Everything you need to know about RESPA, explained

Amy Swinderman

Jun 7, 2016

The Real Estate Settlement Procedures Act has been around since 1974 — but the changes over the past few years, combined with the creation and implementation of the Consumer Financial Protection Bureau (CFPB), have caused some confusion in the industry.

What is the act? What does it mean for agents and for consumers?

Here’s what you need to know about RESPA — explained.

What is RESPA?

It’s the Real Estate Settlement Procedures Act, a consumer protection statute passed by the U.S. Congress in 1974.

The statute has two main purposes:

1. To help consumers become better shoppers for settlement services; and

2. To eliminate kickbacks and referral fees that may increase the costs of certain settlement services.
The consumer side of RESPA requires that borrowers receive disclosures at certain times during the mortgage loan transaction that plainly describe the terms of the loan, all settlement service charges associated with the loan and the business relationships between the lender and other settlement service providers, if any.

RESPA also addresses certain industry practices that have in the past been shown to increase the cost of settlement services. Specifically, it prohibits any person (or company) from giving or accepting anything of value in exchange for business referrals. It also prohibits a person from giving or accepting any portion of a charge for a service that wasn't actually performed.

Where can I find RESPA?

RESPA is codified at Title 12, Chapter 27 of the United States Code, 12 U.S.C. §§ 2601-2617.

Why was RESPA enacted?

In the 1970s, Congress became concerned that mortgage loan applicants were being overcharged for settlement services. A 1972 study by HUD and the Administrator of Veterans Affairs (VA) found that most borrowers were not shopping around for their settlement service providers, and instead, their real estate brokers, closing attorneys and other professionals were referring them to lenders, title insurance companies and other providers.

Of particular concern to Congress was the report's finding that there was little price competition for those services, and consumers were being overcharged by companies that were engaged in systematic kickbacks and referral fees schemes.

The HUD/VA report requested that Congress give the agencies the power to establish maximum allowable settlement charges and to require the use of uniform consumer disclosures.

This recommendation didn't sit well with the real estate industry, so Congress instead opted to enact a statute that would give consumers more advance disclosure of their settlement costs and crack down on the practice of kickbacks and referral fees.
Who administers RESPA?

From the time RESPA was enacted in 1974 until 2011, HUD administered and enforced the act. In July 2011, those duties transferred to the Consumer Financial Protection Bureau (CFPB), a federal agency created in 2010 by the passage of the Dodd–Frank Wall Street Reform and Consumer Protection Act.

Most states also have laws similar to RESPA on the books. Some are even stricter than RESPA, creating a debate in some areas of the country about what business practices are deemed legal.

Most states have the authority to enforce their own versions of RESPA. There have been cases where companies simultaneously faced RESPA charges on both a federal level and a state level.

Sometimes states will “piggyback” on federal cases, especially if they believe the conduct at issue is a serious problem in their market. But state officials have sometimes initiated RESPA investigations and worked in tandem with federal officials, as well.

What kinds of loans are governed by RESPA?

RESPA applies to “federally related” mortgage loans that are secured by a mortgage loan on a one- to four- family residential property.

A federally related mortgage loan is one made by any lender whose deposits or accounts are insured by any federal agency, intended to be sold to any of the government-sponsored enterprise or made by any creditor who makes or invests in residential real estate loans aggregating more than $1 million per year.

RESPA governs purchase loans, assumptions, refinances, property improvement loans and lines of credit associated with those federally related mortgage loans.

How does RESPA define “settlement service provider”? Who, exactly, does this statute affect?

RESPA defines “settlement services” as “any service provided in connection with a real estate settlement including, but not limited to, the following:

- Title searches
• Title examinations
• The provision of title certificates
• Title insurance
• Services rendered by an attorney
• The preparation of documents
• Property surveys
  • Rendering of credit reports or appraisals
• Pest and fungus inspections
• Services rendered by a real estate agent or broker
• The origination of a federally related mortgage loan (including, but not limited to, the taking of loan applications, loan processing and the underwriting and funding of loans)
• The handling of the processing, and closing or settlement”

**Consumer disclosures**

**What were the consumer disclosures required under RESPA?**

Much of RESPA concerns certain disclosures that were required to be given to borrowers at specific times during the mortgage transaction. These disclosures let the borrower know what to expect with regard to the terms of the mortgage loan, how the loan will be serviced and associated settlement costs.

The borrower must also be informed that he has the right to shop around for and choose his own settlement service providers, as well as about what, if any, business relationships his settlement service providers may have with each other.

First, there was the **Good Faith Estimate of Settlement Costs**, or GFE.

