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RESPA at 50

KEY REFORMS TO RESPA SECTION 8 TO BETTER SERVE THE MODERN MORTGAGE MARKET

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Executive Summary

The Real Estate Settlement Procedures Act (RESPA) turns 50 this year. It is time to seriously explore both the continued necessity of RESPA Section 8 and key reforms to make the Section fit the modern mortgage industry. This paper will focus on Section 8's prohibitions against kickbacks and unearned fee splitting. The purpose of this paper is to propose several solutions to modernize RESPA and align the law with current shopping technology, protect consumers, and decrease costs and inefficiencies for both the lender and consumer.

In any other industry, it would generally be acceptable to make a payment or give a gift out of appreciation to someone who puts a buyer in touch with a seller. This is not the case in the residential mortgage industry, where such standard business practices can lead to fines or even possibly jail time. In the 1970s, Congress was concerned that mortgage settlement service providers paying and receiving referral fees to generate business were increasing prices to consumers to cover referral fee expenses.

By enacting RESPA, Congress expressed an intent to outlaw kickbacks or referral fees that unnecessarily increase the costs of settlement services. There is virtually no empirical evidence that RESPA lowered costs post-enactment. Subsequent reforms to the mortgage industry regulatory environment following enactment of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) and its implementing regulations have also called into question the purpose and necessity of RESPA Section 8.

At a high level, RESPA controls the business relationship between settlement service providers, including lenders, for federally related mortgage loans:

- Section 8(a) of RESPA prohibits payments in return for referrals of settlement service business.
- Section 8(b) prohibits the splitting of fees in connection with the performance of settlement services, other than for services rendered.
- Section 8(c) provides specific exceptions to the general prohibitions in Sections 8(a) and 8(b) for certain business transactions, such as physical and digital marketing service agreements, as well as affiliated business arrangements.

Part I describes how the current regulatory regime controlling referrals between settlement service providers often leaves service providers without a strong indication of whether they are complying with those requirements. Additionally, the difficulties of managing to these RESPA prohibitions increase compliance costs on settlement service providers, often without a material benefit to consumers.

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Part II provides a background on how subsequent reforms to the mortgage industry following passage of the Dodd-Frank Act have made RESPA Section 8 outdated and unnecessary. When considering the best way forward, regulators, industry, and consumers should consider the extensive statutory and regulatory requirements that have shaped the industry since the financial crisis.

Part III discusses MBA's recommendations for modernizing RESPA, specifically:

- **General Recommendations.** These recommendations are meant to bring RESPA in line with current jurisprudence and ensure mortgage lenders and settlement service providers have clarity as to their potential liability. First, the Consumer Financial Protection Bureau (CFPB) should recognize in guidance and in future actions that, as demonstrated by both its plain statutory terms and its legislative history, RESPA sets only limited prohibitions on the payment of things of value. Additionally, the CFPB should update its guidance to recognize that subsequent litigation has limited the applicability of RESPA in certain situations. The CFPB should also make changes to the way RESPA is litigated. First, the CFPB should only require defendants to claim an exception under Section 8(c) after a RESPA violation has been established. Secondly, the CFPB should affirmatively state that the statute of limitations to bring a claim under RESPA starts on the date of the RESPA violation.

- **Marketing Services Agreements (MSAs) and Desk Rentals.** MBA offers several recommendations regarding the method by which the CFPB determines whether an MSA is an illegal hidden referral fee. These changes will allow lenders and settlement service providers to market their products competitively, receive fair compensation for that marketing, and give consumers the benefit of receiving information about alternative settlement service providers. The CFPB should revise its policy on rental office spaces so that whether the arrangement is a hidden referral fee is determined according to whether the amount paid for the space exceeds its fair market value. This change reflects the basic economic reality that some marketing spaces are inherently more valuable than other spaces. Additionally, in lieu of limiting the compensation for MSAs to the fair market value of the agreement, a lender or settlement service provider instead should be required to provide disclosures to consumers explaining the marketing agreement and disclose that the consumer is free to choose other settlement service providers.

- **Digital Marketing and Lead Generation.** RESPA was enacted in a pen-and-paper-based world and needs to be re-examined in the context of the modern digital marketing landscape. The CFPB should recognize advances in how businesses communicate in the RESPA regulatory scheme and make it easier for lenders to digitally market their products to consumers. The CFPB recently released an Advisory Opinion on Digital Mortgage Comparison-Shopping

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Platforms (also known as the Comparison Shopping AO) that prohibited the non-neutral display of lenders, deeming it a UDAAP and RESPA violation. The CFPB should fully repeal the AO. RESPA does not require neutrality with regard to marketing, only that referrals be free from kickbacks and hidden referral fees. The CFPB should also amend Regulation X to allow lenders to advertise and market their products or services directly to settlement service providers, so long as the marketing does not provide a thing of value in return for referrals. In a similar vein, providing a lead to a lender should not be considered a referral if the lead does not recommend the lender to the borrower. Lastly, the CFPB should clarify that mass marketing advertisements, even if they are tailored for individual borrowers, are not referrals. Commercial advertising does not suddenly become a referral that steers consumers or affirmatively influences their decision for a settlement service provider simply because the advertising is tailored for a particular consumer profile.

- **Affiliated Business Arrangements (AfBA).** Much like marketing, advancements in technology have changed the way settlement service providers and their affiliates deliver services to their customers. The CFPB determines whether an AfBA is a bona fide settlement service provider based on guidance originally published by the Department of Housing and Urban Development (HUD) 28 years ago that does not reflect the modern hybrid work environment. The CFPB should update this guidance and eliminate outdated factors. To give greater clarity to entities relying on this exception and to fully enable the AfBA provisions of RESPA Section 8(c)(4), the CFPB should publish guidance that reflects the exception's purpose without punishing financially successful affiliated businesses. The CFPB should make it easier for consumers to receive affiliated business disclosures electronically. In addition, the CFPB should simplify disclosures to consumers that explain the business model of the AfBA. Both changes will make it easier for consumers to receive and understand information about the affiliate arrangement and thereby make it easier to shop for alternative settlement service providers. As an additional consumer benefit, the CFPB should make it clear that an AfBA offering a discount to a potential customer does not constitute steering that borrower to that particular AfBA, instead of dissuading AfBAs from offering consumers benefits that could potentially lower the cost of homebuying for borrowers. Lastly, to provide further clarity to potential borrowers, Congress should amend RESPA so that affiliated business disclosures to consumers are not required to include a range of estimated fees charged by the AfBA to avoid confusion between this disclosure and the generally more accurate Loan Estimate.

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PART 1:

Background

I. OVERVIEW OF RESPA SECTION 8

Section 8 of RESPA and its implementing regulations generally prohibit a person from giving or receiving unearned real estate settlement service fee splits or giving or receiving kickbacks or things of value pursuant to any agreement or understanding for the referral of a real estate settlement service involving a federally related mortgage loan.[1] Section 8(a) of RESPA prohibits payments in return for referrals of settlement service business. Section 8(b) prohibits the splitting of settlement service fees, other than for services rendered.[2] Section 8(c) provides specific exceptions to the prohibitions in Sections 8(a) and 8(b).[3] Finally, Section 8(d) identifies the penalties for violating RESPA Section 8. Each of these sections are explained in further detail below.

RESPA Section 8 generally applies to settlement services involving federally related mortgage loans. Settlement services are provided in connection with a real estate settlement, including real estate brokerage and settlement agent services, loan origination activities, title insurance services, and services rendered by mortgage brokers, among other activities.[4] Federally related mortgage loans are non-commercial loans to consumers secured by a first or subordinate lien on a one- to four-unit family dwelling or, in certain circumstances, a manufactured home.[5] RESPA applies to both government-insured or guaranteed and conventional mortgage loans, and includes refinances, adjustable-rate mortgage loans, or reverse mortgages.[6] In general, if there is not both a settlement service and a federally related mortgage loan, RESPA does not apply. In practice, RESPA applies to most mortgage transactions.

II. LEGISLATIVE AND REGULATORY HISTORY

Section 8 of RESPA was developed as a consumer protection statute at a time when home shoppers were almost totally dependent on real estate agents for information about home sales and the homebuying process. This gave real estate agents enormous influence over consumers seeking homes. RESPA was signed into law in December 1974 and became effective on June 20, 1975. This law was passed following a study by HUD on mortgage settlement costs claiming that borrowers were charged unnecessarily high settlement charges because of abusive industry practices.[7] The general purpose of RESPA was to ensure that consumers were provided with information and the cost of settlement services.

Initially, Congress considered two basic approaches to lower settlement costs.[8] The first approach was to regulate closing costs by imposing a maximum-allowable charge for services. The second approach, ultimately adopted by Congress, regulates the underlying business relationships and procedures that affect costs. Congress believed it could reduce unnecessary or unreasonably high costs by making information about the settlement process available to homebuyers in advance of

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1 12 U.S.C. § 2607.

2 12 U.S.C. § 2607(b), 12 C.F.R. § 1024.14 (2023).

3 In view of the broad Section 8(a) and (b) prohibitions, it is reasonable to assume that Congress intended the exceptions in 8(c) to be equally as broad. As explained in greater detail below, regulators have tend to take very narrow views of the exceptions under Section 8(c).

4 12 U.S.C. § 2602(3), 12 C.F.R. § 1024.2 (2023).

5 12 U.S.C. § 2602(1), 12 C.F.R. § 1024.2 (2023).

6 12 C.F.R. § 1024.5(b) (2023) (RESPA is expressly not applicable to certain transactions, including extending credit for business, commercial or agricultural purposes, and secondary market transactions.).

7 12 U.S.C. § 2601.

