

**National Reverse Mortgage Lenders Association
("NRMLA")
Questions and Answers**

**Part-Time "Employees" of HECM Loan Originators:
Selected RESPA Section 8, FHA, and State Law Issues**

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1. **What is a HECM loan?** A HECM loan is an FHA-insured home equity conversion reverse mortgage loan ("HECM"). It generally permits seniors 62 years old or older to convert part of the equity in their homes into tax-free payment streams without having to sell their homes. All HECM loans are reverse mortgages. However, not all reverse mortgages are HECM loans.
2. **Do other types of reverse mortgages exist?** Yes. There are at least two other types of reverse mortgages currently offered by reverse mortgage loan originators: the Financial Freedom CashAccount Loan and the Fannie Mae HomeKeeper Loan.
3. **Who may originate a HECM loan?** Only an FHA-Approved Mortgagee or Loan Correspondent (a "HECM Loan Originator") may originate a HECM Loan. Among other requirements, a HECM Loan Originator also must be licensed to originate mortgage loans in the states in which it operates, unless otherwise exempt from such state law licensing requirements.
4. **Are the Answers to these Questions applicable only to HECM Loans?** No. Some of these Answers (other than those directly related to FHA requirements) may be applicable in whole or in part to other forward or reverse conventional single-family residential mortgage loans. However, all of these Answers are applicable to HECM Loans, and they have been prepared for consideration by the HECM Loan Originators that are Members of the National Reverse Mortgage Lenders Association.
5. **May part-time HECM Loan Originator employees originate HECM Loans?**
Yes.
6. **Are there "special considerations" that come into play when HECM Loan Originator employees are part-time employees of the Originator rather than its full-time employees?** Yes. There are "special considerations," particularly if those part-time employees also are engaged in the sale or origination of other real estate settlement services financial products such as insurance ("Related Financial Products") and particularly if the purchase of such Related Financial Products by a senior is made possible in whole or in part by the application of HECM Loan proceeds in a contemporaneous transaction.

7. **Are there “special advantages” to HECM Loan Originators in having employees rather than independents contractors or agents originate HECM loans?** Yes. There are “special advantages” (under applicable RESPA Section 8, FHA and law regulations, among others) to HECM Loan Originators in having employees (even if they work for the Originator only on a part-time basis), rather than independent contractors or agents, originating HECM Loans.
8. **What are those “special advantages”?** Generally, the RESPA Section 8, FHA and state law regulations applicable to such employee arrangements are less restrictive or more flexible than those applicable to independent contractor or agent arrangements for the origination of HECM loans.
9. **Are there “special requirements” that HECM Loan Originators must meet in order to help assure that their loan origination personnel are considered to be and appropriately classified as their employees rather than their independent contractors or agents?** Yes. There are “special requirements” under applicable RESPA Section 8, FHA, and state law regulations that must be met by HECM Loan Originators originating HECM loans through their employees rather than through their independent contractors or agents.
10. **Do these Questions and Answers describe everything that HECM Loan Originators should know about the “special considerations,” “special advantages,” and “special requirements” that are applicable to part-time employees of HECM Loan Originators?** Surely you jest. HECM Loan Originators need to secure advice that is tailored to their particular facts and circumstances from competent and experienced professionals before Originators enter into arrangements with part-time employees for the origination of HECM loans.
11. **What are the RESPA Section 8 restrictions?** RESPA Section 8 generally prohibits any person from giving or receiving a fee, kickback or any thing of value in return for referral of settlement service business including HECM loans. In addition, RESPA Section 8 generally prohibits fee splitting and unearned fees except for services actually performed. We refer to those provisions as the “RESPA Section 8 Restrictions.” The RESPA Section 8 Restrictions are broad, and the violation of them can result in the imposition of federal criminal penalties.
12. **What is the RESPA Section 8 “special advantage” to HECM Loan Originators in having employees rather than independents contractors or agents originate HECM loans?** Payments by an employer, including a HECM Loan Originator, generally may be made to its employee without regard to the RESPA Section 8 Restrictions. Payments by a HECM Loan Originator to its independent contractors and agents generally are subject to the RESPA Section 8 Restrictions.
13. **Does RESPA Section 8 define who is an employee?** Unfortunately, no. The term “employee” is not expressly defined under RESPA Section 8 or in its implementing Regulation X issued by HUD.

