

TIME TO REVIEW RESPA, SECTION 8 COMPLIANCE

IT IS NOT THE TIME TO LET SLIP
RESPA, SECTION 8(c) COMPLIANCE

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RESPA's Central Objective: Eliminate abusive practices that drive up consumer's costs

- ❖ Section 8 (a): Anti-kickbacks/referral fees
 - ❖ 5 elements of a Section 8(a) kickback
 - ❖ Give or receive
 - ❖ Anything of value
 - ❖ Pursuant to an agreement or understanding
 - ❖ To refer
 - ❖ Settlement services
 - ❖ In connection with a federally related mortgage loan

FURTHER PROTECTION FROM ABUSIVE FEE

❖ Splitting fees – Section 8(b)

❖ No person shall give and 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

8(c)'s Exceptions to 8(a)

Fees that are not referral fees:

1. Payment to attorneys for actual services rendered;
2. Payment by title company to its duly appointed agent for services actually performed in the issuance of a policy of title insurance, or a lender to its duly appointed agent for services actually performed in the making of a loan;
3. Payments pursuant to cooperative brokerage and referral arrangements or an agreement between real estate agents and brokers;
4. An employer's payment to its own employees for any referral activities; and
5. Transactions in the secondary market.

Two most commonly misunderstood exceptions

No. 1: Section 8(c)(2):

The payment to any person of a bona fide salary or compensation for goods or facilities actually furnished or for services actually performed (Section 8(c)(2))

- ❖ Marketing Services Agreement
- ❖ Administrative Services Agreement
- ❖ Desk/Office Rentals
- ❖ Shared Employee Agreements

EXCEPTIONS: SECTION 8(C)(4) Affiliated Business Arrangements (“AfBA”)

No. 2: AfBAs expressly permitted as long as:

- ❖ disclosure of the existence of the arrangement and a written estimate of the charge or range of charges generally made by the provider to which the person is referred (AfBA Disclosure form) is provided;
- ❖ consumer is not required to use the affiliated business; and
- ❖ the only "thing of value" received as a result of the arrangement is limited to a return on an ownership interest

EXCEPTIONS: SECTION 8(C)(4) AfBA

- ❖ RESPA provided AfBA disclosure form (Appendix D) must include:
 - ❖ a preliminary field allowing for identification of the consumer and the entity making the referral, the property address, and the date;
 - ❖ a notice and description of the business relationship between the affiliates and a notice of the potential financial benefit the referral may provide the referring party;
 - ❖ an acknowledgement with a line for signature by the consumer;

EXCEPTIONS: SECTION 8(C)(4) AfBA

- ❖ the estimated charges or range of charges for the settlement service; and
- ❖ a block paragraph with the following language and typography:

Set forth below is the estimated charge or range of charges for the settlement services listed. You are NOT required to use the listed provider(s) as a condition for [settlement on your loan on][or][purchase, sale, or refinance of] the subject property. THERE ARE FREQUENTLY OTHER SETTLEMENT SERVICE PROVIDERS AVAILABLE WITH SIMILAR SERVICES. YOU ARE FREE TO SHOP AROUND TO DETERMINE THAT YOU ARE RECEIVING THE BEST SERVICES AND THE BEST RATE FOR THESE SERVICES.

**SAUL EWING
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What about . . .

- Title JVs with an LLC investor made up of owner/broker and agents?
- Title JVs with agents investors?
- Title JVs with LO investors?
- Home Hazard Ins. JVs?
- Home warrant JVs?
- Relationships that provide consumers with a benefit/reward that can be used by you as an incentive?