8 S. REP. NO. 93-866, at 3 (1974).

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settlement, thereby allowing the consumer to shop around for other offers and prohibiting kickbacks and unearned settlement service fee splits.[9]

RESPA has been amended multiple times in the past.[10] After its passage in 1974, minor revisions were made to RESPA in 1976. Subsequently, HUD published a rule requiring lenders to provide a good faith estimate with the estimated charges and fees for settlement services at the time of application and a HUD-1 settlement statement with final charges at the time of closing. The first major revision to RESPA was made in 1983, making it clear that affiliated business arrangements between lenders and settlement service providers do not violate Section 8. Next, in 1992, Congress amended RESPA to apply to all residential mortgage loans with a lien. HUD also issued its first regulations governing affiliated business arrangements in November 1992.

Significant legislative amendments to RESPA were made when Congress passed the Dodd-Frank Act in July 2010, which transferred regulatory authority over RESPA from HUD to the newly created CFPB. In 2013, based on an amendment to both RESPA and the Truth in Lending Act (TILA), the CFPB published a rule that combined disclosures required under the two statutes and their implementing regulations, TILA/Regulation Z and RESPA/Regulation X, into the TILA/RESPA Integrated Disclosure (TRID). For many mortgage loans, these TRID disclosures replaced the good faith estimate under RESPA and initial disclosure under TILA with a Loan Estimate and replaced the HUD-1 settlement statement under RESPA and final TILA disclosure with a Closing Disclosure.[11] That rule became effective in October 2015. These disclosures have constituted the entirety of the CFPB's regulatory efforts around RESPA Section 8. Although it issued some FAQs in 2020 and the Advisory Opinion in 2023 regarding digital mortgage shopping sites, the CFPB has not engaged in rulemaking regarding Section 8 of RESPA or, to our knowledge, studied the empirical question of whether RESPA Section 8 is effective in reducing settlement costs to consumers.

III. RESPA SECTION 8(a): ANTI-KICKBACK PROVISIONS

Under Section 8(a), "[n]o 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] For example, a mortgage broker may violate RESPA if the broker repeatedly refers its customers to an attorney who performs title services while the attorney provides the broker or the broker's employees legal services at a discounted rate.

In order for an arrangement to violate RESPA Section 8(a), there must be three elements: an agreement relating to settlement services, a referral, and thing of value:

- As a precondition, the arrangement must be in relation to settlement services and a federally related mortgage loan.
- There must be an agreement or understanding between the parties. An agreement includes written and verbalized agreements but can also be established by a pattern or practice.
- A person must make a referral. A referral is conduct that affirmatively influences the selection of a particular settlement service provider by a person.
- A thing of value is any payment, advance, loan, service, or other consideration. It is further defined in Regulation X, but it should be noted that a thing of value does not need to involve a transfer of money.[13]

In the mortgage broker/attorney example above, all elements of Section 8(a) are satisfied. The attorney's title services are "settlement services" for a federally related mortgage loan, the mortgage broker repeatedly makes a "referral" to the attorney by directing its customers to use the attorney for title services, and the attorney provides a "thing of value" (i.e., discounted legal services) pursuant to an "agreement or understanding" and in return for the referral. Both the attorney and the mortgage broker violate Section 8(a) by giving and receiving a thing of value in exchange for the referral of title business.

9 *Id.*

10 RESPA News, Timeline of Revisions, Amendments, (last visited Sept. 18, 2024), available here.

11 2013 Integrated Mortgage Disclosure Rule Under the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z), 78 Fed. Reg. 79730 (Dec. 31, 2013), available here.

12 12 U.S.C. § 2607(a).

13 12 C.F.R. § 1024.14(d) (2023).

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IV. RESPA SECTION 8(b): FEE SPLITTING PROVISIONS

Under Section 8(b), "[n]o person shall give and no person shall accept any portion, split, or percentage of any charge made or received for the rendering of real estate settlement services in connection with a transaction involving a federally related mortgage loan other than for services actually performed."[14] For example, say a title insurance agent regularly pays a portion of its title insurance commissions to a real estate broker, and while there is no evidence of a referral arrangement between the title agent and broker, the broker performs no services for the title agent. Both the title agent and real estate broker may be deemed to violate RESPA Section 8(b) based on the sharing of a portion of the title insurance agent's commission with the broker without services being rendered. Importantly, no referral arrangement needs to be shown to establish a Section 8(b) violation.

In order for a fee split to violate RESPA:

- There must be a charge for settlement services made in connection with a federally related mortgage loan. This includes, for example, a real estate agent's commission, appraisal fees, and origination fees.
- The divided portion of the fee must also be unearned. This means at least one party receiving a portion of the fee must not have performed any services to justify receipt of that portion.
- At least two parties must divide or share the fee. In other words, the activities of a single party do not violate Section 8(b) even if the fee or charge is later deemed "unearned."[15]

In the title agency/real estate broker example above, all elements of a Section 8(b) RESPA violation are satisfied. The title insurance agent's commission is a charge for a settlement service, the percent of the commission that the real estate broker receives is an unearned fee because the real estate broker did not perform any services to facilitate obtaining the title insurance policy, and the title insurance agent's commission is split between two parties.

14 12 U.S.C. § 2607(b).

15 Freeman, et al. v. Quicken Loans, Inc., 566 U.S. 624 (2012) (Prior to the U.S. Supreme Court decision in Freeman, HUD officials maintained that Section 8(b) liability extended to a single loan service provider's charging for settlement services. However, the Supreme Court held that a fee for settlement services must be divided between two or more persons, with no services performed by the party receiving the split of the fee, to constitute a violation of Section 8(b)).

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V. RESPA SECTION 8(c): EXCEPTIONS TO THE ANTI-KICKBACK AND REFERRAL FEE PROHIBITIONS

Section 8(c) contains various exceptions to the general prohibitions against kickbacks/referral fees and fee splits in Section 8(a) and (b). A fee paid or thing of value given under one of exceptions does not violate RESPA. Although there are several exceptions, this paper will focus on affiliated business arrangements and payments for services rendered or goods or facilities provided.

A. SECTION 8(c)(2) — PAYMENTS FOR SERVICES OR GOODS PROVIDED

Section 8(c)(2) provides that "nothing shall prohibit the payment... for goods or facilities actually furnished or for services actually performed."[16] In subsequent rulemakings, HUD and the CFPB specified that in order to qualify for this exception under Section 8(c), the transaction must satisfy two requirements. First, the person must provide goods, facilities, or services that are actually provided, necessary to the transaction, and distinct from goods or services already provided. For example, a lender may receive payment from a settlement service provider for providing them a service. Second, the compensation paid must be reasonably related to the value of the goods or facilities furnished or the services performed. This is referred to as the fair market value standard.[17] However, Regulation X specifies that, "[t]he 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."[18] For example, under current CFPB understanding, if a lender wanted to buy billboard space for an advertisement, with one billboard outside a Realtor's office and another outside a dentist office, the lender would have to pay the fair market value for both billboards despite the fact that the billboard outside of the Realtor's office could spur more business. If the payment exceeds the fair market value, the excess will likely be considered a referral fee in violation of Section 8 of RESPA.

i. Marketing Agreements

A settlement service provider may contract with another settlement service provider or other company for marketing and advertising services without violating RESPA Section 8. Under Section 8(c)(2)(i), marketing agreements must:

(i.) provide for services, goods, and/or facilities; and

(ii.) pay no more than reasonable market-based compensation that the parties must be able to explain and justify without regard to the amount or volume of referrals to be generated from the marketing services.

With regard to marketing agreements, typically one settlement service provider — such as a mortgage company — enters into an agreement with another settlement service provider — such as a real estate brokerage company — where the real estate brokerage company agrees to perform marketing and advertising services on behalf of the mortgage company in return for a fee. Because a real estate brokerage company is in a position to refer settlement service business to the mortgage company, any marketing agreement must satisfy the two-part test under Section 8(c)(2). The real estate brokerage company must provide services, goods,

16 12 U.S.C. § 2607(c)(2), 12 C.F.R. § 1024.14(g)(1)(iv) (2023); *see also* PHH Corp. v. Consumer Fin. Prot. Bureau, 831 F.3d 1, 41 (D.C. Cir. 2016) ("'Nothing' in Section 8 'shall be construed as prohibiting' 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.' *See* 12 U.S.C. § 2607(c)(2). Nothing means nothing.").

17 12 C.F.R. § 1024.14(g) (2023), Real Estate Settlement Procedures Act (RESPA): Home Warranty Companies' Payments to Real Estate Brokers and Agents, 75 Fed. Reg. 36,271, 36,272 (June 25, 2010).

18 12 C.F.R. § 1024.14(g)(2) (2023).

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and/or facilities to market and advertise the mortgage company, and any fee paid by the mortgage company to the real estate brokerage company must not exceed the fair market value of those marketing services. Otherwise, if services, goods, and/or facilities are not provided, or if the marketing fee is in excess of fair market value, the marketing fee paid by the mortgage company and received by the real estate brokerage company could be considered an impermissible referral fee.[19]

In 2010, HUD issued an interpretive rule explaining this exception in the context of certain home warranty plan marketing arrangements.[20] This interpretive rule confirmed that a settlement service provider may pay a reasonable fee for marketing services under Section 8(c)(2) in some circumstances.

HUD indicated that a settlement service provider may pay a real estate broker/agent a marketing fee where:

- The settlement service provider's services are actual, necessary, and distinct from any other services the settlement service provider otherwise would perform without additional compensation;
- The payment from the other settlement service provider is not tied in any way to the value or volume of business realized under the arrangement; and
- The payment reflects the fair market value of the services performed by the settlement service provider.

