



**Understanding and Mitigating RESPA Section 8(a) Risks**  
**New York Region**  
**November 21, 2019**

# Outline

- Purpose/Coverage of Regulation X and RESPA Section 8(a)
- Overview of Supervisory Guidance
- Recent Case Law and Enforcement
- Compliance Management System Best Practices
- Consumer Compliance Examinations
- Question and Answer

# Purpose of RESPA Section 8(a)

RESPA states that the purpose of Section 8(a) is to eliminate “kickbacks or referral fees that tend to increase unnecessarily the costs of certain settlement services.”

- 12 U.S.C. § 2601(b)(2) – Real Estate Settlement Procedures Act

# 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.”

- 12 U.S.C. § 2607(a) – Real Estate Settlement Procedures Act
- 12 C.F.R. § 1024.14(b) – Regulation X

# Threshold Question:

## Is the transaction covered by RESPA?

- The transaction is covered if it is:
  - a settlement service,
  - involving a federally related mortgage loan.
- These terms are defined in RESPA and Regulation X
  - RESPA: 12 U.S.C. § 2602
  - Regulation X
    - 12 C.F.R. § 1024.2
    - 12 C.F.R. § 1024.5(b) (exemptions)

# RESPA Section 8(a) – Elements

Elements of a violation – all three must be present:

1. Payment or transfer of a thing of value
2. Pursuant to an agreement or understanding to refer settlement service business
3. Resulting in an actual referral

# RESPA Section 8(a) – Elements

First Element: The payment or transfer of a thing of value

- “thing of value” is defined broadly
  - 12 C.F.R. § 1024.14(d)
- “Thing of value” can include . . .
  - Money
  - Gift card
  - Tickets to a sporting event or concert
  - Services, or paying for someone else’s services

# RESPA Section 8(a) – Elements

Second Element: The payment was made pursuant to an agreement to refer settlement service business.

- “Agreement” [Definition: 12 C.F.R. § 1024.14(e)]
  - Need not be written or verbalized
  - Can be established by a practice, pattern or course of conduct



# RESPA Section 8(a) – Elements

## Second Element (Continued):

- “Referral” [Definition: 12 C.F.R. § 1024.14(f)]
  - Any action that has the effect of affirmatively influencing the selection by any person of a particular settlement service provider, or
  - when a person paying for a settlement service is required to use a particular provider of a settlement service

# What is a referral?

- “Required Use” can also be an improper referral
  - Example: “If you want to use my company for the mortgage, you must use ABC Title.”
- Note: Providing discounts for the use of certain settlement providers is not considered “required use” if
  - any package or discount is optional to the purchaser, and
  - the discount is a true discount below prices that are otherwise generally available, and is not made up by higher costs elsewhere in the settlement process

# RESPA Section 8(a) – Elements

Third element: The agreement or understanding resulted in an actual referral.

- No requirement that a loan is made from the referral.

# RESPA Section 8(c) – Safe Harbor Provisions

- There are certain exceptions or “safe harbors” to liability under RESPA Section 8. [12 C.F.R. § 1024.14(g)]
- Some Examples (not an exhaustive list)
  - A payment of a fee to an attorney for services actually rendered;
  - A payment by a title company to its agent for services actually performed in the issuance of a title insurance policy;
  - A payment by a lender to its agent or contractor for services actually performed in the origination, processing, or funding of a loan;
  - An employer’s payment to its own employees for any referral activities.

# RESPA 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”
- 8(c)(2) applies if . . .
  - the payments are reasonably related to the value of the goods, facilities, or services (i.e., fair market value), AND
  - goods/facilities were actually furnished or services were actually performed

# Overview of Supervisory Guidance\*

- **CFPB's Compliance Bulletin 2015-05- RESPA Compliance and Marketing Service Agreements**
- **HUD Statement of Policy 1996-3, Rental of Office Space, Lock-outs, and Retaliation**
- **HUD Advisory Letter from Grant E. Mitchell (Informal Opinion)**

\*Please note that the FDIC neither cites violations nor takes enforcement action based on supervisory guidance. See **FIL-49-2018: Interagency Statement Clarifying the Role of Supervisory Guidance** for details.

