearned fee or whether a single culpable party giving or receiving an undivided unearned fee may violate the subsection.<sup>37</sup> The underlying sub-issue concerns what level of deference to accord HUD's interpretation of section 8(b).<sup>38</sup>

*1. Whether Two Culpable Parties Are Necessary for a Violation of Section 8(b)*

The principle point of contention in the current section 8(b) circuit split is whether an unearned fee must be split or shared between two culpable parties to fall within the subsection's prohibitions.<sup>39</sup> To date, courts of appeals for six circuits have considered this issue.<sup>40</sup> While some courts hold that two culpable parties must split or share an unearned fee in order to fall within the purview of section 8(b), others hold that a single settlement service provider charging an undivided unearned fee violates the provision.<sup>41</sup> Despite the fact that HUD, pursuant to its statutorily granted authority,<sup>42</sup> has interpreted section 8(b) as applying to all three types of undivided unearned fees,<sup>43</sup> the current circuit split remains unresolved.

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34. *Id.* (stating that situations involving "payments for settlement services where all or a portion of the fees are unearned" violate the statute).

35. *See, e.g., Santiago*, 417 F.3d at 390 (holding that section 8(b) does not prohibit a settlement service provider from overcharging for its services).

36. *See supra* notes 7–11 and accompanying text.

37. *See supra* notes 8, 9.

38. *See supra* note 10.

39. *Cohen v. JP Morgan Chase & Co.*, 498 F.3d 111, 115 n.3 (2d Cir. 2007).

40. *See supra* note 7 and accompanying text.

41. *See, e.g., Cohen*, 498 F.3d at 126 (holding that section 8(b) prohibits a single settlement service provider from charging an undivided unearned fee); *Haug v. Bank of Am., N.A.*, 317 F.3d 832, 836 (8th Cir. 2003) (holding that two culpable parties are necessary for a violation of section 8(b)).

42. 12 U.S.C. § 2617 (2006).

43. 2001 Policy Statement, *supra* note 11.

The arguments for both sides focus on the proper interpretation of the language employed in section 8(b). Specifically, courts disagree as to whether the term “and” in the phrase “no person shall give and no person shall accept” creates two distinct causes of action (i.e., one involving the giving of an unearned fee by a single culpable party and the other involving the receiving of an unearned fee by a single culpable party) or whether the phrase, taken as a whole, creates one cause of action requiring two culpable parties (i.e., the giver and the receiver of an unearned fee).<sup>44</sup>

## 2. *The Level of Deference that Should be Accorded to HUD’s Interpretation of Section 8(b)*

The sub-issue underlying the section 8(b) circuit split involves the level of deference that should be accorded to HUD’s interpretation of the subsection in a policy statement issued in 2001 (2001 Policy Statement).<sup>45</sup> As RESPA explicitly authorizes the Secretary of HUD “to prescribe such rules and regulations [and] to make such interpretations . . . as may be necessary to achieve [its] purposes,”<sup>46</sup> some circuits have accorded HUD’s 2001 Policy Statement complete deference under the Supreme Court’s holding in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*<sup>47</sup> Other circuits have suggested that HUD’s 2001 Policy Statement should be accorded a lesser degree of deference because it was not issued pursuant to a formal notice and comment procedure.<sup>48</sup> A third line of reasoning proposes that the appropriate level of deference should be determined in light of the balancing test set out in *Skidmore v. Swift & Co.*, because the policy statement does nothing more than interpret an ambiguous regulation that mirrors an ambiguous statute.<sup>49</sup> Although this Note does not attempt to thoroughly analyze the varying degrees of agency deference, a brief examination of each is necessary before analyzing the current section 8(b) circuit split.

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44. 12 U.S.C. § 2607. Compare *Sosa v. Chase Manhattan Mortgage Corp.*, 348 F.3d 979, 982 (11th Cir. 2003) (“The ‘and’ in subsection 8(b) therefore operates to create two separate prohibitions: *First*, ‘no person shall give any portion, split or percentage of any charge . . .’; and *second*, ‘no person shall accept any portion, split or percentage of any charge . . .’”), with *Boulware v. Crossland Mortgage Corp.*, 291 F.3d 261, 266 (4th Cir. 2002) (“The use of the conjunctive ‘and’ indicates that Congress was clearly aiming at an exchange or transaction, not a unilateral act.”).

45. See *supra* note 10 and accompanying text.

46. 12 U.S.C. § 2617(a).

47. 467 U.S. 837 (1983). See, e.g., *Cohen v. JP Morgan Chase & Co.*, 498 F.3d 111, 126 (2d Cir. 2007).

48. See, e.g., *Krzalic v. Republic Title Co.*, 314 F.3d 875, 878–79 (7th Cir. 2002) (citing *Barnhart v. Walton*, 535 U.S. 212 (2002)).

49. *Glover v. Standard Fed. Bank*, 283 F.3d 953, 962 (8th Cir. 2002) (holding that “if the agency ‘simply repeated the statutory language in the regulation and left its interpretation of [the statutory language] to a program [or policy] statement,’ *Skidmore* principles apply” (quoting *Cunningham v. Scibana*, 259 F.3d 303, 307 n.1 (4th Cir. 2001))); see also *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (giving lesser agency rulings, statements, interpretations, and opinions concerning statutory meaning deference only proportional to their power to persuade given the agency’s specialized experience, investigations, and available information).

a. *Skidmore* Deference

In 1944, the Supreme Court rendered its decision in *Skidmore v. Swift & Co.*,<sup>50</sup> in which firemen sought overtime pay under the Fair Labor Standards Act for evening hours spent at fire halls awaiting possible fire alarms.<sup>51</sup> The main issue of the case concerned whether this “waiting time” constituted “working time” under the statute.<sup>52</sup> As the Court found that neither the statute itself nor existing case law definitively resolved the issue,<sup>53</sup> the Court articulated a balancing test for determining the level of deference to be accorded to the opinion of the agency administrator charged with “inform[ing] himself of conditions in industries and employments subject to the Act.”<sup>54</sup> The Court held that even though the administrator’s opinions were not the product of adversarial proceedings and were “not controlling upon the courts by reason of their authority,” the opinions nonetheless “constitute[d] a body of experience and informed judgment to which courts and litigants may properly resort for guidance.”<sup>55</sup> Thus, the Court created a balancing test to be applied in similar situations, holding that “[t]he weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.”<sup>56</sup>

b. *Chevron* Deference

In 1984, the Supreme Court decided *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,<sup>57</sup> outlining a two-step process for determining whether courts should defer to the interpretation of an agency granted authority to administer a statute.<sup>58</sup> In the first step of the *Chevron* analysis, the court must determine “whether Congress has directly spoken to the precise question at issue.”<sup>59</sup> In essence, if the statute unambiguously addresses the question at issue, the court’s inquiry ends.<sup>60</sup> To determine whether a given statute is ambiguous, the court should first look to the statutory language.<sup>61</sup> If Congress’s intent cannot be ascer-

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50. *Skidmore*, 323 U.S. 134.

51. *Id.* at 135–36.

52. *Id.* at 136.

53. *Id.*

54. *Id.* at 136–37.

55. *Id.* at 140.

56. *Id.*

57. 467 U.S. 837 (1984).

58. *Id.* at 842–43; *see also* *Cohen v. JP Morgan Chase & Co.*, 498 F.3d 111, 116–26 (2d Cir. 2007) (applying the *Chevron* two-step analysis to section 8(b)).

59. *Chevron*, 467 U.S. at 842.

60. *Id.* at 842–43.

61. *Cohen*, 498 F.3d at 116 (citing *Zuni Pub. Sch. Dist. No. 89 v. Dep’t of Educ.*, 550 U.S. 81, 93 (2007)); *see also* *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997); *Daniel v. Am. Bd. of Emergency Med.*, 428 F.3d 408, 423 (2d Cir. 2005).

tained from the statutory language, the court should next rely on canons of statutory construction.<sup>62</sup> If the statute remains ambiguous, the court should finally resort to examining the statute's legislative history.<sup>63</sup> If the court still cannot ascertain Congress's intent after conducting the above inquiries, it should proceed to step two of the *Chevron* analysis.<sup>64</sup> Here, the court must determine "whether the agency's answer is based on a permissible construction of the statute."<sup>65</sup> Ultimately, if the statute is ambiguous and the interpretation of the agency granted authority to administer the statute is reasonable, *Chevron* directs the deciding court to defer to the agency's interpretation of the statute.<sup>66</sup>

c. *United States v. Mead Corp.*

In *United States v. Mead Corp.*, the Supreme Court directly confronted the issue of the level of deference that is owed to a "ruling letter" issued by an agency charged with the administration of a federal statute.<sup>67</sup> The Court held that because there was "no indication that Congress intended such a ruling to carry the force of law," *Skidmore* deference (and not *Chevron* deference) was the proper level of deference to accord the administering agency's interpretation of the statute.<sup>68</sup> Similar to *Skidmore*, where the Court observed that the ruling did not result from an adversarial proceeding, the Court in *Mead* noted that the ruling letter at issue was "not subject to notice and comment before being issued."<sup>69</sup> The Court ultimately held "that under *Skidmore* . . . the ruling [letter] is eligible to claim respect according to its persuasiveness."<sup>70</sup>

### III. ANALYSIS

This Part analyzes the various interpretations of section 8(b). First, it addresses HUD's interpretation as found in its officially promulgated regulations, as well as its 2001 Policy Statement. Next, it analyzes the various interpretations of the circuits holding that two culpable parties are necessary for section 8(b) to be violated. Finally, it analyzes the interpretations of those circuits holding that section 8(b) may be violated by a single culpable party.

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62. *Cohen*, 498 F.3d at 116 (citing *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 586 (2004)); *Daniel*, 428 F.3d at 423).

63. *Id.*

64. *Chevron*, 467 U.S. at 843.

65. *Id.*

66. *Cohen*, 498 F.3d at 116 (citing *Chevron*, 467 U.S. at 843–44).