The Interpretive Rule also identified other factors that are not required by statute but that HUD would consider in determining whether a payment arrangement complies with RESPA, including whether:

- The agreement is contained in a written contract;
- The written agreement designates the broker or agent as a legal agent of the settlement service provider;
- The real estate broker or agent discloses its arrangement with the settlement service provider to consumers and clarifies that consumers may purchase settlement services from another provider or choose not to purchase those services; and
- The arrangement is an exclusive one. While an exclusive feature in an arrangement could cause regulators to take a closer look, HUD indicated that the entire arrangement would be assessed to determine if there was a lawful arrangement under RESPA.

HUD made it clear, and the CFPB later adopted the view, that any payments to a real estate broker or agent for marketing services directed to particular homebuyers or sellers, regardless of whether the fees are flat periodic payments or paid per transaction, will not meet the Section 8(c)(2) exception to RESPA.

ii. Digital Marketing Agreements

On February 7, 2023, the CFPB released the Comparison Shopping AO on the RESPA Section 8 anti-kickback provision and how those prohibitions apply to Digital Mortgage Comparison Shopping Tools.[21] The Comparison Shopping AO expressed the CFPB's views on what types of digital marketing arrangements violate Section 8, including the non-neutral presentation of information on the platform to increase the odds that a consumer will select a lender who pays more to be listed on the platform. According to the CFPB, this practice constitutes a RESPA violation and an unfair, deceptive, or abusive act or practice (UDAAP).[22]

Under the Comparison Shopping AO, an operator of such a platform is considered to have received a prohibited referral fee in violation of RESPA Section 8 when the platform:

- "non-neutrally uses or presents information about one or more settlement service providers [including lenders and realtors as defined in RESPA] participating on the platform…

19 Freeman, 566 U.S. at 624 (RESPA itself does not impose the actual, necessary, and distinct elements. This is based on HUD's position, which the CFPB has adopted, that RESPA prohibits unearned fees. As noted below, the Supreme Court rejected that view in Freeman v. Quicken Loans, and as such RESPA should be applied consistently with the Supreme Court's decision. RESPA prohibits (a) referral fees and (b) fee splits, other than for services rendered.).

20 Home Warranty Companies' Payments to Real Estate Brokers and Agents, 75 Fed. Reg. at 36,271 (although the interpretation discusses a home warranty company, HUD later explained that this interpretation is applicable to payments made by other settlement service providers to real estate brokers and agents).

21 Consumer Financial Protection Bureau, Real Estate Settlement Procedures Act (Regulation X); Digital Mortgage Comparison-Shopping Platforms and Related Payments to Operators (Feb. 7, 2023), available here. [Hereinafter *Digital Mortgage Comparison-Shopping Platforms AO.*]

22 Note that this Circular still applies in certain non-RESPA covered financial products.

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- [for which the] non-neutral use or presentation of information has the effect of steering the consumer to use… those settlement service providers [constituting referral activity]… and

- the operator receives a payment or other thing of value that is… for that referral activity."

Examples of non-neutrally presenting information include biasing the information used to generate comparisons by setting a search function to boost the rankings of lenders who pay more to participate on the platform, presenting additional information for a subset of higher-paying providers, or separating lower-paying providers onto a second page. Even randomly assigning the top spot in a lender ranking on a comparison shopping platform may constitute a referral.[23]

iii. Desk Rental Agreements

HUD has provided guidance regarding so-called "desk rental arrangements," such as leasing for an office or room, which was later adopted by the CFPB.[24] Typically in these arrangements, one settlement service provider enters into an agreement with another settlement service provider whereby, for example, a mortgage company agrees to lease office space or the use of conference room space to a title insurance agency in return for a fee from the title insurance agency. Because a mortgage company is in a position to refer settlement service business to the title insurance agency, any office lease agreement must satisfy the two-part test under Section 8(c)(2). The mortgage company must provide actual goods, services, and/or facilities in the form of office or conference room space, and any fee paid by the settlement service provider must be a general market rent for the office or conference room space and any related goods and services. Otherwise, if actual goods, services, and/or facilities are not provided, or if the rental fee is in excess of general market rent, the rental fee paid by the title insurance agency and received by the mortgage company could be considered an impermissible referral fee under Section 8 of RESPA.

23 *Digital Mortgage Comparison-Shopping Platforms AO, supra* note 21, at 21.

24 Statement of Policy 1996–3, Rental of Office Space, Lock-outs, and Retaliation, 61 Fed. Reg. 29,264 (June 7, 1996).

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HUD further specified that rental payments to a person in the position to refer settlement service business could be viewed as disguised referral fees if the rental payments are not reasonably related to the market value of the space, equipment, and facilities provided.[25] However, HUD and the CFPB judge the reasonableness/fairness of the value in part by what non-settlement service providers would pay for the service (referred to as the "general market value") and not what other settlement service providers would pay for that service (referred to as the "fair market value"). In other words, general market value, unlike fair market value, is not measured by the rate a real estate broker would charge a real estate agent to rent a desk in its office but is instead based on the amount a general member of the public would pay to rent comparable space in a comparable building. For example, if a real estate broker rents its conference room to a title agent to conduct real estate closings, the rental payments made by the title agent will qualify for the Section 8(c)(2) exception if the conference room space is rented at a rate commensurate with the general market value of the room. So, if a non-settlement service provider would pay a rate of $150 per hour, and the title agent pays $150 per hour or less, the rental fees appear to be reasonable and exempted from Section 8(a)'s prohibitions. However, if the title agent pays $250 per hour to rent the conference room space — even if that amount is commensurate with the conference room's value to a settlement service provider — the $100 per hour premium in excess of the general market value may be considered a referral fee in violation of Section 8.[26]

While Section 8 prohibits the payment of a thing of value for actual referrals of settlement service business and fee splits other than for services performed, it in no way prohibits the charging of rent that is based on the value of the leased space, as long as there are no actual payments or things of value for the referral of settlement service business. The value of a leased space depends on various factors having nothing to do with whether any party refers business to the party leasing the space. RESPA does not require the deviation from this basic economic reality, and HUD did not engage in any analysis to support its novel view of rental value.

B. SECTION 8(c)(4) — AFFILIATED BUSINESS ARRANGEMENTS

Congress amended RESPA in 1983 to clarify that a return on ownership interest in an affiliated business arrangement (AfBA) does not violate Section 8 under certain conditions. An AfBA is "an arrangement in which (A) a person who is in a position to refer business incident to or as part of 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 (B) either of such persons directly or indirectly refers business to that provider or affirmatively influences the selection of that provider."[27]

In order to qualify as a valid AfBA under the statute, the arrangement must meet three conditions under the statutory safe harbor test:[28]

- First, the party making the referral must provide a written disclosure to each consumer that discloses the affiliate relationship, the fact that the consumer is not required to use the affiliate for settlement services, and the estimated charges or range of charges imposed by the affiliate.
- Second, subject to exceptions, the consumer being referred must not be required to use the referred affiliated business entity or a particular settlement service provider.
- Third, no thing of value may be given except for the return on the ownership interest or franchise relationship.

In addition to meeting the statutory three-part safe harbor test, regulators have taken the position that an AfBA must be a bona fide provider of settlement services. HUD released Policy Statement 1996-2 to determine whether entities are "bona fide" providers of settlement services or merely "sham" AfBAs designed to circumvent RESPA's anti-kickback provisions.[29]

25 *Id.*

26 Mortgage Bankers Association, *Compliance Essentials: Real Estate Settlement Procedures Act (RESPA) Prohibitions Resource Guide,* available here. (This and other examples are taken from MBA's Compliance Essentials RESPA Resource Guide.).

27 12 U.S.C. § 2602(7).

28 12 U.S.C. § 2607(c)(4).

29 Statement of Policy 1996-2 Regarding Sham Controlled Business Arrangements, 61 Fed. Reg. 29,258 (June 7, 1996).

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Policy Statement 1996-2 enumerated several factors to be considered in determining whether an arrangement is a "sham" and whether a Section 8 violation exists. Regulators will consider the following factors, but note that a response to any one question by itself may not be determinative of a sham AfBA:[30]

- **Capitalization:** whether the AfBA has sufficient initial capital and net worth to conduct the settlement service business for which it was created.
- **Employees:** whether the AfBA has its own employees to perform the services it provides.
- **Management:** whether the AfBA manages its own affairs or is managed by one of its parent providers.
- **Location:** whether the AfBA has its own office that is separate from its AfBA owners or whether the AfBA pays the general market value rent for the facilities furnished.[31]
- **Substantial Services:** whether the AfBA provides substantial services, meaning the "essential functions" and type of services generally performed by the type of entity at issue.[32]
- **Subcontracting:** whether and to what extent an AfBA performs all of the substantial services itself or contracts out part of the work to an AfBA partner or independent third party.
- **Marketing:** whether the AfBA actively competes in the marketplace for business and attempts to market its services to others besides its affiliated business partners.
- **Referrals:** whether the AfBA sends business exclusively to its affiliated business partners that created it or sends business to other entities.

VI. RESPA SECTION 8(d): PENALTY PROVISIONS

While we do not recommend changes to the penalty provisions of RESPA, it is important to understand how the penalties create immense legal risks for mortgage lenders under Section 8. RESPA Section 8 provides for criminal penalties, statutory and class action damages, and enforcement actions from federal and state regulators.[33] For *each* Section 8 violation, a person may be subject to imprisonment for no more than one year and/or payments of up to $10,000. In addition, a person who violates Section 8 can be liable to the person who was charged for the settlement service for the costs of bringing the action (e.g., filing fees and attorney's fees), as well as three times the amount of the charge for the settlement services involved in the violation.

