RESPA Section 8

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What you will learn

• The essentials
• Marketing Service Agreements (MSAs)
• RESPA and unearned fees
• Key to successful relationships
• Resources
RESPA Section 8 (12 CFR 1024.14)

RESPA Section 8: The essentials

• 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, unless otherwise excepted
  • A company may not pay any other company or the employees of any other company (including affiliates) for the referral of settlement service business
    • Exception: May give own employees a referral fee
RESPA Section 8: The essentials

- Referral
  - 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
  - A referral also occurs
    - whenever a person
    - paying for a settlement service or business incident thereto is
    - required to use
    - a particular provider of a settlement service or business incident thereto

- Thing of value
  - Broadly defined
    - The term “payment” is used throughout is synonymous with the giving or receiving of any “thing of value” and does not require transfer of money
  - Includes, without limitation,
    - monies
    - things
    - discounts
    - salaries
    - commissions
    - fees
    - duplicate payments of a charge
    - stock
More things of value you may not have realized

- 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
- reduction in credit against an existing obligation

RESPA Section 8: The essentials

- 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
  - Thing of value received repeatedly and connected in any way with volume or value of business referred
    - Receipt is evidence that it is made pursuant to an agreement or understanding for the referral of business
Marketing Service Agreements

- Usually framed as payments for advertising or promotional services
  - Oral or written
  - Disguised as compensation for referrals
  - Quid pro quo for the referral of business
- Review facts and circumstances
  - Each case may be unique

“MSAs appear to create opportunities for parties to pay or accept illegal compensation for making referrals of settlement service business.”
~ CFPB, Bulletin 2015-05

Impact of MSAs

- Steering of business
  - Consumers pay higher prices
  - Indirectly undermines consumer’s ability to shop
  - Disguise or hide affiliate relationships
  - Creates tangible legal and regulatory risks for the monitoring and administration of MSAs
- Failure to provide services
  - Consumer pays for services not actually performed
  - Reasonable inference can be drawn that MSA is referral arrangement in exchange for kickbacks
- Marketing expenses in exchange for referrals
Impact of MSAs

- Compliance risks
  - Individual, creditor
    - Financial fines, penalties
    - Injunctive relief
    - Could be subject to imprisonment
  - Regulator efforts
    - Bans on entering into MSAs
    - Ban from working in mortgage industry
    - More than $75 million in penalties
      - Plus individual penalties

RESPA Section 8 and unearned fees

- 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 RESPA Section 8
- The source of the payment does not determine whether or not a service is compensable
- Nor may the prohibitions be avoided by creating an arrangement wherein the purchaser of services splits the fee
• Payments Must Be for Goods, Facilities or Services
  • In the determination of whether payments from lenders to mortgage brokers are permissible under Section 8 of RESPA, the threshold question is whether there were goods or facilities actually furnished or services actually performed for the total compensation paid to the mortgage broker.
  • In making the determination of whether compensable services are performed, HUD’s letter to the Independent Bankers Association of America, dated February 14, 1995 (IBAA letter) may be useful.


In IBAA Letter, HUD identified the following services normally performed in the origination of a loan:

• (a) Taking information from the borrower and filling out the application;
• (b) Analyzing the prospective borrower’s income and debt and prequalifying the prospective borrower to determine the maximum mortgage that the prospective borrower can afford;
• (c) Educating the prospective borrower in the home buying and financing process, advising the borrower about the different types of loan products available, and demonstrating how closing costs and monthly payments could vary under each product;
• (d) Collecting financial information (tax returns, bank statements) and other related documents that are part of the application process;
• (e) Initiating/ordering VOEs (verifications of employment) and VODs (verifications of deposit);
• (f) Initiating/ordering requests for mortgage and other loan verifications;
• (g) Initiating/ordering appraisals;
• (h) Initiating/ordering inspections or engineering reports;
• (i) Providing disclosures (truth in lending, good faith estimate, others) to the borrower;
• (j) Assisting the borrower in understanding and clearing credit problems;
• (k) Maintaining regular contact with the borrower, realtors, lender, between application and closing to appraise them of the status of the application and gather any additional information as needed;
• (l) Ordering legal documents;
• (m) Determining whether the property was located in a flood zone or ordering such service; and
• (n) Participating in the loan closing
Unearned fees