67. 533 U.S. 218, 221–23 (2001).

68. *Id.* at 221 (citing *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)).

69. *Id.* at 223; see also *Skidmore*, 323 U.S. at 139.

70. *Mead*, 533 U.S. at 221 (citing *Skidmore*, 323 U.S. 134).

A. *HUD's Interpretation of Section 8(b)*

RESPA specifically authorizes the Secretary of HUD “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 [its] purposes.”<sup>71</sup> Pursuant to this statutory authority, HUD has officially promulgated rules and regulations as well as issued policy statements clarifying its interpretation of section 8(b).<sup>72</sup> Although HUD’s regulations seem to generally interpret section 8(b) as proscribing the charging of undivided unearned fees by a single culpable party,<sup>73</sup> only its 2001 Policy Statement specifically addresses markup fees and overcharge fees.<sup>74</sup>

1. *The Interpretation Found in HUD's Officially Promulgated Regulations*

Prior to 1992, HUD’s officially enacted regulation of section 8(b) merely restated the statutory language of the provision.<sup>75</sup> In 1992, HUD amended its regulations by clarifying its position on three points.<sup>76</sup> First, the regulation now provides that “[a] charge by a *person* for which no or nominal services are performed or for which duplicative fees are charged is an unearned fee and violates this section.”<sup>77</sup> Second, the regulation clarifies that “[t]he source of the payment does not determine whether or not a service is compensable.”<sup>78</sup> Finally, the regulation provides that the prohibitions of section 8(b) cannot “be avoided by creating an arrangement wherein the purchaser of services splits the fee.”<sup>79</sup>

Of these three points of clarification, only the first seems to speak to the issue of whether an unearned fee must be split between two culpable parties in order to fall within the purview of section 8(b).<sup>80</sup> By defining an unearned fee as encompassing a “charge by a *person*,” the regulation implies that only one culpable party is necessary to bring an unearned fee

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71. 12 U.S.C. § 2617(a) (2006); *see also id.* § 2602(6) (defining “the term ‘Secretary’ [as] the Secretary of Housing and Urban Development”).

72. 24 C.F.R. § 3500.14(c) (2009); 2001 Policy Statement, *supra* note 11.

73. 24 C.F.R. § 3500.14(c) (“A charge by a *person* for which no or nominal services are performed or for which duplicative fees are charged is an unearned fee and violates this section.” (emphasis added)).

74. 2001 Policy Statement, *supra* note 11, at 53,057.

75. *Compare* 12 U.S.C. § 2607(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.”), *with* 24 C.F.R. § 3500.14(a)(b) (1992) (“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.”).

76. 57 Fed. Reg. 49,600, 49,605 (Nov. 2, 1992).

77. 24 C.F.R. § 3500.14(c) (2009) (emphasis added).

78. *Id.*

79. *Id.*

80. *See id.*

within section 8(b)'s prohibitions.<sup>81</sup> Nevertheless, the circuits still disagree as to whether an unearned fee must be split between two culpable parties in order to be prohibited by section 8(b).<sup>82</sup>

## 2. *The Interpretation Found in HUD's 2001 Policy Statement*

HUD's 2001 Policy Statement claims to "reiterate[] its long-standing interpretation of Section 8(b)'s prohibitions."<sup>83</sup> This policy statement was issued in response to *Echevarria v. Chicago Title & Trust Co.*, in which the Seventh Circuit held that section 8(b) is merely an anti-kickback provision that requires an unearned fee to be split or shared between two culpable parties in order to constitute a violation.<sup>84</sup> The policy statement interprets section 8(b) as encompassing both unearned fees that are split between two culpable parties and undivided unearned fees charged by a single culpable party.<sup>85</sup>

In relation to undivided unearned fees, the policy statement describes three different situations in which a single settlement service provider can violate section 8(b) by charging an unearned fee.<sup>86</sup> First, HUD takes the position that it is a violation of section 8(b) and its implementing regulations "for *one* settlement service provider to mark-up the cost of the services performed or goods provided by another settlement service provider without providing additional actual, necessary, and distinct services, goods, or facilities to justify the additional charge."<sup>87</sup> HUD also considers it a violation "for *one* settlement service provider to charge the consumer a fee where no, nominal, or duplicative work is done."<sup>88</sup> Finally, HUD interprets section 8(b) as proscribing the charging of a fee where "the fee is in excess of the reasonable value of goods or facilities provided or the services actually performed."<sup>89</sup> Thus, HUD's 2001 Policy Statement clearly outlines its interpretation that section 8(b) prohibits a single settlement service provider from charging purely unearned fees, markup fees, and overcharge fees.<sup>90</sup>

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81. *Id.* (emphasis added); see also 2001 Policy Statement, *supra* note 11, at 53,058–59 ("[S]ince . . . 24 CFR 3500.14(c) speaks of a charge by 'a person,' it is also incorrect to conclude that the Section 8(b) proscription covers only payments or charges among settlement service providers.").

82. See *supra* notes 7–9 and accompanying text.

83. 2001 Policy Statement, *supra* note 11.

84. *Id.* at 53,053; see also *Echevarria v. Chi. Title & Trust Co.*, 256 F.3d 623, 627 (7th Cir. 2001) ("If we subjected to RESPA liability a title company that kept an overcharge without requiring allegations that it shared an unearned fee with a third party, we would radically, and wrongly, expand the class of cases to which RESPA § 8(b) applies."). For a more detailed analysis of *Echevarria*, see *infra* Part III.B.1.a.

85. 2001 Policy Statement, *supra* note 11.

86. *Id.*

87. *Id.* (emphasis added)

88. *Id.* (emphasis added)

89. *Id.*

90. See *id.*

*B. The Rationales of the Circuits Holding that Two Culpable Parties Are Required for a Violation of Section 8(b)*

All of the circuits holding that section 8(b) requires the splitting or sharing of an unearned fee between two culpable parties base their conclusions upon the plain language of the statute.<sup>91</sup> These circuits refuse to consider HUD's interpretation in light of the determination that the plain language of section 8(b) unambiguously requires two culpable parties to split an unearned fee in order to violate the statute.<sup>92</sup> This Section analyzes in detail illustrative cases from the Seventh, Fourth, and Eighth Circuits.

*1. The Interpretations of the Seventh Circuit*

*a. Echevarria v. Chicago Title & Trust Co.*

In *Echevarria v. Chicago Title & Trust Co.*, the Seventh Circuit squarely confronted the issue of whether section 8(b) prohibits the charging of markup fees in relation to a federally related mortgage.<sup>93</sup> The plaintiffs asserted that the defendant had violated section 8(b) by charging them \$45 to record their mortgage, when in fact the defendant had only paid the county recorder \$31.<sup>94</sup> Although the court referred to the \$14 difference as an "overcharge,"<sup>95</sup> this is clearly more akin to a markup fee as the excess charge resulted from a fee being paid to a third-party service provider.<sup>96</sup>

The case reached the Seventh Circuit on the plaintiff's appeal after the district court granted the defendant's motion to dismiss.<sup>97</sup> In the district court, the defendant argued that the "plaintiffs failed to state facts tending to prove that Chicago Title gave an unearned fee to a third party or received an unearned fee from a third party."<sup>98</sup> The district court judge granted the motion to dismiss based on a prior Seventh Circuit case that "held on very similar facts that the challenged behavior did not constitute fee splitting under RESPA § 8(b)."<sup>99</sup>

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91. *Haug v. Bank of Am., N.A.*, 317 F.3d 832, 836 (8th Cir. 2003) (holding that section 8(b) "unambiguously requires at least two parties to share a settlement fee in order to violate the statute"); *Krzalic v. Republic Title Co.*, 314 F.3d 875, 879–80 (7th Cir. 2002) (holding that the plain language of section 8(b) requires two culpable parties for a violation); *Boulware v. Crossland Mortgage Corp.*, 291 F.3d 261, 265 (4th Cir. 2002) (same).

92. *Haug*, 317 F.3d at 838, 840 (HUD's interpretation should not be considered because the plain language of section 8(b) is unambiguous); *Krzalic*, 314 F.3d at 879 (deference to HUD's interpretation is unnecessary because the plain language of section 8(b) is unambiguous); *Boulware*, 291 F.3d at 267 (same).

93. 256 F.3d 623, 624–25 (7th Cir. 2001).

94. *Id.*

95. *Id.* at 625.

96. See *supra* Part II.B.2 (describing what constitutes a markup fee).

97. *Echevarria*, 256 F.3d at 625.

98. *Id.*

99. *Id.* (citing *Durr v. Intercounty Title Co.*, 14 F.3d 1183, 1183 (7th Cir. 1994)).

On appeal, the plaintiffs argued that by amending its regulations in 1992, HUD had removed the fee splitting requirement that the Seventh Circuit had previously attributed to section 8(b).<sup>100</sup> Specifically, the plaintiffs argued that by amending its regulations to state that “[a] charge by a person for which no or nominal services are performed . . . is an unearned fee and violates this section,” HUD had mandated that “stating a fee split with a third party is no longer a necessary element of a RESPA § 8(b) claim.”<sup>101</sup> In rejecting this logical argument, the Seventh Circuit reasoned that the amendment to the regulation should be “evaluated . . . in context, reading the subsection as a whole.”<sup>102</sup> The court explicitly adopted the reasoning of an Alabama district court that stated “[t]he court may not, by concentrating on one sentence and ignoring its context, create an entirely new zone of proscribed conduct.”<sup>103</sup>

The court, however, made no mention of the fact that because the first sentence of the regulation merely restates the arguably ambiguous language of section 8(b), the amendment fits within the context of the regulation if section 8(b) is read as proscribing two distinct acts. The only ancillary support that the court offered for its holding was that “the new heading added by the 1992 amendments, ‘*No split of charges except for actual services performed*,’ expresses clearly that HUD did not attempt to expand liability past situations involving fee splitting between the fee collector and a third party.”<sup>104</sup> Quite to the contrary, HUD subsequently issued its 2001 Policy Statement as a direct result of the Seventh Circuit’s misunderstanding of its intentions.<sup>105</sup> Ultimately, the court reiterated its opinion that “‘RESPA is an anti-kickback statute’”<sup>106</sup> and affirmed the dismissal of the plaintiffs’ claims because they “fail[ed] to accuse a third party of accepting unearned fees.”<sup>107</sup>

b. *Krzalic v. Republic Title Co.*

The Seventh Circuit again confronted the issue of whether an unearned fee must be split between two parties in *Krzalic v. Republic Title Co.*<sup>108</sup> The plaintiffs alleged that the defendant had violated section 8(b) by charging them \$50 to record their mortgage when it only paid the

100. *Id.* at 627–28 (citing 24 C.F.R. § 3500.14(c) (2000)); *see also* 24 C.F.R. § 3500.14(a)(b) (1992).