14. **Are there, nevertheless, “special requirements” under RESPA Section 8 that HECM Loan Originators should meet to help assure that their loan origination personnel are considered to be and classified as their employee rather than their independent contractors or agents?** Yes. Informal past HUD guidance about this issue suggests that persons compensated only by commissions that are relatively high in relation to the HECM loan origination services they provide; who devote only sporadic or relatively limited time to such loan origination activities; and who operate relatively free of supervision and control by the HECM Loan Originator, are more likely to be considered to be and classified as independent contractors or agents of the HECM Loan Originator rather than its employee.
15. **Is there other HUD guidance about the RESPA Section 8 “special requirements for part-time employees?”** Yes. Some time ago HUD proposed (but did not make effective) a revision to Regulation X that compensation paid by an employer to its *bona fide* employees” would be free of the RESPA Section 8 Restrictions. In its commentary to its proposal, HUD indicated that, among other things, it sought to bar the payment of compensation to part-time employees for referrals. HUD further stated that “sham employment arrangements,” such as a title company paying a one hour “salary” to a real estate agent who provides a referral, and issuing a W-2 form reflecting its payment to the real estate agent for the employment services rendered in making the referral, would violate the RESPA Section 8 Restrictions. Recent HUD RESPA enforcement actions also have focused on similar alleged sham employment arrangements.
16. **Is there an FHA “special requirement” that those who originate HECM loans for HECM Loan Originators be their employees rather than their independent contractors or agents?** Generally, yes. The FHA generally requires that persons who perform HECM loan origination work be employees of a HECM Loan Originator.
17. **Does the FHA define who is an employee?** Not well or clearly.
18. **Are there, nevertheless, FHA “special requirements” that HECM Loan Originators should meet to help assure that their loan origination personnel are considered to be and classified as their employees rather than their independent contractors or agents?** Yes, some. HUD Handbook 4000.4 suggests that Mortgagees need to withhold taxes, social security, pension, health benefit, and other deductions from their employees’ compensation. HUD Handbook 4060.1 advises that Mortgagees must exercise control and responsible management supervision over their employees, including, at a minimum, regular and ongoing reviews of performance. Additionally, the Handbook provides that all employees, with the exception of receptionists, must be employed exclusively by the Mortgagee and must conduct only the business affairs of the mortgagee during normal business hours.

19. **Are there FHA “special requirements” for part-time employees of HECM Loan Originators?** Yes. Mortgagee Letter 96-18 (April 16, 1996) provides that Mortgagee employees (other than receptionists, appraisers, inspectors or other technical staff) “may not work for more than one company engaged in the real estate finance business at the same time. This also includes working as a real estate agent or broker as well as originating or underwriting loans for more than one lending institution.” Mortgagee Letter 94-39 (August 9, 1994) permits Mortgagees to have part-time employees, but does not permit those part-time employees “to have additional employment (including self-employment) in the mortgage or real estate industry.”
20. **Are there other federal law definitions of an “employee” that can be of some help?** Yes, but only in a limited way. The Internal Revenue Service (“IRS”) “right of control” test has been applied in a variety of contexts, including those involving income tax, unemployment compensation, and labor law issues. Under this IRS approach, greatly simplified, an employer-employee relationship generally exists if the employer has the right to control not only the result of the work, but also the details of and the means by which the result is to be accomplished. It generally is not necessary for the employer actually to exercise such control, as long as the employer has the right to do so. In contrast, if the worker remains independent in determining how to accomplish his or her work, the worker will likely be considered to be an independent contractor.
21. **Is compliance with the IRS “right of control” test by a HECM Loan Originator sufficient to assure that the “special advantages” the flow from employment arrangements will be available to it?** No. The IRS test describes factors the IRS will consider to determine whether an employer-employee relationship exists for federal employment tax purposes, as well as certain other tax-related purposes. Neither HUD nor the FHA formally has adopted it for their purposes.
22. **Considering both the “special requirements” of RESPA Section 8 and the FHA, is there general guidance that may be provided to HECM Loan Originators that seek to have their loan origination personnel considered to be and appropriately classified as employees?** Yes, some. A key consideration for the HECM Loan Originator would be to exercise significant control and supervision over such personnel and their HECM loan origination work. Such personnel must be employed by only one HECM Loan Originator, and not otherwise be employed in the real estate settlement services industry. Compensation on a W-2 basis is strongly preferred. The employment relationship should be fully documented in writing.
23. **Do state law “special considerations” apply to HECM Loan Originators?** Yes. Many states require HECM Loan Originators to be licensed as mortgage lenders or mortgage brokers unless they exempt them from such state requirement.
24. **Do state law “special considerations” apply to individuals who originate HECM loans as employees of HECM Loan Originators or independent contractors or**

agents? Yes. Many states require employees and independent contractors or agents of HECM Loan Originators to be licensed as loan officers.

25. What activities trigger such state law licensing “special requirements”?

Generally, engaging in mortgage broker activities. For example, in Florida, a HECM Loan Originator employee who accepts loan applications or negotiates the terms or conditions of a mortgage loan is considered a mortgage broker and must be licensed.

