

K&L GATES

AMERICAN LAND TITLE ASSOCIATION

A Compliance And Survival Guide To The
**REAL ESTATE SETTLEMENT
PROCEDURES ACT**

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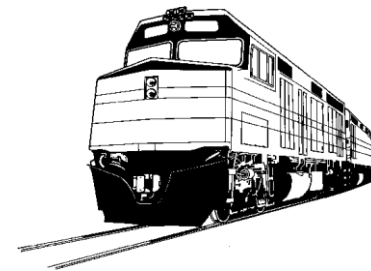
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INTRODUCTION

Real Estate Settlement Procedures Act (RESPA)

- Most important and most controversial statute affecting settlement service industry
- Statute defies BUSINESS LOGIC
- Why is RESPA important for my business?
 - Criminal penalties and fines
 - Treble damages
 - Loss of license, reputation

Real Estate Brokers and Mortgage Companies Occupy 1st Class Seats on the Train to Homeownership



1. Uniquely situated at the Crossroads
2. Real estate brokers and mortgage companies find themselves Referrers of settlement service business
3. Title/escrow companies are Referees of settlement service business

Outline for Today's Session

1. RESPA Primer
 - Section 8(a) Anti-Kickback Provisions
 - Section 8(b) Splitting of Unearned Fees
2. Exceptions
 - Affiliated Business Arrangements
 - Section 8(c)(2)
3. Penalties and Enforcement
4. Section 9 Sellers and Title Insurance
5. RESPA Compliance Quiz

RESPA Primer

- Early 70s mortgagees and title companies approach Congress
- Result: Real Estate Settlement Procedures Act
 - Passed 1974
 - Consumer disclosure and anti-kickback act

Consumer Disclosure Law

- **Idea:** Give Buyers and Sellers full disclosure of costs of transaction
- Disclosures
 - GFE
 - Special Information Booklets
 - HUD-1 Settlement Statements
- **Recent Additions**
 - Servicing transfer information
 - Escrow Information
 - Full disclosure Mortgage Broker Fees

Section 8(a) - Anti-Kickback Provisions

ANTI-KICKBACK LAW

1. **Idea:** Eliminate abusive practices such as payment of kickback fees which drive up cost of product to consumers
2. 5 Elements of a Section 8(a) kickback

Section 8(a) says it is illegal to Give or Receive any: (i) **thing of value** pursuant to (ii) **an agreement or understanding** to (iii) **refer** (iv) **settlement services**, in connection with (v) **a federally related mortgage loan**

Anti-kickback Law (cont'd)

- i. **Federally Related Mortgage Loan** = Any loan secured by a first or subsequent lien on a 1 – 4 family residential property

includes

- ✓ Refinances
- ✓ Purchase money mortgages
- ✓ Second liens
- ✓ ARMs
- ✓ Reverse mortgages
- ✓ Interest only mortgages

excludes

- ✓ Commercial loans
- ✓ Construction loans
- ✓ Temporary financing
- ✓ Property over 25 acres
- ✓ Business purpose loans

ANTI-KICKBACK LAW (CONT'D)

- ii. **Settlement Services** = Anything done by Title Agents; Attorneys; Real Estate Agents; Mortgage Brokers; Banks
 - Title searches
 - Credit reports / appraisals
 - Origination of loans
 - Title insurance, etc.

ANTI-KICKBACK LAW (CONT'D)

- iii. **Referral** = Any conduct intended to influence the selection of a **particular** settlement service provider
- iv. **Agreement or Understanding** = Need not be in writing or even articulated or verbalized – may include a practice or course of action where the receipt of a **THING OF VALUE** is understood
 - Wink, wink

Anti-kickback Law (cont'd)

v. **Thing of Value** = Broadly defined to be virtually anything one receives in consideration for making a referral

- \$
- Trips
- Fax machines
- Free advertising
- Commissions
- Discounts
- Computer
- VIAGRA
- Property
- Low interest loans
- Ipods
- Football tickets

IMPORTANT: ALL 5 ELEMENTS MUST BE PRESENT. ANY ONE MISSING: Not a violation of RESPA

Section 8(b) – Splitting of Unearned Fees

SPLITTING FEES MAY ALSO BE A PROBLEM SECTION 8(B) SAYS

No person shall give . . . No person shall accept a split or percentage in connection with a real estate settlement service **other than for services rendered**

A referral is not required to violate Section 8(b).