101. *Echevarria*, 256 F.3d at 627–28 (quoting 24 C.F.R. § 3500.14(c) (2000)). For a detailed discussion of the 1992 amendments to HUD’s section 8(b) regulation, *see supra* Part III.A.1.

102. *Echevarria*, 256 F.3d at 628 (citing *Willis v. Quality Mortgage U.S.A., Inc.*, 5 F. Supp. 2d 1306, 1309 (M.D. Ala. 1998)).

103. *Id.* (quoting *Willis*, 5 F. Supp. 2d at 1309).

104. *Id.* (quoting 24 C.F.R. § 3500.14(c) (2000)).

105. 2001 Policy Statement, *supra* note 11; *see also supra* Part III.A.2 (discussing HUD’s 2001 Policy Statement).

106. *Echevarria*, 256 F.3d at 627 (quoting *Durr v. Intercounty Title Co.*, 14 F.3d 1183, 1186 (7th Cir. 1994)).

107. *Id.*

108. 314 F.3d 875, 877 (7th Cir. 2002).

county recorder \$36.<sup>109</sup> Plaintiffs asserted that the \$14 difference was an unearned fee charged for services not performed.<sup>110</sup> Again, this is a classic example of a markup fee that HUD interprets section 8(b) as prohibiting.<sup>111</sup>

In an apparent reaction to HUD's 2001 Policy Statement, the court began its analysis with a thorough discussion of the level of deference that should be accorded to HUD's interpretation.<sup>112</sup> The court voiced its disdain for *Chevron* deference, which it believed "hands over . . . interpretive responsibility to the officials responsible for making policy judgments."<sup>113</sup> Judge Posner explained that forced deference to "the so-called 'independent' administrative agencies" limits "judicial authority to preserve the deal struck by contending interest groups in the original legislation."<sup>114</sup> After discussing several recent decisions that may cast doubt on the unbridled deference of *Chevron*,<sup>115</sup> the court seemed to offer its approval of the notion that "legislative rules and formal adjudications are always entitled to *Chevron* deference, while less formal pronouncements like interpretative rules and informal adjudications may or may not be entitled to *Chevron* deference."<sup>116</sup> One cannot help but wonder whether Judge Posner's disdain for agency deference stems from the fact that HUD's 2001 Policy Statement was issued in response to *Echevarria*, a case which was argued before him.<sup>117</sup> At the very least, it seems rather odd that he chose this decision (issued roughly a year after the publication of HUD's 2001 Policy Statement) to articulate nearly two pages of dicta concerning administrative agency deference.<sup>118</sup>

After discussing the level of deference owed to HUD's interpretation, the court concluded that HUD's opinions are irrelevant given the

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109. *Id.*

110. *Id.*

111. *See* 2001 Policy Statement, *supra* note 11.

112. *Krzalic*, 314 F.3d at 877–78 (discussing *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984)).

113. *See id.* at 877.

114. *Id.* at 878.

115. *Id.* at 878–79 (discussing *Barnhart v. Walton*, 535 U.S. 212, 222 (2002) ("[T]he interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time all indicate that *Chevron* provides the appropriate legal lens through which to view the legality of the Agency interpretation . . . at issue."); *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649–50 (1990) ("A precondition to deference under *Chevron* is a congressional delegation of administrative authority."); *Glover v. Standard Fed. Bank*, 283 F.3d 953, 961–63 (8th Cir. 2002) (explaining that the degree of deference owed to an agency is contingent upon the agency's reasoning and the formalities of its procedure in reaching its opinion)).

116. *Id.* at 879 (quoting RICHARD J. PIERCE, JR., *ADMINISTRATIVE LAW TREATISE* 6–7 (4th ed. Supp. 2003)).

117. *See id.* at 881 ("One fine day the [2001 Policy] [S]tatement simply appeared in the Federal Register."); *Echevarria v. Chi. Title & Trust Co.*, 256 F.3d 623 (7th Cir. 2001) (argued before Judge Posner); 2001 Policy Statement, *supra* note 11 ("This Statement of Policy is being issued to eliminate any ambiguity concerning the Department's position with respect to . . . overcharges by settlement service providers as a result of [a] question[] raised by . . . *Echevarria*.").

118. *Krzalic*, 314 F.3d at 877–79.

court's finding that the plain language of section 8(b) is unambiguous.<sup>119</sup> The court ultimately held that section 8(b) requires that an unearned fee be split between two parties,<sup>120</sup> and noted that the defendant "did not 'accept any portion, split, or percentage of any charge.'"<sup>121</sup> Surprisingly, the idea that the \$14 markup fee the defendant retained could possibly be considered a "portion" or a "percentage" of a "charge" that the defendant "accept[ed]" somehow escaped Judge Posner. Finally, the court reasoned that if the markup of services received from third parties "is a fraud or market failure or abuse of some sort," then the problem should be remedied by something besides section 8(b) because RESPA "is not a price-control statute."<sup>122</sup>

## 2. *The Interpretation of the Fourth Circuit*

In *Boulware v. Crossland Mortgage Corp.*, the Fourth Circuit confronted the issue of whether an unearned fee must be split between two parties in order to fall within the purview of section 8(b).<sup>123</sup> The plaintiff alleged that the defendant had violated section 8(b) by keeping \$50 for services not performed,<sup>124</sup> specifically, charging \$65 for a credit report that had been obtained from a third-party service provider for only \$15.<sup>125</sup> The Fourth Circuit referred to this fee as an "overcharge,"<sup>126</sup> but it is clearly better classified as a markup fee.<sup>127</sup> The court upheld the district court's dismissal based on its finding that section 8(b) requires a fee to be split between two parties.<sup>128</sup>

The court based its holding on a consideration of the plain language of section 8(b).<sup>129</sup> First, the court examined the phrase "[n]o person shall give and no person shall accept" and concluded that "[t]he use of the conjunctive 'and' indicates that Congress was clearly aiming at an exchange or transaction, not a unilateral act."<sup>130</sup> Without even considering the possibility that the use of the word "and" in the phrase might operate to create two distinct prohibitions, the court conclusively stated that "[o]utside of a kickback or feesplitting situation, there is no way to make sense of the statutory directive that '[n]o person shall give and no person shall accept' any portion of an unearned fee."<sup>131</sup>

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119. *Id.* at 879.

120. *Id.* ("The statutory language describes a situation in which *A* charges *B* (the borrower) a fee of some sort collects it, and then either splits it with *C* or gives *C* a portion or percentage . . . of it.")

121. *Id.* (quoting 12 U.S.C. § 2607(b) (2000)).

122. *Id.* at 881.

123. 291 F.3d 261, 263–64 (4th Cir. 2002).

124. *Id.* at 264.

125. *Id.*

126. *Id.*

127. *See supra* Part II.B.2–3.

128. *Boulware*, 291 F.3d at 265.

129. *Id.* at 265–66.

130. *Id.* (quoting 12 U.S.C. § 2607(b) (2000)).

131. *Id.* at 265 (quoting 12 U.S.C. § 2607(b)).

The court further reasoned that “[b]y using the language ‘portion, split, or percentage,’ Congress was clearly aiming at a sharing arrangement rather than a unilateral overcharge.”<sup>132</sup> In view of this interpretation, the court reasoned that in order for section 8(b) to apply to an overcharge by a single lender (the receiver of the fee), the consumer would have to be the giver of the fee in the transaction.<sup>133</sup> As RESPA purports to protect consumers, the court reasoned that it is “irrational to conclude that Congress intended consumers to be potentially liable under RESPA for paying unearned fees.”<sup>134</sup> The court ignored the assurances of HUD, as *amicus curiae*, that consumers would not be prosecuted by the government.<sup>135</sup> Without further explanation, the court relied on the plain language of section 8(b) to refute the plaintiff’s contention that a violation does not require both a giver and a receiver and, alternately, that section 8(b) only applies to a giver who knows that the fee is unearned.<sup>136</sup>

Finally, the court concluded that it did not need to defer to HUD’s interpretation of section 8(b).<sup>137</sup> Because it believed that the statute is unambiguous, the court stated that “the text of the statute controls.”<sup>138</sup> It is important to note, however, that the court acknowledged that “[d]eference might well be due [to HUD’s] Regulation[s] . . . or HUD’s statement of policy if § 8(b) were ambiguous.”<sup>139</sup> Although the court made no reference to the level of deference that might be owed HUD’s 2001 Policy Statement, it may be telling that the court chose to cite *Chevron* for the above proposition.<sup>140</sup>

### 3. *The Interpretation of the Eighth Circuit*

In *Haug v. Bank of America, N.A.*, the Eighth Circuit also considered whether an unearned fee must be split or shared between two parties in order to violate section 8(b).<sup>141</sup> The plaintiffs alleged that the defendant had violated section 8(b) by marking up a credit report fee, an appraisal fee, and a document delivery service fee in connection with their mortgage loan.<sup>142</sup> Specifically, the plaintiffs accused the defendant of outsourcing these services to third-party service providers at a signifi-

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132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.* (“[I]t is unclear whether the government would be bound by HUD’s statement that it is ‘unlikely to direct any enforcement actions against consumers for the payment of unearned fees.’”).