Relevant Court Decisions and Consent Orders

In re JRHBW Realty, Inc., d/b/a RealtySouth and TitleSouth LLC

- ❖ CFBP Consent Order – 8(c)(4) Disclosure deficiencies
 - ❖ Did not use the format of Appendix D.
 - ❖ Did not use capital letters or another means of highlighting the fact that consumers could obtain similar settlement services from other providers.
 - ❖ Did not advise that customers were free to shop around for those services in a separate statement in disclosure.
 - ❖ Rather incorporated into the end of a list of descriptions of seven affiliated businesses, and was hidden in what appeared to be a second description of RealtySouth.
 - ❖ Disclosure form (given by RealtySouth) included marketing statements touting the benefit and value of the affiliated entities.
 - ❖ *"[w]e at RealtySouth believe our affiliates provide superior service, value, and convenience;" "we believe that our affiliates' charges are reasonable and are competitive with the amounts charge by other for the same services;" and "[w]ith competitive, reasonable rates, coupled with the smooth and efficient manner in which the transaction will be handled, the affiliates of RealtySouth are in a unique position to provide you with exceptional value and service in handling your transaction."*

In re JRHBW Realty, Inc., d/b/a RealtySouth and TitleSouth LLC

- ❖ Found a Section 8(a) violation:
 - ❖ Violated Section 8(a) by affirmatively influencing the selection of TitleSouth through its designation in purchase contract;
 - ❖ A pattern and practice of “warm” referrals to TitleSouth, resulting in increased distributions to the entities' shared parent company. (This is controversial); and
 - ❖ Marketing through the Disclosure Statements.
 - ❖ Why:
 - ❖ AfBA disclosure requirements were not met
 - ❖ marketing statements were “beyond” a standard referral
 - ❖ Allowed CFPB to say the receipt of distributions from AfBA (generated from referral of business to the TitleSouth) was not exempted from 8(a) restrictions.

Courts Finding Ways to Forgive

Equitable Tolling: What's that about?

- **A Very Good Reason to Disclose MSA or other 8 (c)(2) relationships**
 - RESPA has 1 year SOL for Section 8 violations
 - RESPA claims may be subject to equitable tolling if plaintiffs can show that they failed to discover the violation within the statutory time period because of the defendants' fraudulent concealment
 - Plaintiffs argue that SOL period should not begin to run until they could have reasonably discovered the violation(s)

Equitable Tolling

- ***Anna Conover, et.al v. Patriot Land Transfer & Wells Fargo (U.S. Dist. Ct., New Jersey)***
 - Violations alleged to occur in 2014-Plaintiffs filed lawsuit in 2017
 - Plaintiffs argued they were unable to discover the violations, despite exercising reasonable diligence throughout the closing process
 - Court found-***“An allegation of ‘affirmative concealment’ goes beyond mere ‘non-disclosure’ and is, therefore, sufficient to state a claim for equitable tolling”***

Equitable Tolling

- ***Patrick Behr v. The Craig Northrop Team PC (U.S. Dist. Ct. Maryland)***
 - Violations alleged to have occurred in 2008, plaintiffs filed suit in 2013
 - Plaintiff alleges secret payments and concealment of kickbacks in title related MSA's and employment relationships
 - The Court determined that there was no way the plaintiffs could have discovered the alleged violation. According to Judge Quarles, the plaintiffs' attorneys learned of the sham marketing agreement during discovery in other litigation

Equitable Tolling

Edmonson v. Eagle National Bank; et al. (2019 appeal from Dist. MD, 1:16-cv-03938-RDB).

- Borrowers alleged that a title company paid several lenders “unearned fees and kickbacks” in exchange for referring the borrowers for its services. The borrowers further alleged that the title company made these payments through sham companies, which were set up to conceal the nature of the alleged kickback. Dismissed on SOL grounds based on Supreme Court case, *Menominee Indian Tribe of Wisconsin v. United States*, 136 S. Ct. 750 (2016).
- U.S. Court of Appeals for the Fourth Circuit revived five putative class actions, which alleged that certain lenders participated in referrals and “kickback schemes” in violation of RESPA.
 - ***Standard/test under the Menominee case is not applicable when plaintiff claims fraudulent concealment.***
 - Correct test: 1) affirmative acts of concealment by the defendant; 2) the plaintiff failed to discover the cause of action within the statutory period; and 3) despite the exercise of due diligence. The borrowers alleged that the title company concealed their causes of action by creating “sham” entities to funnel the kickbacks, which concealed their source.