The fact that RESPA not only provides for civil liability, but also criminal liability, is an important factor when assessing the extraordinarily broad view of the statute taken by HUD and subsequently the CFPB. The Supreme Court has found that RESPA can even be enforced against consumers.[34] Additionally, as the Sixth Circuit has observed, "[a] single statute with civil and criminal applications receives a single interpretation. A bedrock principle of American law requires the government to give the people fair notice of what conduct it has made a crime."[35] Similarly, the District Court in the case observed "[a]ccordingly, because RESPA imposes potential criminal sanctions, 'a relatively strict [vagueness] test is warranted.'"[36] Additionally, the Court determined that it "must examine any guidance 'on its face to determine whether it lacks sufficient definiteness to meet the requirements of the Due Process Clause.'"[37]

RESPA can be enforced in a number of ways. The CFPB has specific RESPA enforcement authority as well as general supervision and examination authority over mortgage lenders pursuant to the Dodd-Frank Act. Additionally, RESPA creates a private right of action to enforce Section 8, allowing individuals harmed to bring their own lawsuit and class action claims on behalf of similarly situated plaintiffs.

30 *But see* Carter v. Welles-Bowen Realty, Inc., 736 F.3d 722 (6th 2013) (overturning the policy in the 6th Circuit on the grounds that the factors necessary to receive safe harbor under § 2607(c)(4) could not be modified by HUD's Policy Statement 1996-2 and that this guidance was not entitled to Chevron deference).

31 Statement of Policy 1996–3, Rental of Office Space, Lock-outs, and Retaliation, 61 Fed. Reg. at 29,264.

32 See Statement of Enforcement Standards: Title Insurance Practices in Florida; RESPA Statement of Policy 1996-4, 61 Fed. Reg. 49,398 (Sept. 19, 1996), Statement of Policy 1999-1 Regarding Lender Payments to Mortgage Brokers, 64 Fed. Reg. 10,080 (Mar. 1, 1999).

33 12 U.S.C. § 2607(d).

34 Freeman, 566 U.S. at 632-633 (citation omitted).

35 Carter, 736 F.3d at 722 (citations omitted) (the court rejected applying the 1996-2 Policy Statement, stating that "a statutory safe harbor is not very safe if a federal agency may add a new requirement to it through a policy statement").

36 Carter v. Welles-Bowen Realty, Inc., 719 F.Supp.2d 846, 852 (N.D. Ohio 2010) (quoting Springfield Armory, Inc. v. City of Columbus, 29 F.3d 250, 252 (6th Cir. 1994)).

37 *Id.,* at 852 (quoting Belle Maer Harbor v. Charter Twp. of Harrison, 170 F.3d 553 (6th Cir. 1999)).

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RESPA includes other elements that can lead to harsh penalties. RESPA is a strict liability statute, meaning that a person only has to prove that a violation occurred to give rise to liability under the Act.[38] In other words, whether a person willfully or knowingly violated the law is not an element of a RESPA violation. Additionally, Section 8 imposes joint and several liability on all persons found to have violated Section 8. This means that if multiple parties engaged in conduct prohibited by Section 8, each party may be liable to the person charged for the settlement service for the full damages award.

VII. CONCLUSION

Given the current market dynamics and evolving technology, it is time to reevaluate RESPA Section 8, its implications for settlement service providers, and its overall benefit to consumers. In Part 3, we demonstrate how the current regulatory regime and ambiguous requirements often mean that settlement service providers may not know what is or is not permissible, and how that lack of clear rules of the road imposes unnecessary compliance costs on lenders.

38 *But see* Spokeo, Inc. v. Robins, 578 U.S. 330 (2016) (consumers are not harmed by a bare procedural violation of the law. Instead, consumers cannot recover unless they show both a violation and that they have suffered concrete harm as a result of the violation).

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PART 2:

RESPA Section 8 Is Outdated and Unnecessary

Reforming RESPA Section 8 would not create an unregulated or lawless mortgage lending landscape. Rather, changes in how consumers shop and obtain information along with subsequent reforms to the mortgage industry following passage of the Dodd-Frank Act have made RESPA Section 8 outdated and, in many instances, unnecessary.

The view that referral fees and fee splits actually lead to higher settlement service costs reflects outdated thinking in 2024. The RESPA objectives of ensuring transparent pricing practices and protecting consumers from abusive practices are achieved by subsequent laws and regulations and by the technological and competition-driven changes in how consumers shop for housing and housing finance since the 1970s.[39]

Following the passage of the Dodd-Frank Act, the CFPB has implemented many reforms intended to ensure fairness and transparency in the mortgage market. As RESPA's Section 8 provisions have arguably outlived their usefulness, regulators, the industry, and consumers should consider the extensive statutory and regulatory requirements that have shaped the industry since the financial crisis and impacted the behaviors RESPA Section 8 seeks to govern. Reducing or eliminating these significant compliance burdens would result in savings to lenders that could be passed on to consumers with little or no impact on consumer protections due to the rules described below.

I. TILA-RESPA INTEGRATED DISCLOSURES

One of the CFPB's most extensive rulemaking projects was the TILA-RESPA Integrated Disclosure (TRID) rulemaking.[40] The TRID rulemaking merged the mortgage disclosures previously required by TILA and RESPA into one set of shopping disclosures (the Loan Estimate) and one set of pre-consummation disclosures (the Closing Disclosure). Although both of these disclosures existed separately before the TRID rule, TRID ensures more reliable, uniform estimates, which "increase the level of shopping for mortgage loans and foster honest competition for prospective consumers among financial institutions."[41]

39 12 U.S.C § 2607(c)(3) (One illustrative example of how referrals may work *sans* RESPA is in the real estate brokerage context. RESPA Section 8(c)(3) creates an exception for certain payments made between licensed real estate brokers. One real estate broker may freely refer a client to other real estate brokers without violating RESPA, so long as the real estate brokerages do not share a portion of their real estate commissions. Thus, in other instances, settlement service providers have been able to make referrals to one another without adverse consumer consequences.).

40 12 U.S.C § 5532(f), 2013 Integrated Mortgage Disclosure Rule Under the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z), 78 Fed. Reg. at 79730.

41 *Id.,* at 79822.

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This is an extremely granular and prescriptive disclosure regime. TRID features strict provisions that require early disclosure of fees charged to borrowers in a uniform format that allows consumers to compare offers from a single lender to alternative offers from other lenders. Additionally, many of the fee amounts disclosed are "locked in," and in most cases cannot be changed. Through this rule, lenders and settlement service providers are penalized for underestimating fees to gain competitive advantage while borrowers have time to shop and compare those fees to other lenders' offerings. The fees are then disclosed again before the closing with a mandatory waiting period to ensure borrowers have time to review and understand the costs of credit. After promulgating the rule, the CFPB later published a comprehensive report showing that the TRID forms improved consumer understanding of costs and fees.[42] Higher costs arising from referral fees that might have been less visible in the 1970s cannot escape the transparency of the competitive market comparisons TRID and internet shopping enables today.

II. QUALIFIED MORTGAGE / ABILITY-TO-REPAY

The Dodd-Frank Act generally prohibits a lender from making a residential mortgage loan without making a good faith determination that the borrower has a reasonable ability to repay the loan.[43] Under the statute and rules promulgated by the CFPB, certain qualified mortgages (QM) are presumed to comply with the ability-to-repay requirement if they meet certain product feature requirements, such as an acceptably low interest rate and limited points and fees, including certain third party fees, charged to consumers.[44] The benefits of this compliance safe harbor and the risk of liability from a non-QM loan mean that the vast majority of mortgage loans made today are QMs.[45] Since most fees are also included in the annual percentage rate (APR) calculation, and points and fees charged to the consumer are capped, the QM rule acts as a limit on the fees that mortgage companies can charge if they want a loan to qualify for QM protection.[46] These provisions also act as

42 Integrated Mortgage Disclosures Under the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z) Rule Assessment (Oct. 2020), available here.

43 15 U.S.C. § 1639c.

44 *Id.* (In order to qualify for the presumption of compliance, the Annual Percentage Rate (APR) of a loan must not exceed the Average Prime Offer Rate (APOR) by more than 2.5 percent. A further class of mortgages are given a conclusive presumption of compliance, or safe harbor, if they meet these requirements and their APR does not exceed the APOR by more than 1.5 percent.).

45 Consumer Financial Protection Bureau, "Ability-to-Repay and Qualified Mortgage Rule Assessment Report," at 127 (Jan. 2019), available here. (Surveys show that, among lenders that originate non-QM loans, the majority indicated that the share of non-QM loans made up less than 5% of their originations).

46 12 C.F.R § 1026.32(b)(1)(i)(D), § 1026.43(b)(9) (QM points and fees are uniquely suited to limiting the ability of creditors to leverage affiliate

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a powerful check on the behavior that led to the passage of RESPA, which was the fear of inflated or unearned fees due to referrals.

III. LOAN ORIGINATOR COMPENSATION

The Loan Originator Compensation Rule (LO Comp Rule) prohibits paying compensation to a loan originator based on the terms of the transactions they originate or proxies for the terms of the transaction.[47] The terms of the transaction are broadly defined and include any right or obligation of the parties in a credit transaction. This means that a loan originator cannot receive compensation based on the interest rate of a loan or on the fact that the loan officer steered a consumer to purchase required title insurance from an affiliate of the lender.[48]

IV. UNFAIR, DECEPTIVE, OR ABUSIVE ACTS OR PRACTICES

At its core, RESPA's anti-kickback provision is designed to address a potential conflict of interest that could deceive consumers or lead to unfair consumer outcomes. Under the Dodd-Frank Act, it is unlawful for any provider of consumer financial products or services or a service provider to engage in any unfair, deceptive, or abusive act or practice.[49] The Dodd-Frank Act provides the CFPB with rulemaking and enforcement authority to prevent these acts or practices. In addition, the CFPB has supervisory authority for detecting and assessing risks to consumers and to markets. While UDAAP determinations are fact-specific, they would seem to prohibit most instances of undisclosed or hidden referral fees where the end result was the consumer paying higher prices for settlement services.