136. *Id.* at 265–66.

137. *Id.* at 267.

138. *Id.*

139. *Id.* (citing *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984)).

140. *Id.*

141. 317 F.3d 832, 834 (8th Cir. 2003).

142. *Id.* at 834–35.

cantly lower cost than it had charged them.<sup>143</sup> Again, this is a classic example of a markup fee that HUD interprets section 8(b) as prohibiting.<sup>144</sup> At trial, the defendant moved for dismissal based on the theory that the plaintiffs had failed to state a claim by not alleging a kickback or fee splitting between two parties.<sup>145</sup> The district court deferred to HUD's 2001 Policy Statement and denied the motion,<sup>146</sup> and the case reached the Eighth Circuit through an interlocutory appeal.<sup>147</sup>

The Eighth Circuit ultimately held that "Section 8(b) is an anti-kickback provision that unambiguously requires at least two parties to share a settlement fee in order to violate the statute."<sup>148</sup> In so holding, the court refused to accept the plaintiffs' argument that "the word 'and' in the phrase 'no person shall give and no person shall accept'" indicates that section 8(b) is violated by both the giving of an unearned fee and also the accepting of an unearned fee.<sup>149</sup> Despite this plausible interpretation, the court concluded that section 8(b) unambiguously requires a defendant to share an unearned fee with a third party.<sup>150</sup> In support of its holding, the court merely asserted that it is consistent with the interpretation of other circuits.<sup>151</sup> The court offered no reason why the plaintiffs' argument was not plausible and no support for its assertion that section 8(b) is unambiguous. Nor did it attempt to find support in RESPA's legislative history, declaring instead that the legislative history is "not dispositive."<sup>152</sup>

Finally, the court concluded that the lower court erred in deferring to the interpretation found in HUD's 2001 Policy Statement.<sup>153</sup> The court reasoned that an explicit finding that a statute is ambiguous is a necessary condition precedent to a court considering an agency's interpretation.<sup>154</sup> Previously, the Eighth Circuit had accorded *Chevron* deference to HUD's 2001 Policy Statement after concluding that section 8(a) and section 8(c) were ambiguous as to whether they proscribed the charging of fees to cover yield spread premiums.<sup>155</sup> In *Haug*, the court distinguished its prior holding based on its assertion that section 8(b) unambiguously requires an unearned charge to be shared between two culpable

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143. *Id.*

144. 2001 Statement of Policy, *supra* note 11.

145. *Haug*, 317 F.3d at 835.

146. *Id.*

147. *Id.*

148. *Id.* at 836.

149. *Id.* (quoting 12 U.S.C. § 2607(b) (2000)).

150. *Id.*

151. *Id.* (citing *Boulware v. Crossland Mortgage Corp.*, 291 F.3d 261, 265 (4th Cir. 2002); *Echevarria v. Chi. Title & Trust Co.*, 256 F.3d 623, 626 (7th Cir. 2001)).

152. *Id.* at 837–38.

153. *Id.* at 838.

154. *Id.* at 838–39.

155. *Id.* at 839 (citing *Glover v. Standard Fed. Bank*, 283 F.3d 953, 961–65 (8th Cir. 2002) (deferring to HUD's 2001 Policy Statement in regards to the charging of fees to cover yield spread premiums)).

parties.<sup>156</sup> Thus, one may reasonably infer that had the court deemed section 8(b) to be ambiguous in regards to markup fees, it would have accorded *Chevron* deference to HUD's 2001 Policy Statement.

C. *The Rationales of the Circuits Holding that Section 8(b) Prohibits the Giving or Receiving of Unearned Fees by a Single Culpable Party*

The three circuits holding that section 8(b) prohibits single culpable parties from either giving or receiving undivided unearned fees have each relied on different reasoning to reach this conclusion.<sup>157</sup> Whereas the Second Circuit has twice accorded *Chevron* deference to HUD's interpretation, the Third Circuit and the Eleventh Circuit both found the statutory language of section 8(b) to unambiguously encompass undivided unearned fees.<sup>158</sup> This Section analyzes the logic underlying the holdings of these circuits.

1. *The Interpretations of the Eleventh Circuit*

a. *Sosa v. Chase Manhattan Mortgage Corp.*

In *Sosa v. Chase Manhattan Mortgage Corp.*, the Eleventh Circuit confronted the issue of whether the defendant had violated section 8(b) by charging the plaintiffs a \$50 fee for a courier service to deliver their mortgage documents<sup>159</sup> when the defendant outsourced this service to a third-party service provider and retained a portion of the fee.<sup>160</sup> Again, this is a classic example of a markup fee that HUD interprets section 8(b) as prohibiting.<sup>161</sup> The plaintiffs alleged that the defendant had "accepted a portion of the charge 'other than for services actually performed'" in violation of section 8(b).<sup>162</sup>

Although the court ultimately affirmed the district court's granting of the defendant's motion to dismiss,<sup>163</sup> it disagreed with the lower court's determination that section 8(b) requires an unearned fee to be split between two parties.<sup>164</sup> The district court had found that section 8(b) un-

156. *Id.*

157. See *Cohen v. JP Morgan Chase & Co.*, 498 F.3d 111, 120–26 (2d Cir. 2007) (according *Chevron* deference to HUD's interpretation after finding section 8(b) to be ambiguous in regards to undivided unearned fees); *Santiago v. GMAC Mortgage Group, Inc.*, 417 F.3d 384, 390 (3d Cir. 2005) ("[T]he text of Section 8(b) clearly allows for a cause of action for markups."); *Kruse v. Wells Fargo Home Mortgage, Inc.*, 383 F.3d 49, 57–61 (2d Cir. 2004) (according *Chevron* deference to HUD's interpretation after finding section 8(b) to be ambiguous in regards to markup fees); *Sosa v. Chase Manhattan Mortgage Corp.*, 348 F.3d 979, 982 (11th Cir. 2003) ("The 'and' in subsection 8(b) . . . operates to create two separate prohibitions.").

158. See *supra* note 157.

159. *Sosa*, 348 F.3d at 981.

160. *Id.*

161. 2001 Policy Statement, *supra* note 11.

162. *Sosa*, 348 F.3d at 981 (quoting 12 U.S.C. § 2607(b) (2000)).

163. *Id.* at 983–84 ("What is missing is an allegation that the portion of the charge that [defendant] retained was accepted 'other than for services actually performed.'").

164. *Id.* at 982–83.

ambiguously requires two parties to split an unearned fee and that a contrary interpretation produces irrational results.<sup>165</sup> The Eleventh Circuit disagreed with both of these assertions.<sup>166</sup>

First, the court found that section 8(b) prohibits two unique actions and can therefore be violated by a single service provider.<sup>167</sup> The court reasoned that because “[t]he ‘and’ in [section 8(b)] connects the two phrases, ‘no person shall give’ and ‘no person shall accept,’” the section therefore proscribes two actions.<sup>168</sup> The court specifically found that “[g]iving a portion of a charge is prohibited regardless of whether there is a culpable acceptor, and accepting a portion of a charge is prohibited regardless of whether there is a culpable giver.”<sup>169</sup> In so holding, the court completely disregarded the almost certain ambiguity which results from the contrary interpretation that the use of the word “and” in section 8(b) necessitates both a culpable giver and a culpable acceptor.<sup>170</sup> Although the court did acknowledge the holdings of the Seventh and Fourth Circuits, it disregarded their reasoning as “a misunderstanding of English grammar.”<sup>171</sup>

Much like the lower court, the court further reasoned that a different reading of section 8(b) would lead to irrational results.<sup>172</sup> Specifically, the court reasoned that if section 8(b) requires an unearned fee to be split between two culpable parties, then a party who offers an unearned kickback could escape liability if a third party refused to accept it.<sup>173</sup> The court concluded that it would be irrational for “the culpable giver’s liability [to] turn on whether the intended recipient decided to accept the kickback.”<sup>174</sup>

Finally, the court disagreed with the district court’s contention that if a settlement service provider can be liable for merely accepting a portion of an unearned fee, then the borrower (i.e., the consumer who pays for the given settlement service) is rendered liable for giving the unearned fee.<sup>175</sup> The court reasoned that a party must knowingly give an unearned fee in order to fall within section 8(b)’s prohibitions.<sup>176</sup> Be-

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165. *Id.* at 982 (“Emphasizing the word ‘and,’ the district court stated that there must be both a culpable giver and a culpable acceptor of the unearned fee . . . . The district court further reasoned that if [the defendant] could be liable for accepting the part of the charge that it did not pay to the third-party contractors, then the borrower could be liable as the ‘giver’ of the purportedly unearned part of the fee.”).

166. *Id.* at 982–83.

167. *Id.*

168. *Id.* at 982 (quoting 12 U.S.C. § 2607(b) (2000)).

169. *Id.*

170. *See Boulware v. Crossland Mortgage Corp.*, 291 F.3d 261, 265–66 (4th Cir. 2002) (articulating this contrary interpretation).

171. *Sosa*, 348 F.3d at 982 (citing *Krzalic v. Republic Title Co.*, 314 F.3d 875, 879 (7th Cir. 2002); *Boulware*, 291 F.3d at 265).

172. *Id.* at 983.

173. *Id.*

174. *Id.*

175. *Id.* at 982–83.