CIRCUIT COURTS SPLIT ON FEE SPLITTING

1. 4 Circuit Courts (7, 4, 8 and 5) say if you don't split mark-up = no violation of 8(b)
2. 3 Circuit Courts (11, 2 and 3) say if you mark up a third-party fee without doing any service = violation of 8(b)
3. HUD adds its 2¢
 - 2001 Statement of Policy

CIRCUIT COURTS SPLIT ON FEE SPLITTING

(CONT'D)

4. HUD Statement of Policy

- i. 2 or more persons split a fee for settlement service where fee is unearned
- ii. One settlement service provider marks up cost of service performed by another
- iii. One settlement service provider charges a fee where **no nominal or duplicative** work is done, or the fee is in **excess** of the reasonable value of the services actually performed

CIRCUIT COURTS SPLIT ON FEE SPLITTING

(CONT'D)

5. Nearly every court rejects HUD's (iii) point

- Courts say a direct charge by a settlement service provider that is not a mark-up of a third-party vendor fee is not covered by RESPA

6. Compliance with Section 8(b) dependent on where you do business

- given criminal sanctions
- given treble damages
- Supreme Court needed to decide the issue

FREEMAN V. QUICKEN LOANS

- Split in the Circuit Courts resolved by the U.S. Supreme Court during 2012 term
- Charging a fee for no services does not constitute a violation of Section 8(b)?
- Defendants charged a discount fee that allegedly did not reduce the interest rate
- Court sided with Defendant and held that two or more parties must split an unearned fee to violate Section 8(b)

Section 8(c) – Exceptions to RESPA Anti-Kickback Provisions

EXCEPTIONS - SECTION 8(C)

Congress recognized certain exceptions where paying a referral fee is ok

- To an Attorney for services actually performed
- By a Title Company to its duly appointed Title Agent for services performed in issuance of a title policy
- By a Lender to its duly appointed Agent
- Cooperative Agreements between listing and selling agents

EXCEPTIONS - SECTION 8(C) (CONT'D)

Congress recognized certain exceptions where paying a referral fee is ok (cont'd)

- Payments by Employer to Employee
- Section 8(c)(2) payments for services rendered or goods/facilities actually provided
- Secondary Market Transactions
- Affiliated Business Arrangements

AFFILIATED BUSINESS ARRANGEMENTS (AFBAS) EXCEPTION

A. AfBAs

1. Prior to 1983 affiliations unlawful
2. Example: ABC Mortgage Company
 - Real estate broker A and B, and mortgage company C form ABC Mortgage Company
3. 1983 RESPA Act amendments
 - 4-part Safe Harbor Test

AFFILIATED BUSINESS ARRANGEMENTS

(AFBAS) EXCEPTION (CONT'D)

B. 1992 RESPA Regulations Give Distinct Advantages to AfBAs

1. Employer may pay Employee for any referral activities
2. Discounts or rebates to consumers to entice them to use AfBAs are permitted

AFFILIATED BUSINESS ARRANGEMENTS **(AFBAS) EXCEPTION** (CONT'D)

C. 1996 HUD Policy Statement

1. HUD addresses abuses
2. 10 factors considered to determine bona fide AfBAs
3. Need not meet all 10 factors
4. Weigh factors to determine if AfBA is bona fide

Affiliated Business Arrangements (AfBAs)

Exception (cont'd)

D. Elements of a Lawful AfBA

1. Capitalization
2. Employees
3. Management
4. Separate Space
5. Core Services
6. Contracting out services
7. Who receives contracts
8. How contracts priced
9. Competing in marketplace
10. Exclusivity with owners

ELEMENTS OF SECTION 8(C)(2)

- RESPA Does Not Prohibit Payments for Goods Provided and/or Services Performed
 - Goods/Services must be actual, necessary and distinct
 - Payment must be commensurate with the value of goods/services

TWO EXAMPLES

A. Marketing and Service Agreements

1. Perform actual marketing services
2. Pay fair market value for marketing services

B. Office Rental Agreements

1. Provide actual office space
2. Pay fair market value rent for office space

Section 8(d) – Penalties and Enforcement

RESPA – STATUTORY PENALTIES AND ENFORCEMENT

A. Section 8(d):

A person that violates Section 8 of RESPA could face:

1. Fine of up to \$10,000 and/or one year imprisonment
 - rare however
2. Treble damages in class actions
 - biggest fear for mortgage lenders
3. Government actions to enjoin violations
 - CFPB
 - State attorney generals