This was given to the borrower within three business days of applying for a loan. The GFE explained what settlement service charges the borrower was likely to pay — but those charges were exactly what the form says: A “good-faith estimate” of what the
borrower may have to pay, and not a guarantee, as changing market conditions can affect prices.

Next, there was the Servicing Disclosure Statement, in which the lender or mortgage broker informs the borrower whether it expects someone else will be servicing the loan after it closes.

Perhaps the most talked-about RESPA disclosure form was the Affiliated Business Arrangement Disclosure, which reminded borrowers that they were not required (with certain exceptions) to use the affiliates of a lender, real estate agent/broker or other participant in the settlement.

If they did choose to use the providers recommended by their real estate agent/broker or lender, any affiliations between the companies — whether they were owned or controlled by a common corporate parent or simply had some sort of affiliated business arrangement — had to be disclosed, and the borrower acknowledged with his signature that he understood those relationships.

Next was the HUD-1 Settlement Statement, a form that itemized the services provided to the borrower and the actual fees charged to him. This form was required to be delivered or mailed to the borrower one day before settlement.

Finally, there were the Escrow Account Operation & Disclosures forms. The entity servicing the loan was required to give the borrower an initial escrow account statement at settlement or within the next 45 days. This form showed all of the payments that were to be deposited into an escrow account, as well as all of the disbursements that were to be made from the escrow account for the first year.

The lender/servicer also reviewed the escrow account annually and was required to report to the borrower once per year about the prior year’s activity and any adjustments that the borrower may have to make in the next year.

How were these disclosures impacted by the TILA-RESPA Integrated Disclosures (TRID) rule?

In 2010, Congress, through passage of the Dodd-Frank Wall Street Reform and Consumer Protection Act, created the CFPB and transferred HUD’s RESPA authority to the bureau. The Dodd-Frank Act mandated that the CFPB propose new rules by
2012 that would combine RESPA’s disclosures with those required under the Truth in Lending Act (TILA) into a single, streamlined disclosure to make the homebuying process easier and simpler for consumers (Click here for our TRID explainer page).

The CFPB’s new rule, TRID, took effect on Oct. 3, 2015, and made significant changes to the disclosures that were formerly required under RESPA. However, it’s important to note that TRID didn’t replace RESPA in its entirety; aside from the changes in required consumer disclosures, the other portions of the statute are still very much in effect.

The first major change is that the GFE and the early Truth in Lending (TIL) statement became the Loan Estimate (LE), which provides a summary of the key loan terms and estimated loan and closing costs. Lenders must provide the LE to consumers within three days after they submit a loan application.

The other major change is that the HUD-1 Settlement was combined with the final TIL statement and became the Closing Disclosure (CD), which provides a detailed accounting of the mortgage loan transaction. Borrowers must receive the CD three business days before closing a loan. Any significant changes to loan terms require the lender to issue a revised CD, triggering a new three-business-day review period.

Prohibited activities

What industry practices does RESPA prohibit?

Namely, offering kickbacks, referral fees and fee-splitting with other settlement service providers in exchange for the referral of business, and charging consumers fees for services that were not actually rendered. This is the “meat” of RESPA and the portion of the statute that affects the real estate industry the most.

Section 8(a) of RESPA, which pertains to business referrals, states: “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.”

Put more plainly, Section 8(a) means that no settlement service provider may pay — or receive — fees or other items with the understanding or agreement that business will be sent their way.
Section 8(b), which pertains to splitting charges, states: “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.”

Section 8(b) concerns any splitting or sharing of fees by and between the person who performs the legitimate service, as well as the person who provides the referral.

What is a “referral”?

It’s an agreement, understanding or expectation that you will send business to someone, or they will send it to you. And while referring borrowers to companies you have previous experience with or engaging in affiliated business arrangements and other partnership structures are longstanding, legal business practices in the real estate industry — and have been proven by some studies to have consumer benefits — RESPA prohibits you from doing certain things in connection with referring business or receiving business referrals from others.

What is a “kickback”?

A kickback is an illegal fee or rebate paid to someone in order to gain that person’s recommendation for the award of business.

What is a “markup”?

A markup is an increase in price above a third-party vendor’s normal fee — and the parties that are referring business to each other may split the difference as a reward for the referral.

For example, an appraiser may normally charge a lender $300 for an appraisal, but in a transaction where the lender refers business to the appraiser, the lender may charge the consumer $400 for the appraisal fee — and one of those providers may keep the extra $100, or the two parties may split it.

This obviously flies in the face of what Congress intended to do with RESPA, because it involves charging consumers a higher fee than they would normally pay, with no extraordinary work being performed to justify the price increase, and the providers collecting the profit on the wrongly inflated fee.
Section 8(b), which pertains to splitting charges, states: “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.”