V. CONCLUSION

Congress has created and the CFPB has implemented a comprehensive regulatory regime that has granular and prescriptive requirements during all aspects of the mortgage origination process. In sum, lenders must disclose all fees under TRID, are encouraged to reduce fees and abide by certain fee caps by the QM rule, and are prevented from charging outrageous fees or engaging in abusive conduct because of UDAAP prohibitions. As consumers in the housing marketplace become more empowered through online shopping and better price discovery and information delivery, RESPA stands as a relic to a past era of real estate agent-influenced consumer relationships. Such static regulations in the face of change interfere with efficient market operation and increase systematic costs.[50] Moreover, whether RESPA should be repealed or reformed, policymakers should first be tasked with studying and reconfirming the consumer protection benefit and/or need for RESPA in light of all the changes to consumer protection and the marketplace since the 1970s.

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relationships to price gouge consumers because certain real estate related fees that otherwise would be excluded from the calculation of points and fees are included when the amounts are paid to the creditor or its affiliate).

47 12 C.F.R. § 1026.36(d)(1)(i) (2024).

48 Loan Originator Compensation Requirements Under the Truth in Lending Act (Regulation Z) 78 Fed. Reg. 11279, 11280 (Feb. 15, 2013), available here. (This scenario is covered by the LO Comp Rule because the consumer is obligated to pay interest and the required title insurance in connection with the loan).

49 12 U.S.C. § 5536.

50 As discussed below, the *Comparison Shopping AO* completely missed the mark on this issue.

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PART 3

Solutions to Modernize RESPA Section 8

I. GENERAL RECOMMENDATIONS

MBA has several recommendations to reform RESPA Section 8. The CFPB should recognize that RESPA itself sets only limited prohibitions on the payment of things of value and should narrow its application in any future guidance or enforcement actions. Additionally, the CFPB should update its guidance to recognize that subsequent litigation has limited the applicability of RESPA in certain situations.

The CFPB should also make changes to the way RESPA is litigated. First, the CFPB should only require defendants to claim an exception under Section 8(c) after a RESPA violation has been established. Second, the CFPB should state that the statute of limitations to bring a claim under RESPA starts on the date of the RESPA violation.

SUPERVISORY/GUIDANCE SOLUTIONS

Issue #1. Regulators interpret RESPA Section 8 as establishing a broad, general prohibition against steering consumers to particular settlement service providers without regard to the "thing of value" element of the prohibition or available exemptions. This was not Congress's intent when it enacted RESPA and is not supported by the language of RESPA.

❄ Why is this a problem?

The broad nature of the RESPA Section 8 referral fee and fee splitting prohibitions requires an equally broad interpretation of the exceptions to such prohibitions. Previously, HUD — and now the CFPB — have shown a tendency to engage in overbroad interpretations and enforcement of the RESPA Section 8 prohibitions, while conversely interpreting the Section 8 exceptions to be very limited in scope. In particular, the CFPB interprets RESPA Section 8 as establishing a broad prohibition against steering or recommending consumers use particular settlement service providers, which was not the intent of Congress and is not supported by the language of RESPA. Congress intended to prohibit the provision of things of value for actual referrals of settlement service business, and to prohibit the splitting of settlement service fees, other than for services rendered. Put simply, Congress was clearly forbidding giving a thing of value for a referral, not the mere act of making a referral or steering a borrower to a particular outcome. RESPA sets forth the following goals:

"It is the purpose of this chapter to effect certain changes in the settlement process for residential real estate that will result:

1. in more effective advance disclosure to homebuyers and sellers of settlement costs;
2. in *the elimination of kickbacks or referral fees* that tend to increase unnecessarily the costs of certain settlement services;
3. in a reduction in the amounts homebuyers are required to place in escrow accounts established to insure the payment of real estate taxes and insurance; and
4. in significant reform and modernization of local recordkeeping of land title information."[51]

51 12 U.S.C. § 2601(b) (emphasis added).

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Had Congress intended RESPA to serve as a general prohibition against recommending consumers consider using particular settlement service providers, it could have stated so. It did not. Moreover, when Congress wants to address inappropriate steering, it knows how to do so. For example, Congress included anti-steering language in the Dodd-Frank Act.[52] The absence of express anti-steering language in RESPA reflects that Congress did not intend RESPA to impose a general prohibition on steering or referring settlement service providers.

Structuring RESPA-compliant marketing services or related arrangements is challenging because regulators interpret RESPA Section 8 as a general steering prohibition and not a limited prohibition on the payment of things of value for actual referrals of settlement service business and a limited prohibition on the splitting of settlement service fees other than for services rendered.

➤ Recommendation

Even though it is clear in the text of the statute and regulation, the CFPB should tailor its examination and enforcement efforts and issue supervisory guidance and revise Regulation X to reflect that RESPA Section 8 sets forth only a limited prohibition on the payment of things of value for actual referrals of settlement service business and a limited prohibition on the splitting of settlement service fees other than for services rendered. It does not provide for a general prohibition against steering in any form or manner, nor does it prohibit marketing or advertising.

Issue #2. The CFPB must prove three distinct elements to establish a RESPA violation. However, the CFPB often fails to distinguish these three elements.

❈ Why is this a problem?

A RESPA violation contains three distinct elements — (i) an agreement or understanding related to a settlement service; (ii) a thing of value; and (iii) a referral of settlement service. All of these elements must be separately met for a violation to be present.

The CFPB, in its guidance and enforcement actions, often blurs the elements such that one action will constitute one or more elements. For example, as discussed below in the Comparison Shopping AO, non-neutral presentation met both the referral and thing of value element. The CFPB believes that if it asserts that there is an impermissible referral fee arrangement — even without demonstrating that the elements of a Section 8 violation exist — then a violation exists unless the examined party can demonstrate that an exemption applies.

➤ Recommendation

The CFPB should reform its examination practices to require its supervisory and enforcement staff to demonstrate the elements of a RESPA violation with specificity before it determines that a lender has committed a violation. The CFPB cannot simply assume the elements of a violation exist and then require the lender to prove the applicability of an exception. This change in supervisory practice will make it clear that a RESPA violation requires three separate and distinct elements — an agreement or understanding, a thing of value, and a referral.

Issue #3. The CFPB ignores and rejects several courts' interpretation of RESPA 8(c)(2) in its enforcement and regulatory actions.

❈ Why is this a problem?

The CFPB arguably applies its own interpretations of laws and rejects interpretations already adopted by the courts. This leads to confusion for regulated entities and constitutionally questionable administration of law. Whether an action violates RESPA needs to be analyzed through all the elements of a violation. The failure to include a Section 8(c) analysis — which the CFPB omits in its RESPA Consent Orders — suggests that the CFPB is not acknowledging the text of the statute or case law in their guidance and enforcement.

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52 15 U.S.C. § 1639b(c)(3) ("The Bureau shall prescribe regulations to prohibit—(A) mortgage originators from steering any consumer to a residential mortgage loan that — (i) the consumer lacks a reasonable ability to repay (in accordance with regulations prescribed under section 1639c(a)); or (ii) has predatory characteristics or effects (such as equity stripping, excessive fees, or abusive terms); (B) mortgage originators from steering any consumer from a residential mortgage loan for which the consume is qualified that is a qualified mortgage (as defined in section 1639c(b)(2)) to a residential mortgage loan that is not a qualified mortgage…").

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For example, the court in PHH v. CFPB warned that nothing in Section 8 "shall be construed as prohibiting" 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."[53] Even the Order dismissing the case, citing the D.C. Circuit and district court opinions, provides that "[i]t is now the law of this case that PHH did not violate RESPA if it charged no more than the reasonable market value for the reinsurance it required the mortgage insurers to purchase, even if the reinsurance was a quid pro quo for referrals."[54]

➤ Recommendation

The CFPB should release a statement acknowledging how Freeman, PHH, and other cases have changed the interpretation of RESPA and revise Regulation X accordingly. Additionally, the CFPB should include an analysis of Section 8(c) that acknowledges PHH and other relevant precedents in all guidance materials (FAQs, Circulars, Advisory Opinions). These clarifications and revisions are important for marketing arrangements, desk rental arrangements, and digital marketing and lead generation.

For example:

- Under Regulation X, "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."[55] That interpretation of RESPA was soundly rejected by the Supreme Court in Freeman.[56] The RESPA statute's original prohibition is materially narrower than Regulation X's broad prohibition on unearned fees. Rather, RESPA prohibits giving or accepting a thing of value for the referral of settlement service business and prohibits the splitting of a fee for a settlement service, other than for services rendered. Additionally, Regulation X provides, "[n]or may the prohibitions of this part be avoided by creating an arrangement wherein the purchaser of services splits the fee."[57] This provision needs to be revised to conform with the Freeman decision to

53 PHH Corp. v. Consumer Fin. Prot. Bureau 881 F.3d 75, 82 (D.C. Cir. 2018) (citing 12 U.S.C. § 2607(c)(2)).

54 In the Matter of PHH Corp., et al. Administrative Proceeding File No. 2014-CFPB-0002 (June 7, 2018).

55 12 C.F.R. § 1024.14(c) (2023).

56 Freeman, 566 U.S. at 624.

57 12 C.F.R. § 1024.14(c) (2023).

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provide that for a violation to exist, the purchaser must split the fee with a third party who does not render services.