- If only provide counseling services
  - (b), (c), (d), (j), and (k)
- Then, must also take the application and
- No steering
  - Counseling gave borrower opportunity to consider products from at least three different lenders;
  - Entity performing counseling would receive the same compensation regardless of which lender’s products were ultimately selected; and
  - Any payment made for “counseling-type” services is reasonably related to services performed and not based on the amount of loan business referred to a particular lender

NewDay Financial Consent Order, February 2015

“Respondent, and its officers, agents, servants, employees, and attorneys who have actual notice of this Consent Order, whether acting directly or indirectly, may not violate Section 8 of RESPA, including by providing a thing of value to a third party pursuant to an agreement or understanding to refer real estate settlement service business, including, but not limited to, providing a thing of value in exchange for an endorsement of Respondent that is directed to a person.”
Key Enforcement Action

- CFPB vs. a major mortgage lender (MML) (Jan 2017)
  - Paying illegal kickbacks for mortgage business referrals
- CFPB vs. two real estate brokers and a mortgage servicer that took illegal kickbacks from MML
- Result:
  - MML CMP $3.5 million civil penalty for illegal conduct
  - Real estate brokers and servicer pay a combined $495,000 in consumer relief, repayment of ill-gotten gains, and penalties
  - Prohibited from future violations of RESPA, will not pay for referrals, and will not enter into any agreements with settlement service providers to endorse the use of their services
  - Paid for referrals through agreements
    - maintained various agreements with over 100 real estate brokers
    - tracked the number of referrals made by each broker and adjusted the amounts paid accordingly
  - Paid brokers to require consumers – even those who had already prequalified with another lender – to prequalify with MML
    - Had brokers engage in a practice of “writing in” MML into their real estate listings
  - Split fees with a mortgage servicer to obtain consumer referrals
    - Identified and persuaded eligible consumers to refinance with MML for their HARP mortgages
    - MML compensated Servicer for the referrals by splitting the proceeds of the sale of such loans evenly with Servicer
    - MML also sent the resulting mortgage servicing rights back to Servicer

Key takeaways of MML

- CFPB did not take issue with the notion of a lender buying information about prospective buyers, such as consumer name, address, email address, and phone number
- CFPB’s investigation revealed other problematic conduct that went beyond the mere transferring of consumer information
Examiner Feedback

• Lead generation
  • Fees reasonably relate to the services being performed
    • $1000/mo for 500 leads
    • $1000/mo for 50 originated leads

  • Do you know how your MLOs are generating leads?

Keys to successful relationships

• No favors
  • Deposit accounts, interest rates
  • Preferred loan interest rates
  • Quid pro quo

• Monitor and verify
  • Ensure controls in place to prevent existence of formal or informal referral arrangements with counterparties to your MSAs and their employees
  • Develop a defensible estimate of each service’s fair market value
    • Document how arrived at that value
  • Ensure any and all services are actually performed
    • Do not pay for services not performed
    • Do not perform services for which you are not paid

• Report issues – promptly
  • Terminate relationship
Keys to successful relationships

• Word choices
  • Preferably expressly written agreement
  • Detail requirements for services
  • Do not call it a ‘referral agreement’ or a ‘referral fee’
  • Call it what it is ... payment for ____ services rendered

Resources

• RESPA implementing regulation: 12 CFR 1024.14
• CPFB Compliance Bulletin 2015-05
• In the Matter of NewDay Financial consent order
• HUD’s Real Estate Settlement Procedures Act (RESPA) Statement of Policy 1999–1 Regarding Lender Payments to Mortgage Brokers; Final Rule
• HUD’s RESPA Statement of Policy 2001-1: Clarification of Statement of Policy 1999-1 Regarding Lender Payments to Mortgage Brokers, and Guidance Concerning Unearned Fees Under Section 8(b)
Questions?