Section 8(b) concerns any splitting or sharing of fees by and between the person who performs the legitimate service, as well as the person who provides the referral.

**What is a “referral”?**

It is an arrangement, understanding or expectation that you will send business to someone, or they will send it to you. And while referring borrowers to companies you have previous experience with or engaging in affiliated business arrangements and other partnership structures are longstanding, legal business practices in the real estate industry — and have been proven by some studies to have consumer benefits — RESPA prohibits you from doing certain things in connection with referring business or receiving business referrals from others.

**What is a “kickback”?**

A kickback is an illegal fee or rebate paid to someone in order to gain that person’s decision or recommendation for the award of business.

**What is a “markup”?**

A markup is an increase in price above a third-party vendor’s normal fee — and the parties that are referring business to each other may split the difference as a reward for the referral.

For example, an appraiser may normally charge a lender $300 for an appraisal, but in a transaction where the lender refers business to the appraiser, the lender may charge the consumer $400 for the appraisal fee — and one of those providers may keep the extra $100, or the two parties may split it.

This obviously flies in the face of what Congress intended to do with RESPA, because it involves charging consumers a higher fee than they would normally pay, with no extraordinary work being performed to justify the price increase, and the providers collecting the profit on the wrongly inflated fee.
What is a “thing of value”?

It may sound like a mere transfer of money, but it actually means any type of consideration made in exchange for the referral of business — and under RESPA, it’s illegal for a real estate agent or broker to give or receive a thing of value contingent on the referral of business, even if the referral agreement is informal and not in writing, and even if it’s disclosed to the consumer.

Examples of “thing of value” include, but are not limited to:

- Money/fees
- Discounts
- Duplicate payments of a charge
- Stock, dividends or distribution of profits
- Credits to be paid at a later date
- The opportunity to participate in a moneymaking program
- Retained or increased earnings
- Increased equity in a parent or subsidiary entity
- Special bank deposits or accounts, or special or unusual banking terms
- Services of all types at special or free rates
- Lease or rental payments
- Trips, cruises and vacations
- Gifts and prizes
- Payment of another person’s expenses
- Reduction in credit against an existing obligation
- Educational seminars, programming and training sessions
- Advertising/marketing goods and services
- Luncheons and open houses
Swag, tchotchkes and other promotional items

One more important thing to know about a thing of value: RESPA doesn’t place dollar values on things of value, but some states have their own limits on the amounts you can give someone who is in a position to refer business to you.

So while federal regulators may not feel the need to prosecute you for paying for a title agent’s cup of coffee, some states may not allow it, depending on how much you spend.

Wait a second! This makes it sound like I am not allowed to network, work or connect with mortgage, title and other settlement service providers at all. Real estate is a relationship-driven business. Am I really not allowed to give any of these items to settlement service providers? Not even a pen with my company’s name on it?

When enacting RESPA, Congress acknowledged some of the business referrals that occur in the settlement service industry do not harm consumers, and said it’s OK for real estate, mortgage and settlement service providers to pay fair and reasonable fees for normal marketing and advertising efforts.

You don’t have to avoid settlement service providers entirely to comply with RESPA. You can give or receive “things of value” in the course of doing business — you just can’t do it with the expectation of business referrals, and you can’t defray another provider’s expenses if they are in a position to refer business to you.

So you can give a title company some pens with your brokerage’s name inscribed on them, but there must not be an agreement that they will send you business for doing so. And you can’t give the title company pens with their name on them, because you’d be offsetting their expenses.

In another scenario, you can host a “lunch and learn” for a local title agency, but the title company shouldn’t reimburse your firm for the cost of the luncheon. If the title company makes a presentation or markets its services, however, making such payments may be permissible under RESPA, as long as they represent the value of the marketing done by the title company.
And in another scenario, you can rent a desk in your office to a mortgage broker to prequalify mortgage applicants, but you must charge them fair market value for the portion of your office that desk takes up, as well as any supplies they use.

**What is “fair market value”?**

It’s the general market value for a good or service that a non-settlement service provider would pay for that good or service. When demonstrating to attorneys, compliance experts and regulators that you are providing a thing of value at fair market value, you must show that the value of the good or service is commensurate with what anyone would expect to pay for it today.

The whole idea is that providers aren’t paying you a higher or lower rate for goods or services with the expectation that you will be referring business to each other as a reward.

**How to calculate fair market value**

However, calculating fair market value can sometimes be tricky. If, for example, you are providing office or desk space to another settlement service provider, you could measure what percentage of your total office space is comprised of that area, and calculate what portion of your own rent this may be.