- The Comparison Shopping AO provides that when the operator of a Digital Mortgage Comparison-Shopping Platform provides compensable services to a lender, and also performs one or more activities that the CFPB deems to be referral activities, at least some of the compensation that the lender pays to the operator is for the referral activity and is not covered by the RESPA Section 8(c)(2) exemption. Yet, the applicability of the Section 8(c)(2) exemption for payment for services, such as marketing and advertising, was confirmed by the D.C. Circuit and the CFPB itself. As noted above, PHH provides "it is now the law of this case that PHH did not violate RESPA if it charged no more than the reasonable market value for the reinsurance it required the mortgage insurers to purchase, even if the reinsurance was a quid pro quo for referrals."[58] That conclusion is not only consistent with the D.C. Circuit ruling, it also is consistent with how HUD and courts in the past interpreted the interaction between Sections 8(a) and 8(c)(2). The CFPB asserts that when a digital mortgage comparison shopping platform operator provides compensable services and any service that the CFPB deems to be a referral, at least some of the compensation received by the operator is for the referral. That position, however, conflicts with the well-established interpretation of the interrelation of Sections 8(a) and 8(c)(2) and effectively reads the Section 8(c)(2) exemption out of the statute. As discussed below, the Comparison Shopping AO should be updated to reflect established law, that bona fide payments for advertising services are permissible under RESPA Section 8.[59]

REGULATORY SOLUTIONS

Issue #1. Housing counseling services and counselor recommendations do not constitute a thing of value.

Why is this a problem?

The goal of mortgage lending is to extend credit to enable sustainable home ownership. However, many consumers seeking homeownership have not yet attained the credit history necessary to qualify for credit. Recognizing the role that housing counselors play and the concerns that arise when not-mortgage-ready consumers are referred back and forth between creditor and counselor, the CFPB published a HUD Housing Counselor No-Action Letter in September 2019.[60]

With the shuttering of the No-Action Letter program in 2022, the CFPB reintroduced uncertainty and risk into the relationship between creditors, counselors, and their mutual customers. The CFPB can remove that uncertainty and encourage creditors to support consumers through the credit building process by making clear that counseling services are not settlement services subject to RESPA's prohibitions.

Recommendation

Clarify that providing housing counseling that includes a referral is permissible under RESPA by incorporating the suggestion in Appendix A stating, in Regulation X, that housing counseling services and counselor recommendations do not constitute a "thing of value." This change will facilitate the use of these services for the benefit of both low- to moderate-income borrowers and first-time homebuyers.

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58 In the Matter of PHH Corp., et al. Administrative Proceeding File No. 2014-CFPB-0002 (June 7, 2018) (citing the decision of the United States Courts of Appeals for the District of Columbia in PHH Corp., 831 F.3d at 41 rev'd in part en banc, 881 F.3d 75 (D.C. Cir. 2018) (The reversal dealt with a matter regarding the constitutionality of the limitations on removing the CFPB Director, and not RESPA.)).

59 *Digital Mortgage Comparison-Shopping Platforms AO, supra* note 21, at 21 (The CFPB noted in their advisory opinion that the ordering of mortgage options may be a deceptive practice if the platform misrepresents the accuracy of the information on the platform, such as presenting the first option as the "best match" when the lender paid for premium placement in the ranking.).

60 Office of Innovation, Consumer Financial Protection Bureau, Letter to Deputy Assistant Secretary Gerecke (September 10, 2019), available here.

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Issue # 2. RESPA does not define who is considered an employee, which makes it difficult to rely on the employee/employer exception to RESPA.

Why is this a problem?

RESPA does not have its own definition of "employee." This makes it difficult to determine whether the Section 8(c)(2) exception for bona fide employee compensation applies to any particular compensation arrangement. In the absence of a definition, HUD has tended to analyze whether an employee/employer relationship existed under Internal Revenue Service (IRS) standards.[61] However, these standards are context dependent and do not provide clear guidance to the industry.

Recommendation

The CFPB should incorporate the suggestion in Appendix A that states, in Regulation X, that the definition of bona fide employee under RESPA refers to applicable federal and state law by defining "bona fide employee" as "any individual who qualifies as a part- or full-time employee (as opposed to being an independent contractor) under applicable state law."

Issue #3. It is unclear when a Section 8 claim accrues.

Why is this a problem?

An action pursuant to Section 8 of RESPA may be brought within three years from the date of the occurrence of the violation.[62] However, in some cases the CFPB has claimed that with an administrative action, the general six-year statute of limitations for government action applies.[63] Additionally, it is an open question as to which action triggers a "violation." Plaintiffs have suggested that the date of the violation can refer to the closing date, the date when payments constituting a hidden referral fee are made to the service provider, or when an agent of the service provider is paid because of services rendered. Some courts have even determined that the statute of limitations does not begin to run until plaintiffs discover the facts of the underlying violation even though the Supreme Court made it clear that Congress would be in the best position include a general "discovery rule" tolling the statute of limitations until discovery if it wants one to be present in a law.[64] It did not do so with RESPA.

RESPA includes separate statutes of limitations according to the type of violation and the entity bringing the claim.[65] Extending the limitation period would negate Congress's intent to impose concrete statutes of limitations. Additionally, creating several possible "violations" could allow a plaintiff to recover damages twice for a single violation in connection with a single settlement service, once at closing and again for remitting payments. Even absent controlling case law and clear statutory language, given that RESPA is a criminal statute, the rule of lenity should be applied in the criminal context to what is at best an ambiguous statute of limitations.[66] The uncertainty caused by this ambiguity leads to excessive litigation costs as lenders have to defend against time-barred claims that clearly should be prohibited under statute.

Recommendation

The CFPB should define the "date of the violation" according to the understanding of the U.S. Fifth Circuit Court of Appeals in Snow v. First American Title Insurance Co.[67] In this case, the Court found that "the date of the occurrence of the violation" refers to the date of payment by the borrower, usually the date of closing, because that is when the settlement service provider earned the "thing of value." The Court concluded this based on the wording of the statute, which refers to the date of a single violation rather than violations, and the

61 HUD Responses to RESPA Questions: Real Estate Agent and Other Settlement Services, available here; *see also* Department of Housing and Urban Development, HUD Settles Case Against Atlanta-Based Lender and Broker Accused of Phony Hiring of Real Estate Agents (Sept. 29, 2003), available here.

62 12 U.S.C. § 2614.

63 PHH Corp., 831 F.3d at 41.

64 Edmonson v. Eagle National Bank, 922 F.3d 535 (4th Cir. 2019). *But see* Rotkiske v. Klemm, 589 U.S. 8 (2019) (The Supreme Court did not address equitable tolling in this case, which may be available for some alleged RESPA violations. Nonetheless, the general rule should still apply.).

65 12 U.S.C. § 2614.

66 Cornell Law School, Rule of Lenity (May 2022), available here. (The rule of lenity is a rule of statutory construction under which courts should apply unclear or ambiguous statutes in a way that is most favorable to the defendant); *see also* Carter v. Welles-Bowen Realty, Inc., 736 F. 3d 722, 729-36 (6th Cir. 2013) (Sutton, J., concurring) (Even absent controlling case law and clear statutory language, and given that RESPA is a criminal statute, the rule of lenity should be applied to what is at best ambiguous statutory language establishing when a violation occurs.)

67 Snow v. First American Title Insurance Co., 332 F.3d 356 (5th Cir. 2003); *see also* In re Community Bank of Northern Virginia, 622 F.3d 275 (3rd Cir. 2010).

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intent of Congress to create three separate statutes of limitations. This conclusion is reinforced by the structure of RESPA, which requires that borrowers are provided with relevant cost disclosures by the date of closing.

Tying the statute of limitations to the date an agent is paid would create different statutes of limitations depending on the payment practices of the service provider. Additionally, the CFPB should be confined to the statutes of limitations in RESPA instead of the extended 6-year statute of limitations for government actions. The CFPB should not be able to extend the statute of limitations indefinitely until they find a possible violation, as it is clear that the statute of limitations applies to the CFPB.

II. MARKETING SERVICES AGREEMENTS AND DESK RENTALS

The methods by which the CFPB determines whether an MSA is an illegal hidden referral fee remain murky. Providing greater clarity will allow lenders and settlement service providers to market their products competitively, receive fair compensation for that marketing without harming consumers, and give consumers the benefit of receiving information about alternative settlement service providers. The CFPB should revise its policy on rental office spaces so that whether the arrangement is a hidden referral fee is determined according to whether the amount paid for the space exceeds its fair market value. This change reflects the basic economic reality that some marketing space is inherently more valuable than other spaces for certain uses. The CFPB should also exempt MSAs from RESPA Section 8 and require the lender or settlement service provider to provide disclosures to consumers explaining the marketing arrangement and making it clear that the consumer is free to choose other settlement service providers.

SUPERVISORY/GUIDANCE SOLUTIONS

Issue #1. Whether the amount paid for a settlement service is a hidden referral fee is judged according to general market value, and not fair market value, as set forth in Statement of Policy 1996–3, Rental of Office Space, Lock-outs, and Retaliation (61 Federal Register 29264 (1996)).

❋ Why is this a problem?

RESPA Section 8 in no way prohibits the charging of rent that is based on the value of the leased space, as long as there are no actual payments of things of value for the referral of settlement service business. However, in the view of the CFPB, the reasonableness of the goods, services, or facilities provided under a desk rental agreement is determined according to its general market value, which is the value of the good, service, or facility

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to a non-settlement service provider. The value of a leased space depends on various factors having nothing to do with whether any party refers business to the party leasing the space. A space located in a premium location that increases the likelihood of receiving more business is worth more to a settlement service provider because of the access to potential consumers. However, absent some sort of "warm handoff," the access to potential consumers is itself not a referral. It is basic economic sense that office space in a real estate broker's office is more valuable to a title agent than to a florist or dentist.

➤ Recommendation

The CFPB should revise Statement of Policy 1996–3, Rental of Office Space, Lock-outs, and Retaliation to permit the use of a fair market value standard for desk and similar rental agreements that allows for the recognition of the basic economic reality that location often is a significant factor in determining the value of leased space, and that only lease arrangements that provide for the payment of things of value for actual referrals of settlement service business violate RESPA Section 8.

