



Lending Soup

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CONFIDENTIAL AND PROPRIETARY

WHAT YOU WILL LEARN

- ▶ RESPA Section 8
- ▶ Lending to service members
- ▶ Private Flood Insurance
- ▶ Appraisal proposal
- ▶ Key examiner trends
- ▶ On the horizon

RESPA SECTION 8 (12 USC 2607)

- ▶ (a) Business referrals
 - ▶ 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.
- ▶ (b) Splitting charges
 - ▶ 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.
- ▶ (c) Fees, salaries, compensation, or other payments
 - ▶ **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 (A) a disclosure is made of the existence of such an arrangement to the person being referred and, in connection with such referral, such person is provided a written estimate of the charge or range of charges generally made by the provider to which the person is referred ... (B) such person is not required to use any particular provider of settlement services, and (C) the only thing of value that is received from the arrangement, other than the payments permitted under this subsection, is a return on the ownership interest or franchise relationship, or
 - ▶ (5) such other payments or classes of payments or other transfers as are specified in regulations prescribed by the Bureau, after consultation with the Attorney General, the Secretary of Veterans Affairs, the Federal Home Loan Bank Board, the Federal Deposit Insurance Corporation, the Board of Governors of the Federal Reserve System, and the Secretary of Agriculture. ...

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RESPA SECTION 8 (12 CFR 1024.14)

- ▶ **§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.
 - ▶ (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.
 - ▶ (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.
 - ▶ (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.

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RESPA SECTION 8 (12 CFR 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.);
 - ▶ (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
 - ▶ (vii) An employer's payment to its own employees for any referral activities.
 - ▶ (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.
 - ▶ (3) *Multiple services.* When a person in a position to refer settlement service business, such as an attorney, mortgage lender, real estate broker or agent, or developer or builder, receives a payment for providing additional settlement services as part of a real estate transaction, such payment must be for services that are actual, necessary and distinct from the primary services provided by such person. For example, for an attorney of the buyer or seller to receive compensation as a title agent, the attorney must perform core title agent services (for which liability arises) separate from attorney services, including the evaluation of the title search to determine the insurability of the title, the clearance of underwriting objections, the actual issuance of the policy or policies on behalf of the title insurance company, and, where customary, issuance of the title commitment, and the conducting of the title search and closing.

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RESPA SECTION 8

- ▶ CFPB trend
 - ▶ Ignore exceptions
 - ▶ Inconsistent with HUD and court's longstanding interpretations
 - ▶ CFPB Bulletin 2015-5
 - ▶ *"Nevertheless, any agreement that entails exchanging a thing of value for referrals of settlement service business involving a federally related mortgage loan likely violates RESPA, whether or not an MSA or some related arrangement is part of the transaction."*
 - ▶ *"This compliance bulletin summarizes existing requirements under the law as well as findings and conclusions the Bureau has made in exercising its enforcement authority. **The bulletin is a nonbinding general statement** of policy articulating considerations relevant to the Bureau's exercise of its supervisory and enforcement authority. It is therefore exempt from the notice and comment rulemaking requirements under the Administrative Procedure Act, pursuant to 5 U.S.C. 553(b). Because no notice of proposed rulemaking is required, the Regulatory Flexibility Act does not require an initial or final regulatory flexibility analysis. **The Bureau has determined that this compliance bulletin does not impose any new or revise any existing recordkeeping, reporting, or disclosure requirements on covered entities or members of the public that would be collections of information requiring OMB approval under the Paperwork Reduction Act.**"⁵*
 - ▶ Cordray's remarks at the Consumer Bankers Association May 2016
 - ▶ *"Likewise, our public enforcement actions have been marked by orders, whether entered by our agency or by a court, which specify the facts and the resulting legal conclusions. **These orders provide detailed guidance for compliance officers across the marketplace about how they should regard similar practices at their own institutions.** If the same problems exist in their day-to-day operations, they should look closely at their processes and clean up whatever is not being handled appropriately. Indeed, it would be **"compliance malpractice"** for executives not to take careful bearings from the contents of these orders about how to comply with the law and treat consumers fairly."*

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RESPA SECTION 8 NOTABLE CONSENT ORDERS