This amount would be what you’d charge anyone — not just a settlement service provider — to rent that space, and what people in your neck of the woods would expect to be charged for renting a similar space.

The amount to be paid must not be tied in any way with the expectation of business referrals, and especially not to a specific number of transactions. Whether that provider brings you two or 20 transactions per month, that provider’s rent payments should always be the same.

Calculating fair market value for other items like marketing services gets a bit hairier. If a real estate brokerage and a title company decide to take out a joint ad in a newspaper, both parties must pay fair market value for the portion of the ad containing their company’s content (such as logo, contact information, etc.)
If your brokerage’s content takes up about 75 percent of the ad’s total space, and the title company’s content takes up about 25 percent of it, you should be paying 75 percent of the cost of that ad, and the title company should pay for 25 percent of it.

You could allow a title company to place a web banner ad on your website, but you should charge that title company a fee that reflects the amount of space the banner takes up on the page, how often it appears, the size of the audience it reaches, etc. — and that amount must be what similar websites would charge for that same kind of banner.

There are three general rules that most compliance experts advise you to keep in mind when calculating fair market value:

1. Put it in writing: Document all agreements in formal, legally binding contracts that spell out exactly what each party’s responsibilities are.

2. Obtain third-party valuations: You may think you know how to calculate how much to charge for a web banner, but other people in the e-commerce world may have a different approach. Seek out an expert on these matters — someone who is in no way connected to your business or line of work — to provide an unbiased, objective value of the goods and services you wish to provide.

3. Periodically revisit these charges and fees to make sure they are still fair, reasonable and in line with general market value.

What are some examples of RESPA-compliant interactions I can have with settlement service providers?

The National Association of Realtors (NAR) has issued quite a bit of RESPA compliance guidance to its Realtor members over the years, and here is a short list issued by the association of some common interactions that are legal under RESPA:

- RESPA allows a title agent to pay for your dinner when business is discussed, as long as those dinners are not a regular occurrence.

- RESPA allows a home inspection company to sponsor association events when representatives from that company also attend and to post a sign
identifying its services and sponsorship of the event.

- RESPA allows a lender to pay you fair market value to rent a desk, copy machine and phone line in your office to prequalify applicants.

- RESPA allows a title agent to provide, during an open house, a modest food tray in connection with the title company’s marketing information indicating that the refreshments are sponsored by the title company.

- RESPA allows you to jointly advertise with a mortgage broker if you pay a share of the costs in proportion with your prominence in the advertisements.

- RESPA allows a hazard insurance company to give you marketing materials such as notepads, pens and desk blotters which promote the hazard insurance company’s name.

**Are there scenarios that are absolutely illegal under RESPA?**

We’ve all undoubtedly seen some of these activities at some point, and some of them may have been the subject of lawsuits or regulator penalty. Here are just a few examples of flagrant RESPA fouls:

- Giving settlement service providers vacations, sporting event or concert tickets, raffle tickets, gift certificates, bottles of wine or other things of value as a reward for referring business;

- Hosting cruises with free food, alcohol and door prizes for those who have referred business to you or may be in a position to do so in the future;

- “Sponsoring” the food served at another settlement service provider’s “lunch and learn,” but not making any kind of presentation or offering some kind of marketing at the event that matches the value of the sponsorship;

- Leasing a desk or office space to a mortgage broker, and giving that mortgage broker a discount on rent and supplies if they bring a certain number of transactions your way.
You may be wondering why some people or companies seem to engage in these practices and fly under the RESPA radar. But don’t fall into the foolish trap of thinking you’ll be able to escape scrutiny, too. Any of these activities warrant a knock on the door from the RESPA police.

How do I know if something I am doing is legal under RESPA?

RESPA is not black and white; it’s actually pretty gray. There are hundreds, if not thousands, of possible scenarios and business practices that real estate agents and brokers need to make sure are legal under RESPA.

Some of these scenarios may need to be reviewed on a case-by-case basis, and you will most likely need to provide extensive documentation to show that you made every effort to comply with RESPA.

If you aren’t sure if something you are doing can pass the RESPA smell test, you should consult with an attorney, preferably one who specializes in RESPA compliance. And it’s always a good idea to keep up on the latest case law and other legal happenings to see how different courts and regulators are interpreting RESPA and deeming certain activities to be legal or illegal — because since RESPA was enacted, some of those interpretations have conflicted with others, creating confusion about what’s legal and what’s not.

Permissible activities

Are there any marketing activities or business relationships that are permissible under RESPA?

Don’t worry; RESPA is not just a list of don’ts. There are some practices and arrangements that are allowed under the statute, which are described in Section 8(c).

