

# RESPA Compliance: Understanding Things of Value and Referrals

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# Agenda

- Introductory Comments and RESPA Scope 1
- RESPA Section 8 Basics
  - Section 8(a) referral fee prohibition
  - Section 8(b) fee splitting prohibition
    - Tortured history
  - Section 8(c)(1)(B) title company specific exemption
  - Section 8(c)(1)(C) lender agent specific exemption
  - Section 8(c)(2) the general goods, facilities and services exemption
  - Section 8(c)(4) affiliated business arrangement exemption
- RESPA 8(c)(2) general goods, facilities and services exemption in practice
  - Bona fide aspect
  - CFPB Compliance Bulletin 2015-05—RESPA Compliance and Marketing Services Agreements—  
Issued October 2015 and rescinded October 2020
  - RESPA FAQs
    - General RESPA Section 8 guidance
    - Gifts and promotional activity
    - Marketing services agreements
      - Think advertising not marketing

## Introductory Comments and RESPA Scope

- RESPA was adopted in 1974 and became effective in 1975
  - HUD adopted Regulation X, and Dodd-Frank moved RESPA and Regulation X to the CFPB
- Initially the scope of RESPA was limited, but it now applies to most residential transactions that involve financing
  - Purchase money
  - Refinance
  - Home improvement
  - Home equity, both closed-end and open-end (although there are certain disclosure exemptions for open-end transactions subject to Regulation Z home equity line of credit requirements)
  - First or junior lien
- Certain exempted transactions
  - Loans primarily for a business, commercial or agricultural purpose—can look to Regulation Z for guidance
    - Investment property loans
  - Temporary financings
    - A construction only loan with a term less than two years
    - A bridge loan
  - A loan on vacant land, unless within two years a home is constructed or placed on the land using the loan proceeds

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## Referral Fee and Fee Splitting Prohibitions

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

## Fee Splitting Prohibition Tortured History

- In Regulation X, HUD sets forth its view 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 the fee splitting prohibition
- In Statement of Policy 2001-1, HUD interprets the prohibition to prohibit three separate actions:
  - Two or more persons split a fee for settlement services, any portion of which is unearned
  - 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
  - One service provider charges 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
- U.S. Supreme Court in *Freeman v. Quicken Loans* in 2012 rejects the broad interpretation of the fee splitting prohibition, finding that it only prohibits actual fee splits
  - RESPA is not the only law that can cover fees

## POLL QUESTION

**A local real estate agent hosts a group of clients for a golf tournament. They ask the title company to sponsor a hole. Is it OK?**

- Yes
- No
- Depends

## POLL QUESTION

**A local real estate agent hosts a group of clients for a golf tournament. They ask the title company to sponsor a hole. Is it OK?**

- Yes
- No
- **Depends**
  - Probably OK. Title company should make sure it can put signage up at hole and be present at the tournament, and it is paying to market its services.
  - Marketing value of sponsorship should be exposing your brand to attendees.



## Section 8(c)(1)(B) Title Company Specific Exemption

- Nothing in this section shall be construed as prohibiting (1) the payment of a fee . . . (B) by a title company to its duly appointed agent for services actually performed in the issuance of a policy of title insurance
- HUD 1996-4 Statement of Policy regarding core title services
  - Although technically applies to title practices in Florida, HUD indicates principles would apply generally
  - Need for title agency to perform core title services set forth:
    - The examination and evaluation, based on relevant law and title insurance underwriting principles and guidelines, of the title evidence to determine the insurability of the title being examined, and what items to include and/or exclude in any title commitment and policy to be issued
    - The preparation and issuance of the title commitment, or other document, that discloses the status of the title as it is proposed to be insured, identifies the conditions that must be met before the policy will be issued, and obligates the insurer to issue a policy of title insurance if such conditions are met
    - The clearance of underwriting objections and the taking of those steps that are needed to satisfy any conditions to the issuance of the policies
    - The preparation and issuance of the policy or policies of title insurance
    - The handling of the closing or settlement, when it is customary for title insurance agents to provide such services and when the agent's compensation for such services is customarily part of the payment or retention from the insurer

