

**The Real Estate Settlement Procedures Act
(RESPA) and Enforcement Actions by the
Consumer Financial Protection Bureau
(CFPB)**

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Real Estate Settlement Procedures Act (RESPA)

Prohibition against Kickbacks and Unearned Fees

Section 8 of RESPA; 12 U.S.C § 2607

Section 8 of RESPA prohibits giving or receiving any fees, kickbacks or any "thing of value" for the referral of business in connection with real estate transactions involving certain residential mortgage loans. 12 U.S.C. § 2607(a) provides:

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.

Regulation X § 1024.14 Prohibition against Kickbacks and Unearned Fees.

(a) *Section 8 violation.* Any violation of this section is a violation of section 8 of RESPA (12 U.S.C. 2607).

(b) *No referral fees.* No person shall give and no person shall accept any fee, kickback or other thing of value pursuant to any agreement or understanding, oral or otherwise, that business incident to or part of a settlement service involving a federally related mortgage loan shall be referred to any person. Any referral of a settlement service is not a compensable service, except as set forth in § 1024.14(g)(1). A company may not pay any other company or the employees of any other company for the referral of settlement service business.

Real Estate Settlement Procedures Act (RESPA)

Prohibited Fee Splitting

Section 8 of RESPA; 12 U.S.C § 2607(b)

Section 8 also prohibits certain fee splitting unless the payment is for *services actually performed*. 12 U.S.C. § 2607(b) provides:

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 other than for services actually performed.

Reg. X § 1024.14(c) Prohibited Fee Splitting

...

(c) *No split of charges except for actual services performed.* 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 settlement service in connection with a transaction involving a federally related mortgage loan ***other than for services actually performed.*** 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. The source of the payment does not determine whether or not a service is compensable. Nor may the prohibitions of this part be avoided by creating an arrangement wherein the purchaser of services splits the fee.

(emphasis added).

Definitions of "Thing of Value"

RESPA

12 U.S.C. § 2602(2)

[T]he term “thing of value” includes any payment, advance, funds, loan, service, or other consideration;

Definitions of "Thing of Value"

Regulation X

Reg. X § 1024.14(d)

(d) *Thing of value.* This term is broadly defined in section 3(2) of RESPA (12 U.S.C. 2602(2)). It includes, without limitation, monies, things, discounts, salaries, commissions, fees, duplicate payments of a charge, stock, dividends, distributions of partnership profits, franchise royalties, credits representing monies that may be paid at a future date, the opportunity to participate in a money-making program, retained or increased earnings, increased equity in a parent or subsidiary entity, special bank deposits or accounts, special or unusual banking terms, services of all types at special or free rates, sales or rentals at special prices or rates, lease or rental payments based in whole or in part on the amount of business referred, trips and payment of another person's expenses, or reduction in credit against an existing obligation. The term "payment" is used throughout §§ 1024.14 and 1024.15 as synonymous with the giving or receiving of any "thing of value" and does not require transfer of money.

Definition of "Agreement or Understanding for the Referral of Business"

Reg. X § 1024.14(e)

(e) *Agreement or understanding.* An agreement or understanding for the referral of business incident to or part of a settlement service ***need not be written or verbalized*** but ***may be established by a practice, pattern or course of conduct.*** When a thing of value is ***received repeatedly*** and is ***connected in any way with the volume or value of the business referred,*** the receipt of the thing of value is evidence that it is made pursuant to an agreement or understanding for the referral of business.

(emphasis added).

Definition of "Referral"

Reg. X § 1024.14(f)

(f) *Referral.* (1) A referral includes any oral or written action directed to a person which ***has the effect of affirmatively influencing the selection*** by any person of a provider of a settlement service or business incident to or part of a settlement service when such person will pay for such settlement service or business incident thereto or pay a charge attributable in whole or in part to such settlement service or business. . . .

(emphasis added).

“Exceptions” – “Permitted Payments”

[Subject to the CFPB's Position in PHH Corporation Case . . . To Be Discussed]

12 U.S.C. §2607(c) provides:

Nothing in this section shall be construed as prohibiting (1) the payment of a fee (A) to attorneys at law for services actually rendered or (B) by a title company to its duly appointed agent for services actually performed in the issuance of a policy of title insurance or (C) by a lender to its duly appointed agent for services actually performed in the making of a loan, **(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**, (3) payments pursuant to cooperative brokerage and referral arrangements or agreements between real estate agents and brokers, (4) affiliated business arrangements so long as . . .

(emphasis added).