This section provides for the following exceptions that allow the real estate, mortgage, title, escrow and settlement services industries to work together in a legally compliant way:

- The payment of attorneys’ fees for services actually rendered, by a title company to its duly appointed agent for services actually performed in the issuance of a title insurance policy or by a lender to its duly appointed agent
for services actually performed in the making of a loan;

- 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;

- Payments pursuant to cooperative brokerage and referral arrangements or agreements between real estate agents and brokers;

- An employer's payment to its own employees for any referral activities;

- Affiliated business arrangements, as long as some conditions are met;

- Transactions on the secondary market.

What is an “affiliated business arrangement” (ABA)?

RESPA defines an ABA as an arrangement in which:

A person who is in a position to refer business incident to or a part of a real estate settlement service involving a federally related mortgage loan, or an associate of such person, has either an affiliate relationship with or a direct or beneficial ownership interest of more than 1 percent in a provider of settlement services; and

Either of such persons directly or indirectly refers such business to that provider or affirmatively influences the selection of that provider.

In an ABA, _bona-fide_ dividends and capital or equity distributions related to ownership interest or a franchise relationship between entities in an affiliate relationship are permissible. _Bona-fide_ business loans, advances and capital or equity contributions between entities in an affiliate relationship are also allowed, as long as they are for ordinary business purposes and are not fees for the referral of settlement service business or unearned fees.

A return on an ownership interest does not include:

- Any payment which has as a basis of calculation no apparent business motive other than distinguishing among recipients of payments on the basis of the amount of their actual, estimated or anticipated referrals;

- Any payment which varies according to the relative amount of referrals by the
different recipients of similar payments; or

- A payment based on an ownership, partnership or joint venture share which has been adjusted on the basis of previous relative referrals by recipients of similar payments.

All ABAs must demonstrate compliance with the following conditions:

- The person making the referral must provide the consumer with an ABA disclosure statement describing the nature and structure of the relationship between the providers, along with an estimated charge or range of charges generally made by those providers. This disclosure must be made at the time of the referral, or if the lender requires use of a particular provider, at the time of the loan application.

- No person making a referral has required the consumer to use a particular provider as a condition of representing that consumer;

- The only permissible thing of value that is received from the arrangement, other than these payments, is a return on an ownership interest or franchise relationship — but even this provision in the RESPA statute is a bit murky, as the CFPB has stated in some of its enforcement actions that it considers an ABA agreement itself to be a thing of value. Many compliance experts disagree with this analysis, but many companies are shying away from ABAs, just to be on the safe side.

Where a lot of companies run into trouble is assuming that the mere labeling of a thing of value determines whether it is a bona-fide return on an ownership interest or franchise relationship. In reality, a thing of value will be determined by regulatory investigators by analyzing facts and circumstances on a case-by-case basis.

A return on franchise relationship may be a payment to or from a franchisee, but it does not include any payment which is not based on the franchise agreement, nor any payment which varies according to the number or amount of referrals by the franchisor or franchisee, or which is based on a franchise agreement that has been
adjusted on the basis of a previous number or amount of referrals by the franchiser or franchisees. A franchise agreement may not be constructed to insulate against kickbacks or referral fees — this is called a “sham” ABA.

**What is a “joint venture” (JV)?**

A JV is similar to an ABA, but the structure provides for the partnering settlement service providers to pool their resources to accomplish a business activity. A JV must be a standalone, bona-fide business with sufficient capital, employees and separate office space, and must perform core services associated with that industry.

Companies in the real estate, mortgage, title, escrow and settlement services began to establish JVs to enhance their purchase mortgage strategies or to enter a new market that may have historically been difficult for them.

In 1996, HUD issued formal guidance establishing a 10-prong test to determine whether a JV is legal:

1. Does the new entity have sufficient initial capital and net worth, typical in the industry, to conduct the settlement service business for which it was created? Or is it undercapitalized to do the work it purports to provide?

2. Is the new entity staffed with its own employees to perform the services it provides? Or does the new entity have “loaned” employees of one of the parent providers?

3. Does the new entity manage its own business affairs? Or is an entity that helped create the new entity running the new entity for the parent provider making the referrals?

4. Does the new entity have an office for business which is separate from one of the parent providers? If the new entity is located at the same business address as one of the parent providers, does the new entity pay a general market value rent for the facilities actually furnished?

5. Is the new entity providing substantial services, i.e., the essential functions of the real estate settlement service, for which the entity receives a fee? Does it incur the risks and receive the rewards of any comparable enterprise operating in the market place?
6. Does the new entity perform all of the substantial services itself? Or does it contract out part of the work? If so, how much of the work is contracted out?