26. How do state mortgage broker laws define an employee? A state-specific review is necessary to answer this question. For example, in Ohio, an employee is a person for whom the mortgage broker, in addition to paying wages, pays social security and unemployment taxes, provides workers’ compensation and withholds local, state, and federal income taxes. In Oklahoma, an employee is a person who has an employment relationship acknowledged by both the employee and the mortgage broker and who is treated as an employee by the mortgage broker for federal income tax purposes.

27. Are there any “special advantages” under state mortgage broker laws in having employees rather than independents contractors or agents originate HECM loans? Yes, in many states. Certain states specifically exempt employees of licensed mortgage brokers from the requirement to be individually licensed. The exemption may apply to all employees or only to certain kinds of employees.

28. How may a HECM Loan Originator make sure this “special advantage” is available? A HECM Loan Originator acting as a mortgage broker must become familiar with applicable state licensing laws prior to contracting with or otherwise compensating an employee, particularly if the employee has a significant level of involvement in the origination of HECM loans.

29. Do some states require that loan officers be “bona fide” employees of a HECM Loan Originator? Yes. Some states require an employee to be a “bona fide” employee in order to qualify for the “special advantage” of being exempt from individual licensure. For example, in Virginia, the failure to withhold taxes from compensation paid to persons making mortgage loan referrals may demonstrate that such persons are not “bona fide” employees but independent contractors. In Virginia, a mortgage broker who compensates unlicensed independent contractors without withholding taxes is subject to license revocation and may be referred to prosecuting and taxing authorities.

30. Is withholding funds for the payment of federal income taxes a key “special requirement” under state mortgage broker laws? Yes, in some states, but not all. For example, in Arkansas, an employee is defined as an individual who is employed by a mortgage broker, whether by employment contract, agency, or other arrangement and *regardless* of whether the individual is treated as an employee for purposes of compliance with the federal income tax laws. In Florida, the key “special requirement” appears to be whether the employee is subject to the right of control by the mortgage broker.

31. **Can a part-time HECM Loan Originator employee qualify for the “special advantage” of being exempt from state law licensing requirements?** In some states. For example, in Wyoming, persons employed by or under contract with a mortgage broker on a full-time basis generally are exempt from licensure. Persons who are employed on a part-time basis by or under contract with no more than one mortgage broker generally also are exempt, provided that any fees paid by borrowers are paid to the mortgage broker and not to the employee.
32. **Do all HECM Loan Originator employees have to obtain an individual state license?** No. In some states, HECM Loan Originators and their employees may be exempt from otherwise applicable licensing requirements. In some states, HECM Loan Originators may pay compensation to certain kinds of unlicensed employees. For example, employees whose activities are ministerial or clerical in nature (which may include those who gather mortgage loan information, quote available interest rates or loan terms and conditions, word process, send correspondence or assemble files) need not obtain a loan originator or similar individual state license.
33. **Should a HECM Loan Originator be concerned about applicable state law loan officer employee and independent contractor licensing requirements?** Yes. In some states, a loan officer may not need an individual license if the loan officer is an employee of a HECM Loan Originator. However, an independent contractor may need an individual license in that state. Paying compensation to a loan officer who is an independent contractor or whom the state classifies as an independent contractor, who does not have the license required by an independent contractor because the HECM Loan Originator inappropriately considered the person to be its employee, may subject the HECM Loan Originator to state administrative and/or criminal penalties, and could lead to the loss of its approval as a HECM Loan Originator by the FHA and violate RESPA Section 8 Restrictions.
34. **Do other laws affect part-time HECM Loan Originator employees who originate HECM Loans?** Yes, there are many state and federal laws that affect compensation and activities of part-time HECM Loan Originator employees. Such laws include, for example, employment laws, labor laws, wage and hour laws and tax laws. State and federal laws that impose disclosure requirements also need to be considered. In addition, particularly in connection with the activities of part-time employees also involved in the offering of Related Financial Products to seniors, federal and state consumer protection laws that punish or bar fraudulent, misleading, unfair or deceptive practices, are particularly important, though not reviewed in these Questions and Answers.
35. **What is the National Reverse Mortgage Lenders Association’s “parting advice” to HECM Loan Originators with regard to part-time HECM Loan Originator employees?** Be conservative. Be cautious. Protect seniors and their interests.

Secure professional advice before engaging part-time employees, particularly if they also are engaged in offering Related Financial Products to seniors and particularly if those products are paid in whole or in part with the proceeds of a HECM loan in a contemporaneous transaction. Make sure that seniors understand the multiple roles such part-time employees may play, and understand their rights to purchase or not purchase Related Financial Products. Comply with applicable RESPA Section 8 Restrictions and FHA requirements. Assure that state law licensing requirements for the HECM Loan Originator and its part-time employees are honored, and that other licensing requirements that may be applicable to such part-time employees involved in the offering of Related Financial Products are honored as well.