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**NATIONAL ASSOCIATION OF REALTORS®**

# MARKETING AND SERVICES AGREEMENTS IN AN ENFORCEMENT ERA

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**February 19, 2015**

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## INTRODUCTION

### Real Estate Settlement Procedures Act (RESPA)

1. Most **important** and most **controversial** statute affecting settlement service industry
2. Statute defies **BUSINESS LOGIC**
3. However, lenders that solicit referral fees are subject to severe penalties
  - Criminal penalties
  - Treble damages
4. RESPA both
  - Consumer disclosure statute
  - Anti-kickback statute

## Consumer Disclosure Law

1. **Idea:** Give Buyers and Sellers full disclosure of costs of transaction
2. Disclosures
  - GFE
  - Special Information Booklets
  - HUD-1 Settlement Statements
  - Servicing transfer information
  - Escrow Information
  - Full disclosure Mortgage Broker Fees
3. RESPA disclosures will be integrated into TILA disclosures
  - August 25, 2015
  - Goodbye GFE and initial TIL = Loan Estimate
  - Goodbye HUD-1 and final TIL = Closing Disclosure

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# Section 8(a) - Anti-Kickback Provisions

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## Anti-kickback Law

1. **Idea:** Eliminate abusive practices such as payment of kickback fees which drive up cost of product to consumers

2. 5 Elements of a Section 8(a) kickback

Section 8(a) says it is illegal to Give or Receive any: (i) **thing of value** pursuant to (ii) **an agreement or understanding** to (iii) **refer** (iv) **settlement services**, in connection with (v) **a federally related mortgage loan**

## Anti-kickback Law (cont'd)

- i. **Federally Related Mortgage Loan** = Any loan secured by a first or subsequent lien on a 1 – 4 family residential property

### includes

- ✓ Refinances
- ✓ Purchase money mortgages
- ✓ Second liens
- ✓ ARMs
- ✓ Reverse mortgages
- ✓ Interest only mortgages

### excludes

- ✓ Commercial loans
- ✓ Construction loans
- ✓ Temporary financing
- ✓ Property over 25 acres
- ✓ Business purpose loans

## Anti-kickback Law (cont'd)

- ii. **Settlement Services** = Anything done by Title Agents; Attorneys; Real Estate Agents; Mortgage Brokers; Banks
  - Title searches
  - Credit reports / appraisals
  - Origination of loans
  - Title insurance, etc.

## Anti-kickback Law (cont'd)

- iii. **Referral** = Any conduct intended to influence the selection of a **particular** settlement service provider
- iv. **Agreement or Understanding** = Need not be in writing or even articulated or verbalized – may include a practice or course of action where the receipt of a **THING OF VALUE** is understood
  - Wink, wink



## Anti-kickback Law (cont'd)

v. **Thing of Value** = Broadly defined to be virtually anything one receives in consideration for making a referral

- \$
- Commissions
- Property
- Trips
- Discounts
- Low interest loans
- Fax machines
- Computer
- Ipods
- Free advertising
- VIAGRA
- Football tickets

**IMPORTANT: ALL 5 ELEMENTS MUST BE PRESENT. ANY ONE MISSING: Not a violation of RESPA**

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# Section 8(b) – Splitting of Unearned Fees

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## Splitting Fees May Also Be a Problem Section 8(b) says

No person shall give . . . No person shall accept a split or percentage in connection with a real estate settlement service **other than for services rendered**

A referral is not required to violate Section 8(b).

## Circuit Courts Split on Fee Splitting

1. 4 Circuit Courts (7, 4, 8 and 5) say if you don't split mark-up = no violation of 8(b)
2. 3 Circuit Courts (11, 2 and 3) say if you mark up a third-party fee without doing any service = violation of 8(b)
3. U.S. Supreme Court settles the split

## **Freeman v. Quicken Loans**

- Supreme Court holds two or more parties must split unearned fee to violate Section 8(b)
- Settlement service providers may mark up third party fees, so long as provider does not split mark-up with another party
- If mark-up is split with another party – split must be based upon services rendered

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# Section 8(c) – Exceptions to RESPA Anti-Kickback Provisions

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## Exceptions - Section 8(c)

Congress recognized certain exceptions where paying a referral fee is ok

- To an Attorney for services actually performed
- By a Title Company to its duly appointed Title Agent for services performed in issuance of a title policy
- By a Lender to its duly appointed Agent
- Cooperative Agreements between listing and selling agents

## Exceptions - Section 8(c) (cont'd)

Congress recognized certain exceptions where paying a referral fee is ok (cont'd)

- Payments by Employer to Employee
- Secondary Market Transactions
- Affiliated Business Arrangements
- **Section 8(c)(2) payments for services rendered or goods/facilities actually provided**



## Elements of Section 8(c)(2)

- Payment for Goods Provided and/or Services Performed
- 2 Part Test
  - Good/Services must be actual, necessary and distinct
  - Payment must be commensurate with the value of goods/services