The “Who” and “What” of AfBA Disclosure

- Meridian Title Investigation and Settlement
 - Some owners of the title agency were some of the owners of a title insurance underwriter (“Affiliated Underwriter”)
 - Algorithm used to select Affiliate Underwriter
 - Do those owners of both agency and Affiliate Underwriter have a conflict of interest?
 - CFPB: Must disclosure to provide consumers with ability to say “no” to Affiliated Underwriter

State Action On Prohibited Kickbacks

- **Washington State's Cease-and-Desist Order against Modus Technologies**

<https://www.geekwire.com/2021/seattle-real-estate-startup-modus-hit-cease-desist-order-insurance-commissioner/#:~:text=Modus%20digitizes%20and%20automates%20the%20title%20and%20escrow,that%20filed%20for%20an%20IPO%20earlier%20this%20month.>

- RCW 48.29.210: “A title insurer, title insurance agent, or employee, agent, or other representative of a title insurer or title insurance agent shall not, directly or indirectly, give any fee, kickback, or other thing of value to any person as an inducement, payment, or reward for placing business, referring business, or causing title insurance business to be given to either the title insurer, or title insurance agent, or both.”
- Allegations:
 - Engaging in an agreement, arrangement, scheme or understanding with Modus Title LLC designed to avoid state insurance regulations under Chapter 48 RCW and chapter 284-29 WAC;
 - Offering illegal inducements via its technology platform in violations of RCW 48.29.210;
 - Offering complimentary nontitle goods or services to producers of title insurance business in connection with Modus Title LLC; and
 - Offering complimentary or co-branded advertisements to producers of title insurance business in connection with Modus Title LLC.

Modus

- Modus Technologies, wholly owns Modus Title, and provide agents who referred business to Modus Title (and used the Modus Technologies' platform, which is also really Modus Title's platform), services and product.
- Take aways:
 - States are willing to read their statutes and regulations broadly to achieve the stated goal of prohibiting referral fees, kickbacks, and anti-advertising.
 - In, at least Washington, a parent company or affiliate of a title agency is the agency's "agent" and "representative" for purposes of interpreting statute/regs.
 - Providing services and/or products to a buyer can be interpreted as a referral fee or kickback to agent – especially when it benefits good will of agent.

Other Concerning Practices

- Paying real estate agents, attorneys or their spouses who are licensed title producers a commission for referrals coming from them or their spouses.
- MSA with real estate teams.
- AfBAs that violate state “controlled business” limitations.
- Warm hand-off referrals disguised with some form of “work share.”
- More referrals based on a “performance matrix.”
- Customer reward that is an impermissible real estate commission sharing.
- Subsidizing costs in return for referrals

Interesting Happenings

- South Carolina: real estate agents challenge legality of title agency joint ventures which have agents as investors.
 - Since only attorneys can issue title, the distribution to non-attorney investors is an illegal attorney fee kickback and/or unauthorized practice of law.
 - An aside: SC has strict requirements for its required AfBA Disclosures addressing title agency, mortgage lender or broker, and P&C insurance brokerage.
- Fair Lending and Fair Housing (+UDAAP) risks with affiliated lender/brokerages with real estate brokerage.
 - Disparity in referring potential buyers to lender
 - Disparity in handling purchase by ZO based on protected class membership
 - Disparity in handling purchase or listing/sale based on location of the property
 - Disparity in marketing or place ZO or ZL

SAUL EWING ARNSTEIN & LEHR LLP'S REAL ESTATE SETTLEMENT SERVICES GROUP

Saul Ewing has a team of attorneys dedicated to representing and counsel real estate settlement services industry clients, including mortgage lenders and brokers; mortgage loan servicers; real estate brokers and agent teams; title insurance underwriters and agents; P&C Insurance brokers, and appraisers, among others, in civil litigation/class actions, government investigations and enforcement action. Additionally, these lawyers also provide regulatory/compliance counseling to the aforementioned industry members, as well as fintech, proptech, and other tech companies that provides settlement services platforms, with start-up; joint ventures; affiliated business arrangements; licensing; debt and equity financing; and M&A transactions. The group has expertise in the CFPA's UDAAP Provisions; RESPA and Reg. X; TILA and Reg. Z; ECOA; FCRA; TCPA, FDCPA; FACTA; State Consumer Data Protection, Use, and Cyber Security regulations; HOEPA; Fair Foreclosure Acts; insurance rate issues and other statutory and common law consumer protection statutes.

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