## Section 8(c)(1)(C) Lender Agent Specific Exemption

- Nothing in this section shall be construed as prohibiting (1) the payment of a fee . . . (C) by a lender to its duly appointed agent for services actually performed in the making of a loan
  - Mortgage brokers typically are independent contractors and not agents of the lender
- HUD Statement of Policy 1999-1 regarding lender payments to mortgage brokers, with clarifications in HUD Statement of Policy 2001-1

## Section 8(c)(2) General Goods, Services and Facilities Exemption

- Nothing in this section shall be construed as prohibiting . . . (2) the payment to any person of a bona fide salary or compensation or other payment for goods or facilities actually furnished or for services actually performed
- We will address this in more depth later

## Section 8(c)(4) *Affiliated Business Arrangement Exemption*

- Nothing in this section shall be construed as prohibiting . . . (4) affiliated business arrangements
- Three conditions apply:
  - A disclosure with specified information is provided at or before the time of the referral
  - No required use of affiliate, subject to limited exceptions
    - Attorney or law firm representing a client in a real estate transaction and has a related title agency
  - The only thing of value that is received from the arrangement, other than the payments permitted under RESPA Section 8, is a return on the ownership interest or franchise relationship
- HUD 1996-2 Statement of Policy sets forth how HUD would assess if an affiliated business arrangement qualifies for the exemption
  - Ten factors regarding formation, structure and operations of the entity
  - Four factors regarding distributions by the entity to owners
- U.S. Court of Appeals for Sixth Circuit in *Carter v. Wells-Bowen Realty* (2013) declines to follow the additional HUD conditions
  - Jurisdiction covers Kentucky, Michigan, Ohio and Tennessee

## Section 8(c)(2) General Goods, Services and Facilities Exemption in Practice

- Nothing in this section shall be construed as prohibiting . . . (2) the payment to any person of a ***bona fide*** salary or compensation or other payment for goods or facilities actually furnished or for services actually performed
  - Bona fide aspect
- CFPB Compliance Bulletin 2015-05—RESPA Compliance and Marketing Services Agreements—Issued October 2015 and rescinded October 2020
  - Be careful what you ask for, you may get it
- RESPA FAQs issued in conjunction with rescission of Compliance Bulletin 2015-05
  - General RESPA Section 8 guidance
    - Provides general guidance on RESPA scope, the referral fee prohibition, fee splitting prohibition and the general goods, services and facilities exemption
  - Gifts and promotional activity
  - Marketing services agreements

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## POLL QUESTION

**Can a title company give a real estate agent note pads with the title company's name on them?**

- Yes
- No
- Depends

## POLL QUESTION

**Can a title company give a real estate agent note pads with the title company's name on them?**

- **Yes**
  - Note pads with the title company's name on them likely would be considered normal promotional items and would not be prohibited under RESPA.
  - However, note pads with the real estate agent's name on them likely would violate RESPA as they would "defray" the real estate agent's marketing expenses.
- **No**
- **Depends**

## RESPA FAQs—Gifts and Promotional Activity

- Under RESPA Section 8, can a lender or other settlement service provider give a gift, refund, or discount to a consumer for using that lender or provider?
  - Generally, yes.
  - RESPA Section 8 does not prohibit a lender or other settlement service provider from giving a consumer a gift or an incentive (e.g., a discount, refund of fees, chance to win a prize, etc.) for doing business with that entity. However, RESPA Section 8 prohibits, for example, giving an incentive to a consumer in exchange for the consumer referring other business to that lender or other settlement service provider.
  - Other federal and state laws may also have restrictions that apply and should be consulted
- There is no actual exemption under RESPA or Regulation X for settlement service provider giving a thing of value to a consumer to select the provider
  - The informal position only applies to the consumer purchasing the settlement service
- With title insurance, state anti-inducement and anti-rebate insurance laws must be considered