# Overview of Supervisory Guidance

## CFPB Compliance Bulletin 2015-05- RESPA Compliance and Marketing Service Agreements

- Discusses RESPA **compliance issues** that can arise when settlement services providers enter into MSAs (i.e. agreements for advertising or promotional services) with persons who are positioned to make referrals to the providers.
- Reminder of prohibition on kickbacks and referral fees under RESPA and describes the substantial risks posed by entering into MSAs.
- Defines Marketing Service Agreements (MSAs).
- **Key Question** – Are the payments really compensation for advertising or promotional services, or are the payments disguised compensation for referrals?

# Overview of Supervisory Guidance

## Statement of Policy 1996–3, Rental of Office Space, Lock-outs, and Retaliation

- HUD issued this statement in response to numerous complaints that it received, alleging that certain settlement service providers, particularly lenders, are leasing desks or office space in real estate brokerage offices at higher than market rate in exchange for referral of mortgage business.
- HUD noted that “an example of a “thing of value” is a rental payment that is higher than that ordinarily paid for the facilities.
- **Key Question-** Is this a bona fide rental?
- **Key Question-** Is the renter paying “general market value”? Rent should be what non-settlement service provider would pay for the same amount of space and services in the same or a comparable building.



# Overview of Supervisory Guidance

**HUD Advisory Letter from Grant E. Mitchell, dated March 24, 1994**

**May a person in the real estate settlement service business pay for or be paid for a prospects list (potential customer list)?**

- **HUD's position:** It's an improper referral if payment is conditioned on
  - the number of closed transactions resulting from the lead
  - any other considerations, such as endorsement of the settlement service
    - Example: the lead generator tells the lead "XYZ Bank will give you the best mortgage"

# Enforcement

## Marketing Service Agreement Example

### CFPB – Lighthouse Title, Inc. Consent Order (2014)

- Lighthouse entered into MSAs with a number of other settlement services providers.
- Problems with these MSAs:
  - Neither Lighthouse nor other counterparties determined or documented what a fair market value for the services was.
  - Fees were established by considering how many referrals Lighthouse had received from the counterparties.
  - Lighthouse did not monitor counterparties to see if it received the services under the MSAs.
- Result: CFPB determined that Lighthouse's payments under the MSAs were actually payments for referrals.

# Enforcement

## Desk Rental and Marketing Service Agreement Example CFPB – Prospect Mortgage LLC Consent Order (2017)

- Prospect maintained agreements with numerous real estate brokers
- Problems with these agreements:
  - Tracked referrals and adjusted compensation accordingly.
  - Required use of Prospect for prequalification.
  - Conditioned desk rental payments on referrals rather than general market value.
- Result: CFPB determined that Prospect's payments under these various agreements were illegal kickbacks for mortgage referrals.

# Enforcement

## Marketing Service Agreement and Desk Rental Example FDIC – HomeStreet Bank Order to Pay Civil Money Penalty (2019)

- HomeStreet, through its now discontinued Home Loan Center, entered into online co-marketing agreements and desk rental agreements for the payment of referral fees.
- All agreements found to be in violation have been terminated.
- Result: Without admitting or denying the violations of RESPA Section 8(a), the bank stipulated to payment of a \$1.35 million civil money penalty.

# Supervisory Responses

- Recommendations and Matters Requiring Board Attention
- Level 2/Medium Severity and Level 3/High Severity Violations
- Informal or Formal Enforcement Actions:
  - Board Resolutions, Memoranda of Understanding, Consent Orders, Civil Money Penalties, and Orders for Restitution
- CFPB Referrals

# Compliance Management System

## Section 8(a) Best Practices

- Management Oversight
- Compliance Program
  - Policies and Procedures
  - Training
  - Monitoring/Audits
  - Complaint Procedures

# Consumer Compliance Examinations

- What will examiners look at?
  - Oversight, due diligence, and on-going monitoring
  - Actual practices compared to the contract's terms and conditions, including compensation structure
  - Valuations, and rental expense history
  - Application and origination records
  - Documentation of goods/services provided or received

# Understanding and Mitigating RESPA Section 8(a) Risks New York Region Regulatory Call