“Exceptions” – “Permitted Payments”

Reg. X § 1024.14(g) *Fees, salaries, compensation, or other payments.* (1) Section 8 of RESPA permits:

- (i) A payment to an attorney at law for services actually rendered;
- (ii) A payment by a title company to its duly appointed agent for services actually performed in the issuance of a policy of title insurance;
- (iii) A payment by a lender to its duly appointed agent or contractor for services actually performed in the origination, processing, or funding of a loan;
- (iv) A 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;**
- (v) A payment pursuant to cooperative brokerage and referral arrangements or agreements between real estate agents and real estate brokers. (The statutory exemption restated in this paragraph refers only to fee divisions within real estate brokerage arrangements when all parties are acting in a real estate brokerage capacity, and has no applicability to any fee arrangements between real estate brokers and mortgage brokers or between mortgage brokers.);

(emphasis added).

“Exceptions” – “Permitted Payments” (continued)

Reg. X § 1024.14(g)(vi)

Normal Promotional and Educational Activities

(vi) Normal promotional and educational activities that are not conditioned on the referral of business and that do not involve the defraying of expenses that otherwise would be incurred by persons in a position to refer settlement services or business incident thereto; or

Normal Promotional and Educational Activities "Exemption"

- party providing thing of value must engage in "promotion" or "education" i.e. provide advertising materials and business cards, ideally appear in person and speak - don't just drop off the deli tray and leave.
- do not defray expenses i.e. free continuing education to real estate agents
- how lavish? ("normal promotional and educational activities")
- whom to invite?
- all "exemptions" potentially subject to reinterpretation by the CFPB after the PHH case

“Exceptions” – “Permitted Payments” (continued)

Reg. X § 1024.14(g)(vii)

(vii) An employer's payment to its own employees for any referral activities.

Market Value and Resulting Fair Market Value Evaluations

Reg. X § 1024.14(g)(2)

(2) The Bureau may investigate **high prices** to see if they are the result of a referral fee or a split of a fee. If the payment of a thing of value bears ***no reasonable relationship to the market value of the goods or services provided***, then the **excess** is not for services or goods actually performed or provided. These facts may be used as evidence of a violation of section 8 and may serve as a basis for a RESPA investigation. High prices standing alone are not proof of a RESPA violation. The value of a referral (i.e., the value of any additional business obtained thereby) is not to be taken into account in determining whether the payment exceeds the reasonable value of such goods, facilities or services. The fact that the transfer of the thing of value does not result in an increase in any charge made by the person giving the thing of value is irrelevant in determining whether the act is prohibited.

(emphasis added).

Prohibited Kickbacks

- applies to any and all recipients, not just settlement service providers
- no *de minimis* exception

PHH Corporation v. CFPB 839 F.3d 1, D.C.Cir., Oct. 11, 2016
Rehearing en banc Granted, Order Vacated Feb 16, 2017

- **Captive Reinsurance Arrangements**
 - mortgage lender refers a borrower to a mortgage insurer
 - mortgage insurer agrees to use a reinsurer affiliated with the mortgage lender

- CFPB for the first time, contrary to prior HUD guidance, took the position that this arrangement violated RESPA *even if the mortgage insurer paid no more than reasonable market value to the mortgage lender for the reinsurance*. The CFPB's position effectively eliminated the "exception" in the statute and regulation for bona fide payments of compensation for services actually performed.

PHH Corporation v. CFPB

- **The CFPB applied this new interpretation of Section 8 of RESPA *retroactively* to PHH.**
- **The CFPB ordered PHH to pay \$109 million in disgorgement.**
- **PHH appealed to the D.C. Circuit Court of Appeals and challenged the new interpretation and its retroactive application.**
- **PHH also challenged the CFPB's structure as unconstitutional because it has a single director who can only be removed by the President for "cause."**

PHH Corporation v. CFPB

Decision

- **Panel of the D.C. Circuit of Appeals rejected the CFPB's interpretation of Section 8 of RESPA**
- **Rejected the retroactive application, without prior notice, as violative of due process**
- **Found the CFPB's structure to be unconstitutional**

PHH Corporation v. CFPB

Awaiting Decision of

***En Banc* Review of the D.C. Circuit Court of Appeals**

Agreements and Arrangements Between Real Estate Brokers/Agents and Mortgage Companies/Loan Originators

- **Co-Marketing** - Who pays the costs of advertising? Cost-sharing arrangements and the amount each party should pay.
- **Desk Rentals** - Mortgage company rents a desk in a real estate office.
- **Marketing Services Agreements** - Special target of the CFPB. CFPB expresses "grave concerns" in 2015 guidance. Fair market valuation and how this is done. How risky are MSAs and why are they still being used.