176. *Id.* at 983.

cause “a consumer would always pay a fee to a settlement service provider intending that it be used for a service actually performed,” the consumer “would not be liable as the giver of the unearned portion of the fee.”<sup>177</sup> The court clearly voiced its opinion that section 8(b) proscribes the charging of an unearned fee by a single culpable party, but it nonetheless affirmed the district court’s ruling because the plaintiff had failed to allege “that [the defendant] performed no services that would justify its retention of a portion of the fee.”<sup>178</sup>

After the Eleventh Circuit handed down its decision in *Sosa*, some commentators speculated that the decision implied that the circuit interpreted section 8(b) as prohibiting both overcharge fees and markup fees.<sup>179</sup> Subsequent decisions by the Eleventh Circuit have cleared up any confusion regarding its interpretation,<sup>180</sup> and it is apparent that the Eleventh Circuit views section 8(b) as prohibiting markup fees, but not overcharge fees.<sup>181</sup>

#### b. Eleventh Circuit Decisions After *Sosa*

The first significant test of the Eleventh Circuit’s interpretation regarding overcharge fees came in *Friedman v. Market Street Mortgage Corp.*,<sup>182</sup> in which the plaintiffs alleged that the defendant had violated section 8(b) by charging them a \$556.25 fee to waive its standard escrow requirements.<sup>183</sup> Under the terms of its standard mortgage contract, the defendant required its customers to place funds into an escrow account to cover “items such as taxes, insurance premiums, and ‘other items which can attain priority over this Security Instrument as a lien or encumbrance on the Property.’”<sup>184</sup> The plaintiffs had opted to pay a one-time waiver fee in lieu of making monthly payments into the escrow account.<sup>185</sup> As the defendant subsequently sold the loan on the secondary mortgage market, the plaintiffs alleged that no services were performed in exchange for the payment of the waiver fee.<sup>186</sup>

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177. *Id.*

178. *Id.*

179. *See, e.g.*, Jonathan P. Solomon, *Resolving RESPA’s § 8(b) Circuit Split*, 73 U. CHI. L. REV. 1487, 1494–95 (2006) (classifying the Eleventh Circuit as a court “that treat[s] all unilateral charges the same”).

180. *Hazewood v. Found. Fin. Group, L.L.C.*, 551 F.3d 1223, 1225 (11th Cir. 2008) (“RESPA § 8(b) does not provide a cause of action for excessive fees . . .”); *Moody v. Commonwealth Land Title Ins. Co.*, 284 F. App’x 735, 735 (11th Cir. 2008) (same); *Morrisette v. Novastar Home Mortgage, Inc.*, 284 F. App’x 729, 729 (11th Cir. 2008) (same); *Williams v. Countrywide Home Loans, Inc.*, 284 F. App’x 724, 724 (11th Cir. 2008) (same); *Friedman v. Market Street Mortgage Corp.*, 520 F.3d 1289, 1291 (11th Cir. 2008) (same); *Krupa v. Landsafe, Inc.*, 514 F.3d 1153, 1157 (11th Cir. 2008) (referring to section 8(b) as “RESPA’s anti-markup provision”).

181. *See supra* note 180.

182. *Friedman*, 520 F.3d 1289.

183. *Id.* at 1291–92.

184. *Id.* at 1291.

185. *Id.*

186. *Id.* at 1292.

The court ultimately held that “subsection 8(b) does not govern excessive fees because it is not a price control provision.”<sup>187</sup> In rejecting the plaintiff’s argument that HUD’s interpretation should be accorded *Chevron* deference, the court found that section 8(b) does not apply to overcharge fees.<sup>188</sup> In essence, the court reasoned that as long as some services are actually performed, then section 8(b) does not apply to a given fee.<sup>189</sup> The court believed that a contrary reading would require courts to parse out what portions of a given fee are reasonable and what portions are unreasonable.<sup>190</sup> Finally, the court reasoned that the legislative history of RESPA supports its interpretation because Congress chose to enact the Brock Bill (which opted not to directly regulate closing costs) instead of the Proxmire Bill (which proposed the direct regulation of closing costs).<sup>191</sup>

The Eleventh Circuit reiterated its interpretation in *Hazewood v. Foundation Financial Group L.L.C.*,<sup>192</sup> stating, “§ 8(b) does not provide a cause of action for excessive fees—that is, charges where a service was performed, but the plaintiff feels she was overcharged by the service provider.”<sup>193</sup> Furthermore, “a plaintiff must allege that ‘no services were rendered in exchange for a settlement fee’”<sup>194</sup> and that “[w]here the fee is for services actually rendered, there is no [section 8](b) violation.”<sup>195</sup>

## 2. *The Interpretations of the Second Circuit*

### a. *Kruse v. Wells Fargo Home Mortgage, Inc.*

In *Kruse v. Wells Fargo Home Mortgage, Inc.*, the Second Circuit addressed how section 8(b) should apply to both markup fees and overcharge fees.<sup>196</sup> First, the plaintiffs alleged that the defendant had overcharged them for underwriting services by charging them twenty-five times more than the \$20 it had cost the defendant to perform these services.<sup>197</sup> Second, the plaintiffs alleged that the defendant had outsourced several settlement services to various third-party service providers and subsequently marked up their respective fees.<sup>198</sup>

The court began its analysis by considering the overcharge fee claim, concluding that “section 8(b) clearly and unambiguously does not

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187. *Id.* at 1296.

188. *Id.* at 1296–97.

189. *Id.* at 1297.

190. *Id.* (citing *Kruse v. Wells Fargo Home Mortgage, Inc.*, 383 F.3d 49, 56 (2d Cir. 2004)).

191. *Id.* at 1297–98. For a discussion of the differences between the Brock Bill and the Proxmire Bill, see *supra* Part II.A.

192. 551 F.3d 1223 (11th Cir. 2008).

193. *Id.* at 1225 (citing *Friedman*, 520 F.3d at 1296).

194. *Id.* (quoting *Friedman*, 520 F.3d at 1298).

195. *Id.* (quoting *Krupa v. Landsafe, Inc.*, 514 F.3d 1153, 1157 (11th Cir. 2008)).

196. 383 F.3d 49, 55–62 (2d Cir. 2004).

197. *Id.* at 53.

198. *Id.*

extend to overcharges.”<sup>199</sup> In so holding, the court rejected the plaintiffs’ and HUD’s reasoning that “the amount by which a fee (or ‘charge’) for a service exceeds the ‘reasonable value’ of the service provided in return is the ‘portion, split, or percentage’ of the charge that is ‘other than for services actually performed.’”<sup>200</sup> In the court’s view, the plain language of section 8(b) does not authorize a court to break fees down into “reasonable” and “unreasonable” components.<sup>201</sup> Thus, irrespective of the amount, so long as a fee is paid for settlement services that are actually rendered, the fee is not within the prohibitions of section 8(b).<sup>202</sup> Although likely superfluous dicta, the court goes on to note that its holding is supported by RESPA’s legislative history.<sup>203</sup>

In assessing the markup fee claim, the court began with a plain language analysis of section 8(b).<sup>204</sup> First, the court thoroughly discussed the two possible interpretations of the phrase “no person shall give and no person shall accept” in light of prior decisions from the Fourth, Seventh, Eighth, and Eleventh Circuits.<sup>205</sup> The court soundly reasoned that because both interpretations are plausible readings of the provision, section 8(b) is ambiguous as to whether Congress intended it to proscribe markup fees.<sup>206</sup> Without further attempt to employ any other mechanism of statutory interpretation, the court proceeded to discuss the level of deference that should be accorded to HUD’s 2001 Policy Statement.<sup>207</sup>

Of all the circuits to consider whether *Chevron* deference should be accorded to HUD’s 2001 Policy Statement, the Second Circuit undertook the most thorough analysis.<sup>208</sup> The court pointed out four reasons why HUD’s interpretation of section 8(b) in its 2001 Policy Statement should be accorded *Chevron* deference.<sup>209</sup> The court noted that (1) Congress has delegated authority to HUD,<sup>210</sup> (2) the 2001 Policy Statement was the result of the agency’s “careful consideration . . . over a long period of time,”<sup>211</sup> (3) “HUD plainly possesses expertise regarding the market for

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199. *Id.* at 56.

200. *Id.* at 55–56.

201. *Id.* at 56.

202. *Id.*

203. *Id.* at 56–57 (discussing how Congress’s choice to not enact the Proxmire Bill supports the conclusion that section 8(b) was not intended to proscribe overcharge fees).

204. *Id.* at 57–58.

205. *Id.* (citing *Sosa v. Chase Manhattan Mortgage Corp.*, 348 F.3d 979, 982–83 (11th Cir. 2003); *Haug v. Bank of Am., N.A.*, 317 F.3d 832, 836 (8th Cir. 2003); *Krzalic v. Republic Title Co.*, 314 F.3d 875, 879 (7th Cir. 2002); *Boulware v. Crossland Mortgage Corp.*, 291 F.3d 261, 265–66 (4th Cir. 2002)).

206. *Id.* at 58.

207. *Id.* at 58–59.

208. *Id.* at 58–62.

209. *Id.* at 59–61.

210. *Id.* at 59–60 (citing 12 U.S.C. § 2617(a) (2000); *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001); 2001 Policy Statement, *supra* note 11).

211. *Id.* at 60–61 (quoting *Barnhart v. Walton*, 535 U.S. 212, 222 (2002)).

federally related home mortgage loans,”<sup>212</sup> and (4) other circuits have deferred to the 2001 Policy Statement regarding yield spread premiums.<sup>213</sup>

After determining that HUD’s 2001 Policy Statement is entitled to *Chevron* deference with respect to markup fees, the court necessarily remanded the case for further proceedings.<sup>214</sup> It is important to note that the court expressed its view that the plaintiffs’ claim would still turn on whether the defendant had performed any additional services in consideration for the alleged markup fees.<sup>215</sup> In the opinion of the Second Circuit, the fact finder must determine whether services were actually rendered as a condition precedent to determining whether an alleged markup fee violates section 8(b).<sup>216</sup>

b. *Cohen v. JP Morgan Chase & Co.*

In *Cohen v. JP Morgan Chase & Co.*, the Second Circuit was afforded the opportunity to consider section 8(b)’s application to purely unearned fees charged by a single culpable party, and ultimately deferred to HUD’s interpretation.<sup>217</sup> In *Cohen*, the plaintiffs alleged that the defendants had violated section 8(b) by charging them a \$225 post-closing fee for which no services were provided.<sup>218</sup> Because the plaintiffs specifically alleged that the defendant had rendered no services,<sup>219</sup> the court was squarely confronted with a purely unearned fee charged by a single culpable party.<sup>220</sup> As the district court granted the defendant’s motion to dismiss, the Second Circuit accepted this allegation as true and, for the reasons to be discussed, vacated the dismissal.<sup>221</sup>

The court reached its conclusion that section 8(b) prohibits undivided unearned fees through a thorough application of the *Chevron* analysis.<sup>222</sup> As the court had previously held that section 8(b) applies to the actions of a single service provider in regards to markup fees,<sup>223</sup> it here considered whether “the words ‘portion,’ ‘split,’ and ‘percentage’” in section 8(b) unambiguously reflect a congressional intent that unearned fees must be divided between two parties.<sup>224</sup> After a detailed analysis of the definitions of these terms and their applications in other

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212. *Id.* at 61 (citing *Barnhart*, 535 U.S. at 222; *Schuetz v. Banc One Mortgage Corp.*, 292 F.3d 1004, 1012 (9th Cir. 2002)).