CONSUMER FINANCIAL PROTECTION BUREAU - PENALTIES

B. CFPB Has Its Own Weaponry

1. Nuclear arsenal includes:
 - Rescission
 - Refunds
 - Restitution
 - Damages
 - Unjust enrichment
 - Public notification
2. Enforcement authority beyond original statutes
3. Civil money penalties

SECTION 9 – SELLERS AND TITLE INSURANCE

1. Seller cannot require a buyer to purchase title insurance from a particular title company
2. However if seller pays for title insurance, then seller can require use of a particular title insurance company
 - What if seller only pays for owner's title policy issued by its preferred title company?
 - At least one court says an economic incentive for buyer to purchase lender's policy from seller's title company does not amount to required use.
3. If a seller violates Section 9, it is liable to the buyer in an amount equal to 3 times all charges paid by the buyer for title insurance.

RESPA Compliance Quiz

RESPA Pop Quiz for Real Estate Agents, Lenders, Title Agents and Wayward Souls

* * * SCORING * * *

- 0 – 2 Get yourself fitted for prison garb
- 3 – 4 Still susceptible to visit from RESPA Police
- 5 - 6 Impressive
- 7 What are you trying to do? Put me out of business?

RESPA POP QUIZ FOR REAL ESTATE AGENTS, LENDERS, TITLE AGENTS AND WAYWARD SOULS (CONT'D)

1. A real estate agent agrees to buy an interest in a joint venture title agency, along with 10 other agents. However, the real estate agent never refers any business to this title company. What can they do to the real estate agent?
 - a. Put a provision in the Operating Agreement that allows the title company to remove partners that refuse to refer business.
 - b. Nuttin Honey. They're stuck with the real estate agent for life.
 - c. The venture can buy the agent out, if they offer the agent at least twice what the agent paid for his interest.

RESPA POP QUIZ FOR REAL ESTATE AGENTS, LENDERS, TITLE AGENTS AND WAYWARD SOULS (CONT'D)

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 - b. Nuttin Honey. They're stuck with the real estate agent for life.

RESPA POP QUIZ FOR REAL ESTATE AGENTS, LENDERS, TITLE AGENTS AND WAYWARD SOULS (CONT'D)

2. A title agent tells her former customers that if they refer a friend or relative to the title agent, and that friend or relative obtains a title policy from the title agent, the title agent will give that former customer \$250. RESPA violation?
- a. No. While RESPA prohibits paying a thing of value to settlement service providers, the Act does not prohibit paying consumers.
 - b. Yes. Act says no person shall receive a thing of value for referral of business, and that includes former customers.
 - c. Tough call. Most customers can't remember the name of their title agent ten minutes after closing, and besides, most title agents don't seem to have any friends.

RESPA POP QUIZ FOR REAL ESTATE AGENTS, LENDERS, TITLE AGENTS AND WAYWARD SOULS (CONT'D)

2. A title agent tells her former customers that if they refer a friend or relative to the title agent, and that friend or relative obtains a title policy from the title agent, the title agent will give that former customer \$250. RESPA violation?
 - b. Yes. Act says no person shall receive a thing of value for referral of business, and that includes former customers.

RESPA POP QUIZ FOR REAL ESTATE AGENTS, LENDERS, TITLE AGENTS AND WAYWARD SOULS (CONT'D)

3. You're a real estate broker sponsoring a charity golf tournament. You ask a local lender to sponsor a hole-in-one contest for the outing. RESPA violation?
- a. Because it's a charitable event, no RESPA violation.
 - b. OK, if the lender is allowed to put up a sign advertising that his mortgage company is a sponsor of the event.
 - c. Not a RESPA violation, because those hole-in-one contests are rigged. No one ever wins.

RESPA POP QUIZ FOR REAL ESTATE AGENTS, LENDERS, TITLE AGENTS AND WAYWARD SOULS (CONT'D)

3. You're a real estate broker sponsoring a charity golf tournament. You ask a local lender to sponsor a hole-in-one contest for the outing. RESPA violation?
 - b. OK, if the lender is allowed to put up a sign advertising that his mortgage company is a sponsor of the event.

RESPA POP QUIZ FOR REAL ESTATE AGENTS, LENDERS, TITLE AGENTS AND WAYWARD SOULS (CONT'D)

4. A real estate agent wants to send out post cards advertising homes he is listing, so he contacts a local lender and offers to let them put their logo on the post card if the lender pays for the printing and mailing of the cards. RESPA violation?
- a. Sure, by paying the cost of printing and postage, the lender is providing the agent a thing of value with the hope the agent will refer him business.
 - b. No, the agent is providing the lender access to his customer base; in lieu of paying for that, the lender picks up the tab for cards.
 - c. Yes, it's a violation if the real estate agent requests payment from the lender, but if loan officer offers to pay, with no expectation of being reimbursed for expenses, not a violation.