The ideal solution would be to replace the general market value standard in Statement of Policy 1996-3 with a fair market value standard. Under this standard, the compensation paid must be reasonably related to the value of the facilities furnished, considering how valuable the facility is to other settlement service providers. However, if the CFPB decides to retain the general market value standard, it should publish guidance that explains that the standard permits the consideration of the location of the leased space in determining the value without regard to the level of potential referrals of settlement service business. Additionally, the CFPB should then describe how lenders should document compliance with the general market value standard.

REGULATORY SOLUTIONS

Issue #1. RESPA's limitations on the ability for settlement service providers to provide compensation to other settlement service providers make it difficult to structure MSAs and does not provide a direct consumer benefit.

❃ Why is this a problem?

The RESPA limitations create serious compliance hurdles when creating an MSA between settlement service providers. The CFPB maintains that the reasonableness of the compensation paid for marketing services is determined by the fair market value standard, which requires that the compensation paid must be reasonably related to the value of the marketing services performed. However, under the CFPB and previous HUD guidance, when determining fair market value, the potential business obtained should not be a factor in determining whether the payment exceeds the reasonable value of such goods, facilities, or services.[68] This is a significant omission when determining fair market value. The potential business obtained as a result of the characteristics of the consumer audience targeted by the marketing effort is integral to determining the value of the marketing relationship. For example, a marketing campaign in a general newspaper may reach a million readers but could be less valuable to a settlement service provider than a campaign in a new home publication magazine that reaches a hundred thousand readers who are presumably more likely to purchase a home than the general audience. The value of marketing is determined by the method of marketing and the potential consumers the marketing is targeted towards. To structure a payment for marketing without considering the efficacy of the marketing creates irrational outcomes and compliance hurdles.

As it currently functions, the MSA exception provides little clarity or certainty to lenders who wish to make use of the exception. In fact, the CFPB previously recognized in a since-withdrawn bulletin that the current MSA exception does carry inherent risk, even when agreements have been "carefully drafted to be technically compliant with the provisions of RESPA:

"[V]arious mortgage industry participants have publicly announced their determination that the risks and complexity of designing and monitoring MSAs for RESPA compliance outweigh the benefits of entering the agreements… [T]he Bureau has found that many MSAs necessarily involve substantial legal and regulatory risk for the parties to the agreement, risks that are greater and less capable of being controlled by careful monitoring than mortgage industry participants may have recognized in the past."[69]

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68 12 C.F.R. § 1024.14(g)(2) (2023), Real Estate Settlement Procedures Act (RESPA): Home Warranty Companies' Payments to Real Estate Brokers and Agents, 75 Fed. Reg. at 36,271.

69 Consumer Financial Protection Bureau, CFPB Compliance Bulletin 2015-05 (Oct. 8, 2015), available here. Cf. Consumer Financial Protection Bureau, CFPB Provides Clearer Rules of the Road for RESPA Marketing Service Agreements (Oct. 7, 2020), available here (noting that Bulletin 2015-05 was rescinded because it did "not provide the regulatory clarity needed on how to comply with RESPA and Regulation X…").

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➤ Recommendation

The CFPB should change its regulations and guidance to allow for the potential for business generated because of whom the marketing is targeted towards under a marketing agreement to be considered as part of the fair market value. The potential to generate business is in no way a referral that is the focus of RESPA Section 8. In order to lower compliance burdens while protecting consumers from steering, the CFPB should create required disclosures to consumers for lenders who will be using a settlement service provider that is party to an MSA. This disclosure would be required in lieu of limiting the compensation for MSAs to the fair market value of the agreement. These disclosures should make it clear that the borrower can use other settlement service providers. Ideally, these disclosures would be required to be provided soon after (for example, within three days of) application.

When a party performs marketing services for a settlement service provider, the CFPB should require a simple, brief consumer disclosure, which could be included in the marketing materials, advising that the party is compensated for the marketing and that the consumer is free to choose any settlement service provider. A settlement service provider that uses this disclosure should be exempt from Section 8(a) prohibitions, so long as the compensation is not actually based on the number of referrals of a consumer by the party to the settlement service provider.

III. DIGITAL MARKETING AND LEAD GENERATION

In 2023, the CFPB released the Comparison Shopping AO, which prohibited the non-neutral use of information and display of lenders, deeming it a UDAAP and RESPA violation. The CFPB should repeal the AO. RESPA does not require neutrality with regard to marketing, only that referrals must be free from kickbacks and hidden referral fees. The CFPB should also amend Regulation X to allow lenders to advertise and market their products or services directly to settlement service providers, so long as the marketer does not provide a thing of value in return for referrals. In a similar vein, providing a lead to a lender should not be considered a referral if the lead source does not recommend the lender to the borrower. Lastly, the CFPB should clarify that mass marketing advertisements, even if those advertisements are targeted towards certain individual borrowers' profiles, are not referrals. Commercial advertising does not suddenly become a referral that affirmatively influences a decision for a settlement service provider simply because the advertising is targeted towards a particular consumer profile.

SUPERVISORY/GUIDANCE SOLUTIONS

Issue #1. RESPA does not require neutrality with regards to marketing, leads, or even with referrals. Rather, RESPA only requires that referrals be free from kickbacks, and that there be no fee splits other than for services rendered. The Comparison Shopping AO's reliance on RESPA to prohibit non-neutral displays of lenders is based on the erroneous view that RESPA prohibits steering.

❃ Why is this a problem?

As addressed above in the General Recommendations section, Congress did not intend for RESPA Section 8 to impose a general steering prohibition. The scope of RESPA Section 8 is narrow — it prohibits only kickbacks for referrals, and fee splits with no services rendered. Nevertheless, the Comparison Shopping AO misinterprets RESPA's provisions permitting payment for marketing services, ignores controlling court precedent, and creates a neutrality standard that is beyond what RESPA Section 8 requires.[70] While RESPA prohibits paying for a referral, it does not also require that any referral be neutrally presented.

Although the CFPB may believe that the presentation of settlement service provider choices could raise UDAAP concerns, such concerns do not constitute a RESPA violation for two primary reasons.

- First, RESPA elements are distinct. Referrals cannot also be agreements or things of value. In the context of advertising, even if the order in which an option is presented could constitute a thing of value, it cannot also constitute a referral. Again, the elements for a violation must be met separately.
- Second, paying fair market value for marketing services is permissible and not a violation of RESPA. Market value for advertising can be measured by the potential for additional business obtained because of its target audience and exposure. It is reasonable for purchasers of advertising to pay more for higher impact advertising.

70 *Digital Mortgage Comparison-Shopping Platforms AO, supra* note 21.

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Thus, settlement service providers paying market value for advertising services, even in a digital marketing context, have not violated RESPA by simply purchasing advertising. Instead, as suggested above, the CFPB should require that the platform operators include appropriate disclosures if they believe there is confusion.[71]

➤ Recommendation

Rather than rely on RESPA or blend it with other statutes in a manner that collapses the necessary elements of a RESPA violation, the CFPB should regulate and supervise entities that engage in unfair, deceptive, or abusive acts or practices under their UDAAP authority. Such regulation and supervision, however, should not create the false equivalency that a practice which the CFPB considers to be a UDAAP concern is, in and of itself, a RESPA violation.

Following the issuance of the Comparison Shopping AO, the CFPB published Digital Marketing Circular 2024-1 providing such guidance with regard to consumer financial service products not subject to RESPA. The CFPB should repeal the Comparison Shopping AO, leaving in place Digital Marketing Circular 2024-1. The Circular reflects that the appropriate focus is UDAAP and not RESPA.

REGULATORY SOLUTIONS

Issue #1. Mortgage lenders are often introduced to borrowers through referrals from other professionals, but the CFPB seems to view suspiciously marketing to anyone other than the consumer directly. The CFPB should clarify that advertising and marketing to those professionals is a permitted activity under RESPA.

❋ Why is this a problem?

There is nothing wrong with marketing to referral sources as long as the marketing does not provide a thing of value in return for the referrals. However, the CFPB has raised issues with marketing to referral sources in consent orders without any clarity as to what made it problematic. A business model premised on obtaining referrals of customers must be able to market to the referral sources.

Of note is that the CFPB's own FAQs make clear that marketing services are not referrals. More specifically, RESPA MSA FAQ #2 states:

"[R]eferrals include any oral or written action directed to a person where the action has the effect of affirmatively influencing the selection of a particular provider of settlement services or business. In contrast, *a marketing service is not directed to a person; rather, it is generally targeted at a wide audience.* For example, placing advertisements for a settlement service provider in widely circulated media (e.g., a newspaper, a trade publication, *or a website*) is a marketing service."[72]

➤ Recommendation

Amend Regulation X to provide an exception for advertising and marketing as a permissible activity (including marketing to referral sources) under Regulation X that does not violate the anti-kickback provision by adopting the suggested definition for "marketer" and amended definition of "marketing services" in Appendix A below. Marketer should be defined as any person or entity that is paid to provide actual marketing services. Marketing services should be defined as a commercial or advertising message in any medium that promotes, directly or indirectly, a settlement service but does not include any endorsement from the marketer. Fees for marketing services cannot exceed the fair market value of such services.

Issue #2. Lead generation is not a referral.

❋ Why is this a problem?

No creditor can succeed without generating new loans from new customers. To that end, leads are an integral part of a creditor's origination business. Understanding the vital role that leads play in the mortgage business, the CFPB must make clear that the purchase of leads not coupled with a recommendation (i.e., absent an affirmative endorsement) is not a referral.

➤ Recommendation

Adopt the suggested definition of "lead generator" and "lead" and amendments to 12 C.F.R. § 1024.2 in Appendix A below, which clarifies permissible actions under Regulation X. Lead generator should be defined as any

71 Although the CFPB writes that disclosures cannot cure a UDAAP violation, in this case they would provide enough information for consumers to make informed choices for purposes of RESPA.