## Interest In MSAs Has Increased

1. Significant increase in FHA net worth requirements soured many prospective AfBA members
2. New QM Rules
  - affiliated charges counted toward 3% cap
3. Advantages to MSAs
  - no capitalization
  - no infrastructure
  - payment not tied to volume

## RESPA Interpretive Rule

### **A. Marketing and Service Agreements**

1. Been around forever
2. HUD finally weights in June 25, 2010
3. Claims per-transaction agreements suspect

## RESPA Interpretive Rule (cont'd)

### B. Two Types of Marketing Agreements

#### 1. Flat Fee Agreements

- most prevalent
- payment not for referral of particular transaction
- services include signage, web banners, brochures, customer lists, co-advertising, etc.

#### 2. Per-Transaction Agreements

- Market to particular customers
- no sale = no fee earned

## RESPA Interpretive Rule (cont'd)

### C. HUD Interpretive Rule June 2010

1. HUD stuck with 8(c)(2) Exemption
2. But HUD chips away at Exemption
  - opposes direct consumer solicitations
  - opposes directly handing consumer information
  - opposes exclusivity
  - prefers referrer be an agent
  - prefers written agreement
  - prefers written disclosure
3. Individual analysis required

## CFPB Weighs In: Lighthouse Title Consent Order

### A. Background

1. Lighthouse enters into series of MSAs with various real estate brokers
  - in return, brokers would refer title business
  - without MSAs, Lighthouse feared loss of business
  - no determination of FMV under the MSA
2. CFPB alleges
  - monthly fee based upon revenues generated
  - monthly fee based on what competitors willing to pay brokers
  - failure to monitor brokers to confirm services actually provided
    - all evidence payments made for referral of business

## CFPB Weighs In: Lighthouse Title Consent Order

### B. CFPB Prouncements in Lighthouse Consent Order

1. Brokers with MSA referred more title business to Lighthouse than brokers that had no agreement
2. Entering a contract is a “thing of value” even if fees paid under contract are at FM
3. Entering into a contract with an understanding that brokers will refer title busienss violates Section 8(a) of RESPA

## CFPB Weighs In: Lighthouse Title Consent Order

### C. What Happened to Lighthouse?

1. Lighthouse and its officers, agents, servants and employees enjoined from violating RESPA
2. \$200,000 civil money penalty
3. All expenditures worth more than \$5 must be documented for 5 years
4. Forced to terminate all existing MSAs



## **CFPB Weighs In: Lighthouse Title Consent Order**

### **D. Lessons from Lighthouse Consent Order**

1. CFPB makes clear that “quid pro quo agreements” violate RESPA
2. Contract considered a thing of value (one of the elements of a Section 8(a) violation)
3. Independent third party valuation a must
4. Audit to confirm services performed a must

## Important MSA Considerations

### A. Best Practices

1. Flat Fee Agreements
  - Per-transaction Agreements more difficult to defend
2. Services should be geared toward advertising
  - Banner on webpage
  - Signage in offices
  - Racks of brochures
  - Co-advertising
3. Perform audit to verify all services set forth in MSA
4. Do not pay for direct customer solicitations
  - MSA should not include payment for directly soliciting consumers
5. Avoid exclusive arrangements

## MSAs Not Without Risk (cont'd)

### A. Best Practices (cont'd)

5. Avoid preferential designations
  - “preferred lender,” “outstanding,” “exceptional,” etc.
6. Payment for “access” to sales staff frowned upon
  - access to sales meetings in particular
  - difficult to value
7. Disclosure to consumers encouraged
  - Similar to affiliated business disclosure
  - Or included in affiliated business disclosure

## **MSAs Not Without Risk** (cont'd)

### **A. Best Practices** (cont'd)

8. Monthly fee must be commensurate with value of services
  - fair market value
  - lots of factors go into determining value
    - number of offices
    - number of agents
    - number of listings
    - hits on webpage
    - circulation of advertisements
    - etc.
  - independent third party valuation strongly recommended

## **MSAs Not Without Risk** (cont'd)

### **A. Best Practices** (cont'd)

9. Changing monthly marketing fee must be for objective reasons
  - Never based upon production/volume
  - Changes in business model
    - Additional offices
    - Additional agents, etc.

## **MSAs Not Without Risk** (cont'd)

### **A. Best Practices** (cont'd)

10. Provide services for no compensation
  - access to sales meetings
  - conducting customer satisfaction surveys
  - Providing company with monthly reports of
    - services
    - activity levels
    - other data

## Compliance

1. New sheriff in town
  - HUD no longer calling shots
  - CFPB in charge
    - yet to formally announce its policy
2. Make sure Agreements reflect arrangement
  - actual services, actually performed
  - for fair market value
3. CFPB enforcement action matter of time

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# QUESTIONS

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