213. *Id.* at 61 (citing *Heimmermann v. First Union Mortgage Corp.*, 305 F.3d 1257, 1264 (11th Cir. 2002); *Schuetz*, 292 F.3d at 1014; *Glover v. Standard Fed. Bank*, 283 F.3d 953, 962–63 (8th Cir. 2002)).

214. *Id.* at 61–62.

215. *Id.* at 62.

216. *See id.*

217. 498 F.3d 111, 113 (2d Cir. 2007).

218. *Id.* at 113–14.

219. *Id.*

220. *See supra* Part II.B.1.

221. *Cohen*, 498 F.3d at 113.

222. *Id.* at 116–26.

223. *Id.* at 115 n.3 (citing *Kruse v. Wells Fargo Home Mortgage, Inc.*, 383 F.3d 49, 57–58 (2d Cir. 2004); *Sosa v. Chase Manhattan Mortgage Corp.*, 348 F.3d 979, 983 (11th Cir. 2003)).

224. *Id.* at 116–20.

statutes, the court reasoned that the issue boiled down to “whether use of the expansive modifier ‘any’ in conjunction with all three words gives rise to ambiguity regarding Congress’s intent with respect to section 8(b)’s prohibition on undivided unearned fees.”<sup>225</sup> The court found that, on the one hand, these terms connote a division of a fee and, on the other hand, “Congress’s serial reference to ‘any portion, split, or percentage of any charge’ in § 8(b) can plausibly be construed to demonstrate a legislative intent to sweep broadly, prohibiting all unearned fees, however structured.”<sup>226</sup> Therefore, the court logically concluded that the statutory text of section 8(b) is ambiguous as to whether an unearned fee must be split between two parties.<sup>227</sup>

The court next considered whether section 8(b)’s “structure, purpose, and history” resolved this ambiguity.<sup>228</sup> The court first concluded that “[b]ecause the structure of the statute does not speak unambiguously to Congress’s intent with respect to undivided unearned fees, it cannot resolve textual ambiguity.”<sup>229</sup> Next, the court determined that RESPA’s stated purpose did not resolve the ambiguity either.<sup>230</sup> Finally, upon an examination of RESPA’s legislative history, the court held that section 8(b)’s ambiguity was still not resolved.<sup>231</sup>

Ultimately, the court deferred to HUD’s interpretation that section 8(b) prohibits undivided unearned fees.<sup>232</sup> The court did so because it found that RESPA explicitly delegated authority to HUD to promulgate rules and also because HUD’s interpretation was reasonable.<sup>233</sup> In finding that HUD’s interpretation was reasonable, the court pointed to its prior determination that section 8(b) can “plausibly be construed to sweep broadly, prohibiting unearned fees regardless of whether or not they are divided.”<sup>234</sup>

### 3. *The Interpretation of the Third Circuit*

In *Santiago v. GMAC Mortgage Group, Inc.*, the Third Circuit also had the opportunity to decide whether section 8(b) prohibits both mark-up fees and overcharge fees.<sup>235</sup> The plaintiff first alleged that the defendant had violated section 8(b) by charging him “an \$85.00 tax service fee [and] a \$20.00 flood certification” fee when these services were out-

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225. *Id.* at 120.

226. *Id.* (quoting 12 U.S.C. § 2607(b)).

227. *Id.*

228. *Id.* at 120–24 (quoting *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 600 (2004)).

229. *Id.* at 121.

230. *Id.* at 122.

231. *Id.* at 122–24 (noting its reluctance to find any statute’s legislative history conclusive at step one of the *Chevron* analysis).

232. *Id.* at 125–26.

233. *Id.* at 124–25 (citing 12 U.S.C. § 2617 (2006); *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001)).

234. *Id.* at 125.

235. 417 F.3d 384, 385 (3d Cir. 2005).

sourced to a third-party service provider at a lower cost.<sup>236</sup> Second, the plaintiff also alleged that the defendant had violated section 8(b) by charging him “a \$250.00 funding fee” when “the reasonable value of the funding service was \$20.00.”<sup>237</sup>

The court began its analysis by stating that it must first look to the plain language of the statute to determine the intent of Congress.<sup>238</sup> The court then noted that under *Chevron* it must decide whether to defer to HUD’s 2001 Policy Statement if the statute is ambiguous.<sup>239</sup> The court first faced the issue of the alleged overcharge fees and held that “Section 8(b) does not include a cause of action for overcharges.”<sup>240</sup> In so holding, the court rejected the plaintiff’s contention that “Section 8(b) provides that an overcharge occurs when the settlement service provider charges the consumer a fee, of which only one portion is a fee for the reasonable value of ‘services rendered,’” and that “[t]he other portion of the fee, the amount in excess of the reasonable value, is essentially a fee for ‘no services rendered.’”<sup>241</sup> The court reached its determination by relying on the familiar concern that if section 8(b) prohibits overcharge fees, courts would be forced to determine which portions of a given fee were reasonable and which were unreasonable.<sup>242</sup> The court further reasoned that if “unreasonable” charges were actionable under section 8(b), Congress would likely have considered and defined what constitutes an “unreasonable” fee.<sup>243</sup> Because the court concluded that section 8(b) unambiguously does not apply to overcharge fees, it found that “it is not necessary for us to reach the question whether HUD’s interpretation warrants deference.”<sup>244</sup>

Next, the court considered markup fees, which it ultimately concluded are unambiguously prohibited under section 8(b) from being charged by a single settlement service provider.<sup>245</sup> Oddly enough, the court reached this conclusion by first discussing the two conflicting interpretations of the phrase “[n]o person shall give and no person shall accept,” finding that “[b]oth . . . textual interpretation[s] . . . are plausible readings of the statutory language.”<sup>246</sup> The court, however, never ex-

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236. *Id.* at 386.

237. *Id.*

238. *Id.* (citing *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984)).

239. *Id.* (citing *Chevron*, 467 U.S. at 842–43).

240. *Id.* at 386–88.

241. *Id.* at 387.

242. *Id.*

243. *Id.*

244. *Id.*

245. *Id.* at 388–89.

246. *Id.* at 388 (citing *Sosa v. Chase Manhattan Mortgage Corp.*, 348 F.3d 979, 982 (11th Cir. 2003) (“The ‘and’ in subsection 8(b) therefore operates to create two separate prohibitions . . . .”); *Haug v. Bank of Am., N.A.*, 317 F.3d 832, 836 (8th Cir. 2003) (“Section 8(b) is an anti-kickback provision that unambiguously requires at least two parties to share a settlement fee in order to violate the statute.”); *Krzalic v. Republic Title Co.*, 314 F.3d 875, 879 (7th Cir. 2002) (“The statutory language describes a situation in which *A* charges *B* (the borrower) a fee of some sort collects it, and then either

plained how section 8(b) could be unambiguous despite these conflicting interpretations. Rather, the court simply concluded that because reading section 8(b) as prohibiting markup fees is plausible, the plaintiff had stated a valid cause of action.<sup>247</sup> The only ancillary support the court offered for its holding was that because section 8 is entitled “Prohibition against kickbacks and unearned fees” and section 8(a) is entitled “Business referrals,” section 8(b) must be “meant to provide for a situation other than kickbacks.”<sup>248</sup>

The court did offer some dicta regarding the level of deference that should be accorded to HUD’s 2001 Policy Statement.<sup>249</sup> The court specifically voiced its disagreement with the Second Circuit’s decision to accord *Chevron* deference to HUD’s 2001 Policy Statement.<sup>250</sup> The court stated that even if it had concluded that section 8(b) was ambiguous, it would have deferred to HUD’s interpretation as “persuasive under *Skidmore*.”<sup>251</sup> According to the Third Circuit, a court does not need to consider whether *Chevron* deference is warranted if it finds that deference is warranted under *Skidmore*.<sup>252</sup> Finally, the court deemed HUD’s interpretation to be persuasive authority because it “reflects both agency expertise and consideration and is neither contrary to the language of the statute nor an unreasonable interpretation.”<sup>253</sup> The court did not address the fact that the 2001 Policy Statement was issued in the absence of a formal notice and comment procedure and might thus be deserving of some lesser degree of deference.

#### IV. RECOMMENDATION

Before discussing whether section 8(b) proscribes the charging of markup fees and overcharge fees, it must first be determined whether the provision should be interpreted as applying to the actions of a single culpable party. As the acts of marking up settlement service fees and overcharging for settlement service fees can only be performed by a single party, they cannot fall within the prohibitions of section 8(b) if it is properly interpreted as only applying to actions involving two culpable parties. Thus, this Section first discusses whether an offense under sec-

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splits it with *C* or gives *C* a portion or percentage . . . of it.”); *Boulware v. Crossland Mortgage Corp.*, 291 F.3d 261, 266 (4th Cir. 2002) (“The use of the conjunctive ‘and’ indicates that Congress was clearly aiming at an exchange or transaction, not a unilateral act.”)).