- ▶ PHH
 - ▶ CFPB appealed Circuit Court Opinion
 - ▶ Court granted *en banc* review 2/16/2017
 - ▶ Vacated ruling that overturned \$109 million penalty CFPB imposed on PHH
 - ▶ Oral arguments held in May 2017
 - ▶ Opinion expected by end of 2017
- ▶ Prospect Mortgage 2017
 - ▶ Clear case of RESPA Section 8 violation
 - ▶ Paid for referrals through agreements with realtors for referrals
 - ▶ Paid brokers to require consumers, even those who had already prequalified with another lender, to prequalify with Prospect
 - ▶ Split fees (proceeds of sale 50/50) with a mortgage servicer to obtain consumer referrals where servicer worked to identify and persuade eligible consumers to refinance with Prospect for their Home Affordable Refinance Program (HARP) mortgages
 - ▶ Also sent the resulting mortgage servicing rights back to same mortgage servicer
- ▶ Zillow investigation 2017
 - ▶ According to Zillow's earnings release, *"Based on correspondence from the CFPB in August 2017, we understand that it has concluded its investigation. The CFPB has invited us to discuss a possible settlement and indicated that it intends to pursue further action if those discussions do not result in a settlement."*

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LENDING TO SERVICE MEMBERS

- ▶ SCRA examiner findings
 - ▶ Incorrect effective dates when calculating rate reduction
 - ▶ Active duty date required
 - ▶ Date of request is not correct
 - ▶ Incorrect APR calculation
 - ▶ Failure to include all fees
 - ▶ Incorrect payment amount
 - ▶ Remember the payment amount is reduced each month
 - ▶ Failure to apply SCRA protections to all applicable accounts
 - ▶ May not limit to only the account requested; apply to all applicable accounts
 - ▶ Changing terms of credit after SCRA protection is requested
 - ▶ May be considered an unfair or deceptive or abusive practice
 - ▶ Okay to provide unequivocal benefit (e.g., permanently reduce interest rate and fees)
 - ▶ Ensure SCRA parameters are established on collection systems
- ▶ Anticipate new or updated interpretative rule from DOD late 2017
- ▶ MLA examiner findings
 - ▶ Failure to provide MAPR disclosures
 - ▶ Failure to consider non-purchase consumer loans secured by motor vehicles
 - ▶ Insufficient controls and training
 - ▶ Onus is on lender to identify if MLA applies
 - ▶ Still too new in the cycle to identify trends

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PRIVATE FLOOD INSURANCE

- ▶ Proposed rule still not final
 - ▶ Expected by end of year 2017
- ▶ Private flood insurance
 - ▶ Essentially all of the requirements of SFIP policy
 - ▶ Limited changes provided they are in addition to and not in lieu of
 - ▶ May not narrow coverage under SFIP
 - ▶ Must cover both mortgagee and mortgagor
 - ▶ Must provide 45-day cancellation or non-renewal notice
 - ▶ Notice must contain cancellation provisions that are as restrictive as the provisions contained in an SFIP
- ▶ SFIP
 - ▶ a standard flood insurance policy issued under the NFIP in effect as of the date the private policy is provided to a national bank or Federal savings association
- ▶ Mandatory acceptance
 - ▶ Financial institutions must accept private flood insurance if meets regulatory requirements
- ▶ Discretionary acceptance
 - ▶ Limited circumstances when may use discretion in accepting private flood insurance
- ▶ Exception
 - ▶ Provides for an exception for certain mutual aid societies

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RE-THINKING FLOOD STANDARDS

- ▶ Prior to Hurricanes Harvey and Irma, President shelved 2 significant flood rules
 - ▶ FEMA's proposed requirement that construction projects funded through its assistance programs be built between two and three feet above the 100-year flood elevation in an expanded flood plain, depending on whether they represented critical infrastructure
 - ▶ HUD's proposed mandate that new or substantially improved HUD-financed projects, such as multifamily housing complexes, be built two feet higher in an expanded flood plain area
- ▶ But now, re-thinking implementation of certain restrictions due to the massive destruction across multiple states



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FLOOD

- ▶ OCC updates its Flood Disaster Protection Act Exam manual
- ▶ <https://www.occ.gov/publications/publications-by-type/comptrollers-handbook/flood-disaster-protection-act/pub-ch-flood-disaster-protection-act.pdf>



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APPRAISAL PROPOSAL

- ▶ Federal regulatory agencies issued a proposal to increase threshold for required appraisals for commercial real estate transactions from \$250,000 to \$400,000
- ▶ Growing concern over lack of qualified appraisers
 - ▶ Temporary practice permits, allow state-certified or licensed appraisers to provide services in other states
 - ▶ Temporary waiver request to use a state-certified or licensed appraiser in situations where a documented appraiser shortage has led to "significant delays" in appraisals on federal related transactions in a specific geographic area