RESPA POP QUIZ FOR REAL ESTATE AGENTS, LENDERS, TITLE AGENTS AND WAYWARD SOULS (CONT'D)

4. A real estate agent wants to send out post cards advertising homes he is listing, so he contacts a local lender and offers to let them put their logo on the post card if the lender pays for the printing and mailing of the cards. RESPA violation?
 - a. Sure, by paying the cost of printing and postage, the lender is providing the agent a thing of value with the hope the agent will refer the lender business.

RESPA POP QUIZ FOR REAL ESTATE AGENTS, LENDERS, TITLE AGENTS AND WAYWARD SOULS (CONT'D)

5. A real estate agent offers to sell a title agent the names and addresses of individuals that visit the real estate agent's open houses. The real estate agent asks \$10 per name, does not refer the individuals to the title agent, and gets paid the \$10 even if the individuals do not get a title policy from that title agent. RESPA violation?
- a. No. Sure, there is a thing of value being paid to the real estate agent, but since the agent is not recommending the title agent, no RESPA violation.
 - b. Yes, even if the real estate agent does not refer the individuals to the title agency, there is an agreement or understanding that the payment is for settlement service business (i.e., a mortgage loan).
 - c. Yes, RESPA prohibits a settlement service provider from divulging confidential personal information about customers.

RESPA POP QUIZ FOR REAL ESTATE AGENTS, LENDERS, TITLE AGENTS AND WAYWARD SOULS (CONT'D)

5. A real estate agent offers to sell a title agent the names and addresses of individuals that visit the real estate agent's open houses. The real estate agent asks \$10 per name, does not refer the individuals to the title agent, and gets paid the \$10 even if the individuals do not get a title policy from that title agent. RESPA violation?
- a. No. Sure, there is a thing of value being paid to the real estate agent, but since the real estate agent is not recommending the title agent, no RESPA violation.

RESPA POP QUIZ FOR REAL ESTATE AGENTS, LENDERS, TITLE AGENTS AND WAYWARD SOULS (CONT'D)

6. A builder insists that the buyer use a preferred attorney for closing services and a preferred title agency for title insurance. The builder requires the buyer to pay for both services. RESPA violation?
- a. Section 9 of RESPA prohibits a seller from requiring the use of a settlement agent or a title agent.
 - b. Section 9 of RESPA permits a seller to require the use of a title agent, but not a settlement agent.
 - c. The builder could avoid this issue altogether, if it paid for the cost of title insurance, but we know builders don't like to put their hands in their own pockets.

RESPA POP QUIZ FOR REAL ESTATE AGENTS, LENDERS, TITLE AGENTS AND WAYWARD SOULS (CONT'D)

6. A builder insists that the buyer use a preferred attorney for closing services and a preferred title agency for title insurance. The builder requires the buyer to pay for both services. RESPA violation?
- c. The builder could avoid this issue altogether, if it paid for the cost of title insurance.

RESPA POP QUIZ FOR REAL ESTATE AGENTS, LENDERS, TITLE AGENTS AND WAYWARD SOULS (CONT'D)

7. A mortgage company pays its loan officers \$100 for every title order that they refer to the mortgage company's affiliated title insurance company. Violation of Section 8 of RESPA?
- a. Yes. Section 8 of RESPA prohibits the payment of referral fees or kickbacks to any person that refers settlement service business.
 - b. No. As long as the loan officers are W-2 employees of the mortgage company, the mortgage company can pay referral fees to its loan officers.
 - c. Yes. \$100 is a valuable incentive to refer title insurance business, but if the mortgage company had only paid the loan officers \$25 for every title order they referred to the affiliated title company, there would be no RESPA violation.

RESPA POP QUIZ FOR REAL ESTATE AGENTS, LENDERS, TITLE AGENTS AND WAYWARD SOULS (CONT'D)

7. A mortgage company pays its loan officers \$100 for every title order that they refer to the mortgage company's affiliated title insurance company. Violation of Section 8 of RESPA?
 - b. No. As long as the loan officers are W-2 employees of the mortgage company, the mortgage company can pay referral fees to its loan officers.

QUESTIONS

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