7. If the new entity contracts out some of its essential functions, does it contract services from an independent third party? Or are the services contracted from a parent, affiliated provider or an entity that helped create the controlled entity? If the new entity contracts out work to a parent, affiliated provider or an entity that helped create it, does the new entity provide any functions that are of value to the settlement process?

8. If the new entity contracts out work to another party, is the party performing any contracted services receiving a payment for services or facilities provided that bears a reasonable relationship to the value of the services or goods received? Or is the contractor providing services or goods at a charge such that the new entity is receiving a thing of value’ for referring settlement service business to the party performing the service?

9. Is the new entity actively competing in the market place for business? Does the new entity receive or attempt to obtain business from settlement service providers other than one of the settlement service providers that created the new entity?

10. Is the new entity sending business exclusively to one of the settlement service providers that created it (such as the title application for a title policy to a title insurance underwriter or a loan package to a lender)? Or does the new entity send business to a number of entities, which may include one of the providers that created it?

What is a “marketing service agreement” (MSA)?

MSAs are the newest type of affiliated relationship, and probably the most controversial activity that falls under the purview of RESPA. To date, no regulator has provided a concrete definition of an MSA, or described what kind of litmus test it will use to determine whether an MSA is RESPA-compliant.
An MSA is a contract by which one settlement service provider agrees to market another provider's products and services. Generally, a real estate broker, developer, title company or mortgage broker will agree to market the service of another provider in exchange for a marketing fee. That fee is supposed to be based on a fair-market value of the marketing or advertising services to be performed, and must be for a bona-fide service or product, and should not be tied in any way to the referral of business.

Some examples of the types of goods and services provided under an MSA are:

- Displaying another company's marketing materials and signage at offices, on billboards and in other locations
- Including another company's web banner advertisement on your company's website
- Email and direct marketing campaigns to another company’s customers or prospects
- Distribution of fliers, pamphlets and other materials
- Participation in a company's internal meetings or events

HUD began investigating companies engaged in MSAs in the late 2000s, and the CFPB inherited the department's unfinished MSA business when it was established in 2011. Much to pretty much everyone's dismay, the CFPB's interpretation of RESPA's application to MSAs has been broad and damning.

In September 2014, the CFPB fined Michigan title company Lighthouse Title Inc., $200,000 for engaging in MSAs with real estate brokers and others that, at least in the CFPB's view, violated RESPA. Many were stunned when the CFPB took the position that Lighthouse Title's MSA contract itself, made with the understanding that its partners would refer business to it, was considered a thing of value under RESPA.

"The agreements made it appear as if the payments would be based on marketing services the companies were supposed to provide to Lighthouse. However, Lighthouse actually set the fees it would pay under the MSAs, in part, by considering the number of referrals it received or expected to receive from each company. The
CFPB’s investigation found that the companies on average referred significantly more business to Lighthouse when they had MSAs than when they did not,” the CFPB stated.

About a year later in October 2015, the CFPB issued a compliance bulletin stating that in its view, MSAs are “typically framed as payments for advertising or promotional services, but in some cases, those payments are actually disguised compensation for referrals.”

“In the bureau’s experience, determining whether an MSA violates RESPA requires a review of the facts and circumstances surrounding the creation of each agreement and its implementation. The nature of this fact-intensive inquiry means that, while some guidance may be found in the bureau’s previous public actions, the outcome of one matter is not necessarily dispositive to the outcome of another. 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,” the CFPB stated in the bulletin.

But the CFPB did not provide any specific definitions or explanations of what a legally compliant MSA looks like, and the bureau has been widely criticized for “regulating by enforcement,” reserving its judgment on specific MSAs in its consent orders and other regulatory actions.

Are all ABAs, JVs and MSAs shams? Shouldn’t these arrangements make the mortgage loan transaction easier for consumers?

Some businesses, organizations and individuals have argued that affiliated businesses, in their various forms, are sham entities designed to disguise kickbacks and controlled business in the real estate industry. These parties argue that affiliated businesses exploit consumer naiveté about the homebuying process and discourage competition on service and price among settlement service providers.

Proponents of these business relationships argue that their “one-stop shopping” structures offer many consumer benefits, including faster and more efficient service, convenience and a simpler homebuying experience.
These two arguments have been the subject of much debate, countless studies and probes at every level of government for more than two decades — and with both sides offering data, analysis and regulatory interpretation to bolster their positions, the controversy surrounding affiliated business is unlikely to subside, especially because lawmakers and regulators have not been able to come to a consensus.