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Key examiner trends

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EXAMINER TRENDS

- ▶ Charging a fee for expedited payments
 - ▶ Following a script?
 - ▶ Be sure script includes both fee and free payment services available
 - ▶ Be sure actual practice includes disclosing both
 - ▶ Call monitoring should be included in transaction testing
 - ▶ CFPB Bulletin 2017-01
- ▶ Add-on products
 - ▶ Still an issue
 - ▶ Misrepresentation of
 - ▶ Consumer's stated interpretation of what was being sold to him/her
 - ▶ Potential fees
 - ▶ Assurance of fee avoidance, accruals, penalties
 - ▶ Ensure effective controls in place
 - ▶ Marketing
 - ▶ Sales practices
 - ▶ Accurate disclosures, including terms, conditions, costs, downsides

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EXAMINER TRENDS

- ▶ Debt collection
 - ▶ Unauthorized contact with third parties identified by consumer on applications
 - ▶ Misrepresentation in obtaining third party contact information (why need it)
 - ▶ Disclosing debt information to third party
 - ▶ Deceptively implying an authorized user is responsible for the debt
 - ▶ An authorized user is not financially responsible for the debt
 - ▶ Misrepresentation of the effect on a credit report when debt paid in full vs. settled amount
 - ▶ Prior 2013 CFPB Bulletin
 - ▶ Communication timing
 - ▶ FDCPA dictates 8 am to 9 pm
 - ▶ Based on location of the individual (last known address)
 - ▶ Do not base on telephone number area code
 - ▶ Workplace calls
 - ▶ Even if not collecting a 3rd party debt, if consumer states do not call workplace, must cease such activity
 - ▶ Whether you are collecting 3rd party debt or your own
 - ▶ Follow FDCPA best practices
 - ▶ UDAP/UDAAP does apply

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EXAMINER TRENDS

- ▶ TRID retain evidence of compliance
 - ▶ Rule requires LE and CD record retention for a period of 3 years from the later of consummation, date disclosures are required to be made, or date the action is required to be taken
- ▶ TRID Service Provider list
 - ▶ Must provide when you allow the consumer to shop
 - ▶ Not just at initial LE
 - ▶ Later learn that survey is needed; allow consumer to shop
 - ▶ Provide Written List of Providers with revised Loan Estimate
- ▶ Arbitration clauses
 - ▶ Dwelling secured consumer mortgages may not include terms mandating arbitration or other non-judicial procedure
 - ▶ May ask for arbitration when an issue arises
- ▶ Loss mitigation applications
 - ▶ Requires reasonable due diligence
 - ▶ In light of recent storms, forbearance request process should be revisited and tested
- ▶ Periodic statements
 - ▶ If software cannot produce it, you still must provide it

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EXAMINER TRENDS

- ▶ Outdoor signs
 - ▶ Old billboard promotes product or service no longer available
 - ▶ Be sure to remove or update billboards to reflect current offerings
- ▶ Competitor comparisons
 - ▶ Must be able to substantiate claims made
 - ▶ Current, accurate and complete data
- ▶ And no list would be complete without Fair Lending
 - ▶ Mortgage servicing can raise fair lending concerns
 - ▶ Discretion in evaluation and options available
 - ▶ At any phase of mortgage servicing
 - ▶ From payment to release of lien

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THE TROUBLE WITH SELF-REPORTING

- ▶ CFPB Supervisory Highlights
 - ▶ Non public supervisory actions
 - ▶ About \$14 million in restitution, including as a result of institutions who self-report non-compliance



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OTHER CONSENT ORDERS

- ▶ Fay Servicing
 - ▶ Kept consumers in the dark on foreclosure relief process
 - ▶ Failed to timely send acknowledgement and evaluation notices
 - ▶ Moved forward on foreclosures despite consumer actively pursuing options to save home
 - ▶ \$1.15 million restitution
 - ▶ Again, in light of recent storms, be hypersensitive to consumer requests for relief
 - ▶ Fannie and Freddie have issued bulletins
 - ▶ HUD bulletins

- ▶ Nationstar Mortgage (dba Mr. Cooper)
 - ▶ Failure to comply with HMDA data reporting
 - ▶ Consistent year over year errors
 - ▶ \$1.75 million CMP

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On the horizon

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ON THE HORIZON

- ▶ MLA applies to credit cards: 10/3/2017
- ▶ TRID Black hole proposal comments due: 10/10/2017
- ▶ Mortgage Servicing rules: 10/19/2017
- ▶ HMDA Data Collection: 1/1/2018
- ▶ Regulation Z Prepaid card rules extended: 4/1/2018
- ▶ More Mortgage Servicing rules: 04/19/2018
- ▶ Customer Due Diligence Requirements: 5/11/2018
- ▶ Pre-dispute arbitration agreements: 5/19/2018
- ▶ TRID amendments: 10/1/2018



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Questions?

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