## RESPA FAQs—Gifts and Promotional Activity

- The FAQs address the Regulation X promotional and educational activity exemption:
  - What conditions does Regulation X establish for gifts and promotions to be “normal promotional and educational activities” allowed under RESPA?
    - Regulation X allows “normal promotional and educational activities” directed to a referral source if the activities meet two conditions:
      - The activities are not conditioned on referral of business; and
      - The activities do not involve defraying expenses that otherwise would be incurred by the referral source
    - Whether a particular item or activity meets each of these two conditions is a factual question
      - Relevant factors regarding the first condition may include:
        - Whether the item or activity is targeted to referral sources
        - How often the item or activity is given to the referral source
      - A relevant factor regarding the second condition may include:
        - Whether the item or activity involves a good or service that the referral source would otherwise have to pay for themselves
- Common issue—continuing education for real estate agents
  - The FAQs include a scenario that likely qualifies for the exemption and a scenario that likely does not qualify

## RESPA FAQs—Marketing Services Agreements

- **What are marketing services agreements?**
  - Marketing services agreements, or “MSAs,” are agreements that commonly involve an arrangement where one person (or entity) agrees to market or promote the services of another and receives compensation in return. MSAs may involve only settlement service providers or may also involve third parties who are not settlement service providers. For example, an MSA exists when a mortgage loan originator agrees to market or promote the services of a real estate agent in return for compensation
  - A lawful MSA is an agreement for the performance of marketing services where the payments under the MSA are reasonably related to the value of services actually performed. 12 USC § 2607(c)(2); 12 CFR § 1024.14(g)(1)(iv). This is distinguished from an MSA that—whether oral, written, or indicated by a course of conduct, and looking to both how the MSA is structured and how it is implemented—involves an agreement for referrals. Unlike referrals, marketing services are compensable services under RESPA
  - Moreover, when a person performing settlement services receives payment for performing marketing services as part of a real estate transaction, the marketing services must be actual, necessary, and distinct from the primary services performed by the person. These marketing services cannot be nominal, and the payments cannot be for a duplicative charge or referrals

## RESPA FAQs—Marketing Services Agreements

- What is the distinction between referrals and marketing services for purposes of analyzing MSAs under RESPA Section 8?
  - Whether a particular activity is a referral or a marketing service is a fact-specific question for purposes of the analysis under RESPA Section 8(a)
    - Referrals include any oral or written action directed to a person where the action has the effect of affirmatively influencing the selection of a particular provider of settlement services or business incident thereto by a person paying a charge attributable to the service or business. 12 CFR § 1024.14(f)(1). For example, referrals include a settlement service provider directly handing clients the contact information of another settlement service provider that happens to result in the client using that other settlement service provider
  - In contrast, a marketing service is not directed to a person; rather, it is generally targeted at a wide audience. For example, placing advertisements for a settlement service provider in widely circulated media (e.g., a newspaper, a trade publication, or a website) is a marketing service
  - MSAs that involve payments for referrals are prohibited under RESPA Section 8(a), whereas MSAs that involve payments for marketing services may be permitted under RESPA Section 8(c)(2), based on the facts and circumstances of the structure and implementation

## RESPA FAQs—Marketing Services Agreements

- What are some examples of MSAs prohibited by RESPA Section 8?
  - MSAs can be unlawful when entered into based on their structure or can become unlawful based on how they are implemented. The Bureau's Office of Enforcement has identified violations of RESPA Section 8 in investigations that involved the use of oral or written MSAs. An MSA is or can become unlawful if the facts and circumstances show that the MSA as structured, or the parties' implementation of the MSA—in form or substance, and including as a matter of course of conduct—involves, for example:
    - An agreement to pay for referrals
    - An agreement to pay for marketing services, but the payment is in excess of the reasonable market value for the services performed
    - An agreement to pay for marketing services, but either as structured or when implemented, the services are not actually performed, the services are nominal, or the payments are duplicative
    - An agreement designed or implemented in a way to disguise the payment for kickbacks or split charges
- The settlement service industry went down the rabbit hole with marketing
  - Even today, a common shortcoming is lack of detail
  - Also, think advertising not marketing

# Thank you!

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