247. *Id.* at 388–89.

248. *Id.* at 389 (quoting 12 U.S.C. § 2607 (2000)).

249. *Id.* at 389 n.4.

250. *Id.* (citing *Kruse v. Wells Fargo Home Mortgage, Inc.*, 383 F.3d 49, 58–61 (2d Cir. 2004)).

251. *Id.* (citing *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)).

252. *Id.* (citing *Bonneville Int’l Corp. v. Peters*, 347 F.3d 485, 490 (3d Cir. 2003) (“Because we find that the [agency’s] interpretation is persuasive even under the less demanding standard of *Skidmore* deference, we need not go on to parse out whether *Chevron* deference should, in fact, be accorded the [agency’s] regulation here.”)).

253. *Id.* (citing *United States v. Mead Corp.*, 533 U.S. 218, 234 (2001)).

tion 8(b) requires two culpable parties before exploring its specific application to markup fees and overcharge fees.

*A. Section 8(b) Should Be Interpreted as Prohibiting the Charging of Purely Unearned Fees by a Single Culpable Party*

*1. The Statutory Language of Section 8(b) Is Clearly Ambiguous as to Congress's Intent*

As indicated by the divergent and conflicting interpretations by the courts of appeals, there are two distinct yet plausible ways that the plain language of section 8(b) may be read.<sup>254</sup> On the one hand, the phrase “[n]o person shall give and no person shall accept” can reasonably be interpreted as requiring that one culpable party give an unearned fee and another culpable party accept the fee in order for the statute to be violated.<sup>255</sup> On the other hand, this phrase can also be read as prohibiting two unique actions (i.e., the giving of an unearned fee *and* the receiving of an unearned fee).<sup>256</sup> As such, the language of section 8(b) is ambiguous as to whether Congress intended it to apply to only one of these two scenarios or whether it intended the statute to apply to both.

Additionally, the phrase “any portion, split, or percentage of any charge” can be plausibly read in two distinct ways.<sup>257</sup> First, the terms “portion,” “split,” and “percentage” can be read as requiring that a fee must be divided or shared between two culpable parties in order to constitute a violation.<sup>258</sup> Alternately, the use of the word “any” to modify these terms can reasonably be read to include undivided fees either given or received by a single culpable party.<sup>259</sup> For example, if a single culpable party receives one hundred percent of a purely unearned fee, that party has nonetheless received a “percentage” of that unearned fee. As section 8(b) references “*any* . . . percentage of *any* charge,” it can plausibly be read as including one hundred percent of an unearned fee.<sup>260</sup> These conflicting interpretations demonstrate that the statutory language of section 8(b) is ambiguous.

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254. See *supra* note 44 and accompanying text.

255. *Boulware v. Crossland Mortgage Corp.*, 291 F.3d 261, 265–66 (4th Cir. 2002).

256. *Sosa v. Chase Manhattan Mortgage Corp.*, 348 F.3d 979, 982 (11th Cir. 2003).

257. 12 U.S.C. § 2607(b) (2006); see also *Cohen v. JP Morgan Chase & Co.*, 498 F.3d 111, 116–20 (2d Cir. 2007).

258. See *Krzalic v. Republic Title Co.*, 314 F.3d 875, 879 (7th Cir. 2002).

259. See *Cohen*, 498 F.3d at 116–20.

260. 12 U.S.C. § 2607(b) (emphasis added).

2. *RESPA's Structure, Purposes, and Legislative History Are Not Dispositive as to Congress's Intent*

a. Section 8's Structure Is Not Dispositive as to Congress's Intent

As two plausible interpretations of section 8 exist, the structure of the provision is not dispositive for purposes of determining whether Congress intended section 8(b) to proscribe the charging of purely unearned fees by a single culpable party.<sup>261</sup> On the one hand, there is a strong argument that by titling section 8(b) “Splitting charges,” Congress intended that a fee must be shared between two parties in order to constitute a violation.<sup>262</sup> It is equally plausible, however, that in order for section 8(b)'s prohibitions to be distinct from those of section 8(a), Congress must have intended section 8(b) to encompass situations other than those involving two culpable parties.<sup>263</sup> As such, the structure of section 8 as a whole cannot be said to conclusively resolve section 8(b)'s ambiguity in regards to whether it prohibits purely unearned fees from being charged by a single culpable party.<sup>264</sup>

b. RESPA's Stated Purposes Are Not Dispositive as to Congress's Intent

Likewise, RESPA's stated purposes are not dispositive as to whether Congress intended section 8(b) to prohibit purely unearned fees from being charged by a single culpable party.<sup>265</sup> For example, in RESPA's “Congressional findings and purpose” section, Congress specifically states that it “finds that significant reforms in the real estate settlement process are needed to insure that consumers . . . are protected from unnecessarily high settlement charges caused by certain abusive practices.”<sup>266</sup> It is hard to argue that a single service provider charging a fee for which no services have been rendered is not an “abusive practice[]” that “unnecessarily” increases settlement costs.<sup>267</sup> Equally persuasive is the counter argument that RESPA specifically states that “the elimination of kickbacks or referral fees” is one of its purposes, without referencing any fee capable of involving only a single culpable party.<sup>268</sup> Again, as RESPA's stated purposes can be interpreted in two divergent ways, they prove to not be dispositive in clearing up section 8(b)'s ambiguity as to

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261. See *Cohen*, 498 F.3d at 121.

262. See *id.*

263. See *id.*

264. See *id.* at 121–22.

265. See 12 U.S.C. § 2601.

266. *Id.* § 2601(a).

267. *Id.*; see also *Cohen*, 498 F.3d at 122 (“[T]he prohibition of [purely unearned fees charged by a single culpable party] is consistent with RESPA's overall goal to protect consumers from ‘abusive practices’ that result in ‘unnecessarily high settlement charges.’” (citing 12 U.S.C. § 2601(a))).

268. 12 U.S.C. § 2601(b).

whether it prohibits purely unearned fees from being charged by a single culpable party.<sup>269</sup>

c. RESPA's Legislative History Is Not Dispositive as to Congress's Intent

Finally, the legislative history of RESPA's enactment is also not dispositive for purposes of determining whether Congress intended section 8(b) to prohibit the charging of purely unearned fees by a single culpable party.<sup>270</sup> First, it is arguable that prohibiting purely unearned fees charged by a single culpable party fits squarely within RESPA's goal of addressing "[a]busive and unreasonable practices within the real estate settlement process that increase settlement costs to home buyers without providing any real benefits to them."<sup>271</sup> Again, it is hard to argue that a party charging a fee for which no services have been rendered does not constitute an "abusive and unreasonable practice[]." <sup>272</sup>

Alternately, in its discussion of RESPA's "Prohibition Against Kickbacks and Unearned Fees," the Banking, Housing, and Urban Affairs Committee explained in detail several examples of fees that it intended RESPA to proscribe.<sup>273</sup> Nowhere did the committee reference any fees capable of being charged by a single culpable party. Nevertheless, it is impossible to conclude that by not including an example of an unearned fee capable of being charged by a single culpable party, Congress clearly intended section 8(b) to only apply to unearned fees involving two culpable parties.<sup>274</sup> As such, the legislative history behind RESPA's enactment is not dispositive as to Congress's intent regarding purely unearned fees charged by a single culpable party.

3. *Courts Should Defer to HUD's Formally Promulgated Regulation*

As HUD's formally promulgated regulation specifically address unearned fees charged by a single culpable party,<sup>275</sup> the debate over the level of deference that should be accorded to its 2001 Policy Statement is completely irrelevant. The Supreme Court has mandated that "administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to

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269. See *Cohen*, 498 F.3d at 122.

270. See *id.* at 122–24.

271. S. REP. NO. 93-866 (1974), reprinted in 1974 U.S.C.C.A.N. 6546, 6547.

272. *Id.*

273. *Id.*, reprinted in 1974 U.S.C.C.A.N. 6546, 6551–52 (discussing "referral fee arrangements" and "kickbacks, rebates, [and] unearned commissions," payments involving two culpable parties).

274. See *Cohen*, 498 F.3d at 122–24 ("Pension Benefit does not permit us to conclude, merely from the absence of an example of undivided charges in RESPA's legislative history, that Congress thereby expressed its clear intent that § 8(b) not protect consumers from any unearned fees except those reflected in divided charges." (citing *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 649 (1990))).

275. See 24 C.F.R. § 3500.14(c) (2009).

the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.”<sup>276</sup> HUD’s regulation with respect to section 8(b) specifically states that “[a] charge by *a person* for which no or nominal services are performed or for which duplicative fees are charged is an unearned fee and *violates this section*.”<sup>277</sup> Therefore, when a single culpable party (i.e., “a person”) charges a purely unearned fee (i.e., “[a] charge . . . for which no . . . services are performed”), that party has violated section 8(b).<sup>278</sup> Because this regulation was officially promulgated pursuant to authority clearly granted to HUD by Congress,<sup>279</sup> it qualifies for absolute deference under *Chevron*.<sup>280</sup> Thus, as section 8(b) is ambiguous as to whether Congress intended to prohibit purely unearned fees charged by a single culpable party,<sup>281</sup> HUD’s formally promulgated regulation should be deferred to and section 8(b) should be interpreted as proscribing purely unearned fees charged by a single culpable party.

*B. Section 8(b) Should Not Be Interpreted as Prohibiting Overcharge Fees*

Although section 8(b) should be interpreted as prohibiting purely unearned fees from being charged by a single culpable party,<sup>282</sup> it should not be further interpreted as prohibiting a single culpable party from overcharging for services actually performed. Even though the plain language of section 8(b) likely does not permit this improper interpretation, it cannot be said that the argument supporting this interpretation is completely meritless. Thus, the plain language of section 8(b) is arguably ambiguous as to overcharge fees. Regardless, the legislative history of RESPA forecloses any notion that Congress intended section 8(b) to apply to overcharge fees.<sup>283</sup>

*1. The Plain Language of Section 8(b) Is Arguably Ambiguous in Regards to Overcharge Fees*

As an initial matter, the statutory language employed in section 8(b) seems to make it perfectly clear that the provision only applies to

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276. *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001).