Prospect Mortgage LLC - CFPB Enforcement Action

- **related enforcement actions filed against real estate companies:**
 - **Willamette Legacy, LLC d/b/a Keller Williams Mid-Willamette**
 - **RGC Services, Inc., dba Re/Max Gold Coast Realtors**

Prospect Mortgage LLC - CFPB Enforcement Action

- **a violation of law that the real estate agent business partners of Prospect Mortgage LLC ("Prospect") required that their clients be pre-approved by Prospect before would submit an offer**
 - **CFPB: at Prospect's urging, real estate agents added this as a requirement in the MLS**
 - **sometimes borrowers were pre-approved two times**
 - **cash buyers required to be pre-approved by Prospect**
- **a violation of law that real estate agents coerced borrowers into using Prospect by giving credits or waiving charges if borrowers obtained loan through Prospect**

Prospect Mortgage LLC - CFPB Enforcement Action

Paying for Leads versus Paying for Referrals

- exclusivity provision - real estate agent could only give information about prospective borrowers to Prospect and not to other lenders
- real estate brokers gave incentives to their agents including cash payments using monies received from Prospect i.e. \$20 bill for each referral given to Prospect's loan officers
- one real estate broker allowed its agents to offset fees due to the broker i.e. \$500 per month
- of course, there were emails documenting the payments

Prospect Mortgage LLC - CFPB Enforcement Act

Marketing Services Agreements (MSAs)

- **payments of up to \$20,000 per month**
- **CFPB: Real estate companies "purportedly" provided marketing services**
- **amount of payments based upon referral levels, not marketing efforts**
- **"capture rate" was monitored on a monthly basis**
- **documentary evidence stated "boosting referrals" discussed with real estate companies**

[See also *In re: Lighthouse Title*]

Prospect Mortgage LLC - CFPB Enforcement Act

Desk Rental Agreements

- **CFPB: leases were not just for renting office space**
- **in lease agreements, real estate brokers promised to "promote Prospect as a preferred lender" and "endorse" the use of Prospect**
- **evidence that Prospect evaluated these agreements in terms of referrals produced rather than in terms of the cost of renting space**
- **no fair market value analysis**
- **\$3,500,000 civil money penalty**

New Day Financial - CFPB Enforcement Action

- **deceptive advertising regarding endorsement of Veterans' organization**
- **failure to disclose the financial relationship with the Veteran's organization was a UDAAP**
- **payment of "lead generation fees" and \$15,000 monthly licensing fee**
- **named "exclusive lender"**
- **\$2,000,000 in civil penalties**

Zillow - CFPB Investigation

- **the basis for the investigation has not been made public**
- **the CFPB will not say**
- **theories and speculation abound**
- **Zillow disclosed in SEC filing**

Zillow - CFPB Investigation

- **Zillow requires mortgage companies/loan originators to ask real estate agents who are "Premier Agents" with Zillow to invite mortgage companies/loan originators to share cost of advertising**
- **cost sharing issues with multiple lenders - 50% to 90% issue**
- **rotation among lenders in some advertising based on cost share**
- **can the way the leads are transmitted, and the involvement of an online portal, constitute a referral rather than just co-marketing?**
- **promotion of one or a few lenders - "exclusivity" issue**

Zillow - CFPB Investigation

- speculation in the industry that Zillow and business partners may also be accused of UDAAP (Unfair and Deceptive Acts and Practices) violations in addition to RESPA violations
- Can an online portal be charged with providing "substantial assistance" in a violation of law by allowing real estate agents and loan originators to violate RESPA?

Affiliated Business Arrangement

Section 8 of RESPA; 12 U.S.C. § 2607(c)(4); Reg. X § 1024.15

- **common ownership of settlement service providers which are in a position to refer business to one another**
- **"Safe Harbor"**

3 main requirements:

- (1) provide a disclosure regarding the arrangement and an estimate of charges;
- (2) do not require the use of a particular settlement service provider; and
- (3) the only thing of value which is received from the arrangement is a return on the ownership interest.

Affiliated Business Arrangement (ABA)

Borders and Borders - Law Firm - Kentucky

- CFPB sued in federal court alleging several joint venture title insurance providers involving law firm and principals of real estate and mortgage companies were not protected as ABAs because the joint ventures were not bona fide providers of settlement services - profit distributions really alleged kickbacks
- District Court granted Borders and Borders' motion for summary judgment.
- Relied upon *Carter v. Wells Bowen Realty, Inc.*, 736 F.3d 722 (6th 2013). Meeting the three bases for the ABA in the statute is sufficient. Not necessary to meet requirement imposed by HUD guidance that must be a bona fide provider of settlement services.
- CFPB filed a motion for reconsideration currently being considered.

Affiliated Business Arrangement

Meridian Title Corporation

- title insurance agency referred consumers to affiliated title insurer
- failed to disclose their Affiliated Business Arrangement
- appeared to have completely missed the issue of the need to disclose an Affiliated Business Arrangement to consumers
- ordered to pay \$1.25 million in redress to consumers