**Other important RESPA provisions**

**Section 6: The Qualified Written Request (QWR)**

Although RESPA was primarily designed to ensure that consumers receive timely information about the costs of their settlement services, it also imposes certain requirements on mortgage loan servicers, or companies track account balances, manage escrow accounts, handle loss-mitigation and pursue foreclosure in the case of defaulted loans.

Section 6 of the statute sets forth requirements for servicers to correct errors or provide other information to borrowers who request it in the form of a qualified written request (QWR). By making a QWR, a borrower can force a servicer to provide detailed information about his account.

A QWR letter must contain the following:

- The borrower’s name and account information
- Detailed description of the information the borrower is seeking
- A statement of the reasons why the borrower believes the account is in error

If any of this information is missing, it may be disqualified as a QWR.

This letter must be sent to the servicer, not the original lender or some other party, and it must not be written on a payment coupon or other materials supplied by the servicer. It is also recommended that borrowers send this letter via certified mail with return receipt requested, to ensure the servicer has received the letter.

The CFPB has provided sample QWR letters here.
Section 6 also prescribes different timeframes for servicers to respond to QWRs, depending on the type of request. If a borrower is simply requesting information, the servicer must acknowledge the QWR within five business days, then send a response within 30 business days.

But if a borrower is alleging that there is an error with his account (such as payments not being applied to his account), the servicer must acknowledge the QWR within five business days. Then it must correct the error, provide the borrower with notice about the correction and provide contact information for the borrower to follow up, if needed, within seven business days. If no error actually occurred, the servicer must inform the borrower of this by those same deadlines.

In the case of a foreclosure proceeding, in which a borrower alleges the servicer has improperly started the foreclosure process during the 120-day pre-foreclosure waiting period required by federal law, the servicer has 30 business days to respond.

The 30-day deadline can be extended for an additional 15 days if the servicer notifies the borrower within that timeframe of the extension, and gives reasons for the delay. This extension does not apply if the borrower’s notice of error concerns a payoff statement request, or certain loss-mitigation and foreclosure errors.

Section 9: Seller-required title insurance

Section 9 of RESPA prohibits a seller from requiring the homebuyer to use a particular title insurance company, either directly or indirectly, as a condition of sale.

Section 10: Limits on escrow accounts

Section 10 of RESPA sets limits on the amounts that a lender may require a borrower to put into an escrow account for purposes of paying taxes, hazard insurance and other charges related to the property. RESPA does not require lenders to impose an escrow account on borrowers; however, certain government loan programs or lenders may require escrow accounts as a condition of the loan.

During the course of the loan, RESPA prohibits a lender from charging excessive amounts for the escrow account. Each month the lender may require a borrower to pay into the escrow account no more than 1/12 of the total of all disbursements
payable during the year, plus an amount necessary to pay for any shortage in the account. In addition, the lender may require a cushion, not to exceed an amount equal to 1/6 of the total disbursements for the year.

The lender must perform an escrow account analysis once during the year and notify borrowers of any shortage. Any excess of $50 or more must be returned to the borrower.

RESPA enforcement

The CFPB’s enforcement authority

As the regulator charged with enforcing RESPA compliance, the CFPB can take action against persons or entities that violate the law. This process usually begins with the bureau issuing a civil investigative demand, or CID, to people and institutions that it suspects may be violating RESPA. A recipient of a CID may challenge a CID by petitioning the CFPB’s director. The director can respond in three ways: he can reaffirm the bureau’s decision to obtain the information, modify the demand or set it aside altogether.

But if the CFPB discovers that RESPA has been violated, it has a few remedies at its disposal:

- It can file an action in federal district court, which sometimes ends in a settlement or consent agreement;

- It can initiate an administrative adjudication proceeding, which are conducted by an administrative law judge who holds hearings and issues a recommended decision (which the CFPB director can accept or override);

- It can issue a warning letter to advise recipients that certain actions may violate federal consumer financial law, sometimes making them public if the bureau believes the marketplace should be aware of certain activities.

Most state regulators have similar enforcement powers over violators of RESPA.

Other penalties for violating RESPA?
Regulators aren’t the only parties that can take action if a person or entity violates RESPA. The statute also provides for a private right of action for consumers, who may bring civil lawsuits on behalf of themselves, or class-action lawsuits on behalf of themselves and a certain number of other consumers who may have been similarly affected by an alleged violation.

- For Section 6, the portion of the statute concerning QWRs: If the servicer fails to comply with the prescribed deadlines, a borrower may recover any actual damages suffered due to the servicer’s noncompliance, additional damages up to $2,000 if there is a pattern or practice of servicer noncompliance and attorneys’ fees and costs.