277. 24 C.F.R. § 3500.14(c) (emphasis added).

278. *Id.*

279. 12 U.S.C. § 2617(a) (2006) (“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.”); *see also id.* § 2602(6) (“[T]he term ‘Secretary’ means the Secretary of Housing and Urban Development.”).

280. *Mead Corp.*, 533 U.S. at 226–27.

281. *See supra* Parts IV.A.1–2.

282. *See supra* Part IV.A.

283. *See S. REP. NO. 93-866* (1974), *reprinted in* 1974 U.S.C.C.A.N. 6546, 6547–50 (discussing how the Banking, Housing, and Urban Affairs Committee opted for the Brock Bill instead of the Proxmire Bill).

“charge[s] made or received . . . other than for services actually performed.”<sup>284</sup> Therefore, if services are performed in connection with a settlement service charge, the provision has not been violated. It is no surprise that every circuit that considered whether overcharge fees are prohibited by section 8(b) concluded that they are not.<sup>285</sup>

Though this reading of the provision appears to be the proper interpretation, it cannot conclusively be said that a different interpretation is completely meritless. Under the alternate reading, the phrase “any portion, split, or percentage of any charge” should be read in conjunction with the phrase “other than for services actually performed.”<sup>286</sup> To use a familiar example, if a settlement service provider charges a customer \$200 for a credit check that cost it \$15 to run, the \$185 overcharge is arguably a “portion . . . or percentage of [a] charge made” that is not for “services actually performed.”<sup>287</sup> The plausibility of this reasoning seems to be bolstered if viewed in light of the sensibilities of the average person. It seems highly unlikely that, if confronted with the previous scenario, the average person would conclude that the \$185 overcharge was an “earned” fee. Therefore, as both readings of section 8(b)’s language seem to be plausible, the language of the provision is arguably ambiguous and its legislative history should be considered.

2. *The Legislative History of RESPA Forecloses Any Notion that Section 8(b) Was Intended to Prohibit Overcharge Fees*

If RESPA’s legislative history conclusively establishes anything about Congress’s intent, it is that Congress did *not* intend RESPA to be a price control measure to prohibit overcharge fees.<sup>288</sup> No other inference can be drawn from the fact that the Brock Bill was enacted in lieu of the Proxmire Bill.<sup>289</sup> In deciding how to mitigate increasing settlement costs to home buyers, Congress specifically chose *not* to adopt the approach of “regulat[ing] closing costs directly, that is to provide for legal maxima on the charges which may be imposed for services incident to real estate settlements.”<sup>290</sup> Furthermore, the Committee considering the Brock Bill, which was eventually enacted as RESPA, specifically noted that “[federal rate regulation of real estate settlement charges] at the present time is

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284. 12 U.S.C. § 2607(b) (2006).

285. See *Hazewood v. Found. Fin. Group, L.L.C.*, 551 F.3d 1223, 1225 (11th Cir. 2008) (holding that section 8(b) does not prohibit a single lender from charging overcharge fees); *Santiago v. GMAC Mortgage Group, Inc.*, 417 F.3d 384, 387 (3d Cir. 2005) (same); *Kruse v. Wells Fargo Home Mortgage, Inc.*, 383 F.3d 49, 57 (2d Cir. 2004) (same); *Haug v. Bank of Am., N.A.*, 317 F.3d 832, 836 (8th Cir. 2003) (same); *Krzalic v. Republic Title Co.*, 314 F.3d 875, 880–81 (7th Cir. 2002) (same); *Boulware v. Crossland Mortgage Corp.*, 291 F.3d 261, 267–68 (4th Cir. 2002) (same).

286. See *Santiago*, 417 F.3d at 387 (quoting 12 U.S.C. § 2607(b)).

287. 12 U.S.C. § 2607(b).

288. See S. REP. NO. 93-866, reprinted in 1974 U.S.C.C.A.N. 6546, 6546–50.

289. See *id.*, reprinted in 1974 U.S.C.C.A.N. 6546, 6547–50.

290. *Id.*, reprinted in 1974 U.S.C.C.A.N. 6546, 6548.

*unwarranted.*”<sup>291</sup> Thus, there is no way to reasonably argue that Congress intended section 8(b) to prohibit overcharge fees, and the level of deference owed to HUD’s interpretation of section 8(b) in regards to them is not of any particular importance. As such, section 8(b) should *not* be interpreted as prohibiting the charging of overcharge fees by a single culpable party.

*C. The Determination of Whether a Specific Markup Fee Violates Section 8(b) Should Be Made on a Case-by-Case Basis*

Finally, upon concluding that section 8(b) is open to violation by a single culpable party<sup>292</sup> and that its prohibitions should not apply to overcharge fees,<sup>293</sup> it necessarily follows that a given markup fee only violates the plain language of section 8(b) if no services are rendered in connection with the fee.<sup>294</sup> Thus, upon deferring to HUD’s interpretation that section 8(b) prohibits unearned fees from being charged by a single culpable party, there is no need to further debate the level of deference that should be accorded to HUD’s views about markup fees as expressed in its 2001 Policy Statement. It is likely that the marked-up component of a settlement service fee constitutes a “portion . . . or percentage of [a] charge made,” but the plain language of section 8(b) further requires that this “portion . . . or percentage” not be “for services actually performed.”<sup>295</sup> Therefore, if a settlement service provider has provided additional services in relation to its charging of a marked-up fee, then the charging of the markup fee does not violate section 8(b). Conversely, if a settlement service provider has not provided additional services in relation to its charging of a marked-up fee, then the charging of the markup fee does violate section 8(b).

For example, when a settlement service provider outsources a given service to a third-party provider, it typically provides additional services in the form of logistical arrangements.<sup>296</sup> The settlement service provider must contact the third-party provider, communicate information regarding the service to be performed, and coordinate service arrangements with the third-party provider. In consideration for these services, the settlement service provider marks up the fee of the third-party provider. In a situation such as this, one cannot argue that the markup fee is a “charge made . . . other than for services actually performed.”<sup>297</sup>

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291. *Id.*, reprinted in 1974 U.S.C.C.A.N. 6546, 6549 (emphasis added).

292. *See supra* Part IV.A.

293. *See supra* Part IV.B.

294. *See* 12 U.S.C. § 2607(b) (2006).

295. *Id.*

296. *See Sosa v. Chase Manhattan Mortgage Corp.*, 348 F.3d 979, 984 (11th Cir. 2002) (“[E]ven if [the defendant] could not be credited with the actual delivery, [the defendant] benefitted the borrowers by arranging for third party contractors to perform the deliveries.”).

297. 12 U.S.C. § 2607(b).

On the other hand, situations may exist where a settlement service provider provides no services in relation to a markup fee that it charges. For example, a settlement service provider and a third-party provider may have automated the transactions that comprise their relationship. When a given service is needed, the task would be automatically forwarded to the third-party provider and when the service is completed, the end result would be automatically forwarded back. Here, a strong argument exists that when the original service provider marks-up the third-party provider's fee, it has accepted a "portion . . . or percentage of [a] charge made . . . other than for services actually performed."<sup>298</sup>

As these two situations illustrate, there is no way to establish a bright-line rule as to whether section 8(b) prohibits all markup fees. The plain language of section 8(b) requires a case-by-case determination of whether the alleged markup fee was received by the settlement service provider "other than for services actually performed."<sup>299</sup> This determination should turn on a careful examination of the facts specific to each alleged markup fee.<sup>300</sup> If services have been performed, then section 8(b) has not been violated. To interpret the statute otherwise would be to improperly construe RESPA as a price control statute.<sup>301</sup>

## V. CONCLUSION

Section 8(b) of RESPA should therefore be interpreted as prohibiting the charging of purely unearned fees by a single service provider regardless of whether the fee is split or shared with a second culpable party. Also, section 8 should further be interpreted as prohibiting markup fees only in situations where a settlement service provider has provided no additional services in consideration for the marked-up component of the fee. Finally, section 8(b) should *not* be interpreted as prohibiting single settlement service providers from overcharging for their services because Congress clearly did not intend RESPA to operate as a price control measure.

It is important to point out that the resolution proposed by this Note would likely not operate to mitigate the expenses associated with the typical real estate settlement in any significant way. As section 8(b) should not be interpreted as proscribing overcharge fees, the prudent real estate settlement service provider could merely opt to refrain from marking up fees from third-party service providers and simply transpose these costs into the fees it charges for services actually rendered. At the

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298. *Id.*

299. *Id.*

300. *See* Kruse v. Wells Fargo Home Mortgage, Inc., 383 F.3d 49, 62 (2d Cir. 2004) ("Of course, whether the plaintiffs will be able to establish that the defendants in fact charged fees for services 'without performing any additional services'—indeed, precisely what 'providing additional settlement services' means in the context of this case—are questions that the district court may be required to address in the first instance on the basis of the factual record that is developed before it.").

301. *See supra* Part IV.B.2.

No. 3]                   RESPA, HUD, AND THE § 8(b) CIRCUIT SPLIT                   1117

end of the day, consumers will pay the same total price for their real estate settlements and the prudent service provider will have avoided potential liability.

If Congress chooses to act upon the calls for federal action in response to the recent collapse of the American housing market, either new legislation must be enacted or RESPA must be completely overhauled. The simple fact is that RESPA was enacted over thirty years ago in response to “[a]busive and unreasonable practices” that existed at that unique point in time.<sup>302</sup> Thus, it remains largely inapplicable to the recent abusive and unreasonable practices that may have led to the current state of the American housing market. Nonetheless, as RESPA is the only existing federal remedial statute pertaining to residential real estate settlements, its proper interpretation remains particularly relevant.

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302. S. REP. NO. 93-866 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6546, 6547.