- For Section 8, the anti-kickback portion of the statute: Violations are subject to both civil and criminal penalties. In a private lawsuit, a person or entity that violates Section 8 may be liable to borrower for an amount equal to three times the amount of the borrower was charged for a service. In a criminal case, a person who violates this section may be fined up to $10,000 and imprisoned for up to one year.

- For Section 9, the portion of the statute concerning seller-required title insurance: Buyers may sue a seller who violates this provision for an amount equal to three times all charges made for the title insurance.

These are penalties for violating the federal statute; states that have their own RESPA laws on the books may assess their own additional penalties for violations.

**What is the statute of limitations for RESPA cases?**

Individuals have a limited amount of time to file a RESPA complaint or lawsuit. Depending on the plaintiff’s allegations, the deadlines for filing are:

- For Section 6, the portion of the statute concerning QWRs: Three years after an alleged violation occurred.

- For Section 8: One year after an alleged violation occurred.

- For Section 9: One year after an alleged violation occurred.
There is a special exception for the CFPB, state attorneys general and state insurance commissioners, who may bring charges within three years from the date a violation allegedly occurred.

**What’s equitable tolling in RESPA cases?**

Equitable tolling is a principle of law stating that a statute of limitations shall not bar a claim in cases where the plaintiff, despite use of due diligence, could not or did not discover the injury until after the expiration of the limitations period.

In some RESPA cases, plaintiffs allege illegal conduct that occurred beyond the statute of limitations, but assert that they could not have reasonably known at the time that the conduct was illegal or harmful, often because the defendant deliberately obscured their illegal activity from the plaintiff in some way.

Some defendants will also invoke equitable tolling in an attempt to get a case dismissed.

The principle has been used with some degree of success in RESPA cases by both plaintiffs and defendants.

**Other RESPA matters**

I’ve heard a lot about RESPA reform. What was that?

The short answer is that it was a prolonged, frustrating effort to make minor changes to RESPA.

Since RESPA became law in 1974, it has only been amended a handful of times to reflect changing business practices and the advent of new technology. But shortly after the start of the new Millennium, HUD began to think about a substantial overhaul of the statute.

In 2002, Mel Martinez, HUD’s secretary under President George W. Bush, announced plans to reform RESPA, with the intention of simplifying the homebuying process with enhanced consumer disclosures, emphasis on consumer choice of settlement service providers, curbing excessively high settlement fees, fostering innovation in the real estate marketplace and adding more teeth to enforcement efforts. The department received more than 80,000 public comments on its proposals from participants in the real estate, mortgage and settlement service
industries — and the proposed new rule was so controversial that Alphonso Jackson, Martinez’s successor, pulled it in 2004 and said HUD would go back to the drawing board.

A year later in 2005, HUD held a series of roundtable discussions in several cities across the country to collect industry feedback and suggestions, after which it published a draft rule for public comment. This new proposed rule included the following:

- A new GFE that grouped some settlement service fees into major categories, with total charges displayed on the front page to make comparison with other loan offers easier
- A new HUD-1 Settlement Statement to help consumers compare estimated settlement service charges on the GFE with their actual charges
- Clear disclosure of the yield spread premiums that lenders paid to mortgage brokers
- A closing script for settlement agents to read to borrowers at the closing table
- Clearer definitions of required use of settlement service providers

Not surprisingly, the affected industries had plenty to say about all of these suggested changes, and the debate waged for more than three years. Finally, in November 2008, HUD published the much-anticipated final rule, which made the following changes:

- A new, three-page GFE to be given to consumers within three days of making a loan application, with a summary of key loan terms, estimated total settlement charges that would be guaranteed for 10 days
- Disclosure of yield spread premiums, with an optional comparison chart to demonstrate the consequences of a borrower wishing to lower his interest rates or settlement charges at closing
- Modification of the HUD-1 Settlement Statement to facilitate comparison with the GFE
- Minimal changes to the definition of “required use”
The new definition of "required use" and some other minor changes took effect in January 2009; the remaining changes took effect in January 2010.

HUD was widely criticized for taking such a long time to make such minor changes that many felt ultimately didn’t simplify the homebuying process for consumers, caused compliance headaches for lenders and overlapped and conflicted with consumer disclosures mandated by other federal laws.

Email Amy Swinderman

REGULATIONS

Comments

Related Articles

CFPB: Good cop or bad cop?
Apr 21, 2016

Are you disclosing your relationship with your lender?
Apr 20, 2016

Realogy and PHH score big win in RESPA class-action lawsuit
Apr 18, 2016

5 things you need to know about TRID’s mortgage disclosure rule
Apr 12, 2016