72 Consumer Financial Protection Bureau, Real Estate Settlement Procedures Act FAQs (Oct. 7, 2020), available here.

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person or entity who, for compensation or gain or with the expectation of compensation or gain in the role of a lead generator: sells, assigns, or otherwise transfers one or more leads for a residential mortgage loan; generates or augments one or more leads for another person; or directs a consumer to another person for a residential mortgage loan by performing marketing services, including, but not limited to, online marketing, direct response advertising, or telemarketing. A bona fide employee that provides leads to their employer or another bona fide employee of the same employer is not a lead generator. Lead should be defined as any information identifying a potential consumer of a residential mortgage loan that is provided without any endorsement from the lead generator.

Issue #3. Targeted mass marketing is still mass marketing.

Why is this a problem?

At nearly 50 years old, RESPA was conceived in a world dominated by paper or telephone communications and in-person relationships, but its requirements still govern a now-digital world dominated by machine learning and internet relationships. Technology advances that improve settlement service providers' ability to direct messaging to appropriate audiences must be assessed in the context in which RESPA was adopted — settlement service providers providing quid pro quo things of value for direct referrals of consumers. The fact that RESPA was adopted in an environment that did not include the digital communication abilities of today, or the future, does not give the CFPB license to stretch RESPA Section 8 beyond its statutory boundaries, which are rooted in the context of quid pro quo things of value for direct referrals of consumers.

Widely available commercial messages do not suddenly become a referral that affirmatively influences a decision for a settlement service provider simply because the advertising is targeted towards a particular consumer profile. Also, preset compensation amounts not tied to any referrals or level of business generated are not a quid pro quo referral fee. Settlement service providers need the certainty that advertising on a commercial medium, such as through an internet shopping page, retains its status as a marketing service for which the provider can pay reasonable market value and continue to be assured that it has not involuntarily violated RESPA simply because technology has advanced in a way to make advertising efforts more tailored and, therefore, more efficient.

Recommendation

The CFPB should clarify in Regulation X that the definition of referral does not include a mass marketing advertisement in a commercial medium that is nonetheless tailored for individual borrowers (such as online comparison shopping) by adopting the amendments to 12 C.F.R. § 1024.2(b) suggested in Appendix A below.

IV. AFFILIATED BUSINESS ARRANGEMENTS

The CFPB and Congress should update the AfBA exemption to bring it in line with modern business practices and to provide clearer compliance targets to lenders and settlement service providers. The CFPB determines whether an AfBA is bona fide based on guidance originally published by HUD 28 years ago, which does not reflect the modern hybrid-work environment or technological advances. The CFPB should revise this guidance and eliminate the outdated factors. In order to give greater clarity to entities relying on this exception, and to fully enact the AfBA provisions of RESPA Section 8(c)(4), the CFPB should publish guidance that reflects the exception's purpose. The CFPB should also amend Regulation X to make it easier for consumers to receive affiliated business disclosures electronically. In addition, the CFPB should simplify disclosures to consumers that explain the business model of the AfBA. Both changes will make it easier for consumers to receive and understand information about the affiliate arrangement and thereby make it easier to shop for alternative settlement service providers. Instead of discouraging AfBAs from offering consumers benefits, the CFPB should make it clear that an AfBA offering a discount to a potential borrower does not constitute the required use of the affiliated entity or the improper steering of that borrower to that particular affiliate, which could potentially lower the cost of homebuying for borrowers. Lastly, to further provide clarity to potential borrowers, Congress should amend RESPA to remove the requirement that affiliated business disclosures to consumers must include a range of fees or estimated fees charged by the AfBA to ensure that borrowers are not confused between this disclosure and the generally more accurate Loan Estimate.

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SUPERVISORY/GUIDANCE SOLUTIONS

Issue #1. The factors for determining whether an AfBA is bona fide and compliant with RESPA are outdated.

Why is this a problem?

Settlement service providers that seek to establish and operate a RESPA-compliant AfBA are using 28-year-old standards to structure their businesses. Advancements in technology have changed the way settlement service providers deliver services to their customers. Without updated guidance to reflect the realities of settlement service providers in 2024, AfBA owners are forced to risk non-compliance with the 1996-2 Guidance to operate a bona fide and economically feasible business like that of independently owned settlement service providers.

Recommendation

Modify/eliminate various factors in HUD's 1996-2 Guidance. For example:

- Eliminate dedicated office space as a factor of a bona fide entity given modern teleworking and consumers' tendency to shop online for services, rather than in a brick-and-mortar commercial office. Licensed entities should only be required to comply with the office requirements established by FHA or in state licensing statutes.
- Eliminate the last two factors regarding whether the affiliate does business with parties other than those that created the affiliate. RESPA does not require that an AfBA do business with other parties, and Congress understood that companies would form AfBAs with referral sources and, as a natural result of the relationship, the AfBA may focus its business on the referral source.
- Eliminate the factor regarding whether the workforce is made up of employees or independent contractors, except when other applicable law requires an employer-employee relationship. If other applicable laws, such as state licensing laws, do not impose an employer-employee relationship requirement for staff, no such requirement should be imposed to qualify for the AfBA exception under RESPA.

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Issue #2. To give meaning to the AfBA exception, neither the opportunity to invest or purchase shares in an AfBA nor the possibility of receiving profit distributions can be considered a thing of value that violates RESPA Section 8.

❋ Why is this a problem?

The AfBA exception permits owners of a settlement service provider to refer business to the AfBA and receive profit distributions from the AfBA without violating RESPA. RESPA provides that the term "thing of value" includes any payment, advance, funds, loan, service, or other consideration."[73] Regulation X provides that, among other things, a "thing of value" includes "the opportunity to participate in a money-making program."[74] This addition by Regulation X to the concept of a thing of value could be construed to include an opportunity to invest or purchase shares in a settlement service provider. If the mere investment in a business by a person in a position to refer business is a violation of RESPA, it would be impossible for parties to create AfBAs to compliantly share profit distributions with owners. Regulation X must yield to RESPA. Thus, a thing of value cannot be interpreted in a manner that would effectively eliminate AfBAs, which are expressly authorized by Congress. Similarly, the exception explicitly permits an owner to make referrals to an AfBA to generate revenue and eventual profits to be distributed to those owners. In view of the express AfBA exemption, if an owner is clearly permitted to receive profit distributions, the mere possibility of receiving those profits cannot be a separate thing of value that violates RESPA.

➤ Recommendation

The CFPB should follow RESPA and recognize that the mere offer of investment opportunity and anticipated profit distributions is not a thing of value in the context of AfBAs.

Issue #3. The profitability of an AfBA is not an indicator of the AfBA's compliance with RESPA.

❋ Why is this a problem?

One of the conditions of the Section 8(c)(4) AfBA exemption is that other than payments permitted under Section 8, the only thing of value that is received from the AfBA is a return on the ownership interest or franchise relationship. The AfBA exemption contains no restrictions on the amount of profit owners can make as long as those profits are received based on the person's ownership interest. To the extent the AfBA is successful — and owners make a profit in substantial excess of initial capital contributions — that fact alone should not be an indicator of noncompliance.

➤ Recommendation

The CFPB should provide guidance making clear that a positive rate of return on an investment is not evidence of an improper affiliated business arrangement. Rather, the necessary capital to be invested should be commensurate with the costs and risks of operating a similar business, not premised on the expected or actual rate of return.

REGULATORY SOLUTIONS

Issue #1. An affiliated business disclosure should be considered compliant when delivered electronically without the need to satisfy E-Sign requirements.

❋ Why is this a problem?

Regulation X currently permits the affiliated business disclosure to be provided electronically as long as the requirements of the E-Sign Act have first been satisfied. That requires the party providing the affiliated business disclosure to first provide the consumer with disclosures required under the E-Sign Act and then obtain the consumer's consent to receive disclosures electronically before delivering the affiliated business disclosure.

RESPA also requires a party making a referral to provide the affiliated business disclosure to the consumer at or before the time the consumer is referred to the AfBA. "Referral" is construed broadly to include any

73 12 U.S.C. § 2602(2).

74 12 C.F.R. § 1024.14(d) (2023).

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conduct that has the effect of affirmatively influencing a consumer's selection of a particular settlement service provider.

Given that consumers tend to interact initially with service providers via the internet or social media — and a primary purpose of the affiliated business disclosure is to put the consumer on notice of the existence of an affiliated relationship and the consumer's ability to shop for services — an AfBA owner should be able to deliver the affiliated business disclosure electronically via a website or email without complying with the E-Sign Act and thereby satisfy RESPA's requirements for the affiliated business disclosure. This ensures the consumer receives information regarding the affiliated business as soon as possible and does not put the owners of the AfBA at risk of violating the first prong of the three-part statutory safe harbor.

➤ Recommendation

Permit an affiliated business disclosure to be provided electronically without needing to comply with the E-Sign Act. This can be done by amending the following regulations:

- Exempt disclosures by AfBAs from the general disclosure requirements mandating E-Sign compliance in 12 C.F.R. § 1026.17(a)(1) and allow forms under 12 C.F.R. § 1024.15(b)(1) to be provided electronically.
- Amend 12 C.F.R. § 1024.15(b)(1) to allow disclosure to be provided in writing or electronically.

In the modern economy, consumers have become used to electronically receiving disclosures for services. This change would simplify the disclosure process and make the existence of the affiliate relationship clear to the consumer.

Issue #2. Because affiliate relationships are often complicated in business structure, describing an organizational chart in the affiliated business disclosure is often confusing and provides more information than a consumer needs to understand that there is an affiliated relationship and satisfy the purpose of the affiliated business disclosure.

❋ Why is this a problem?

Regulation X broadly requires an affiliated business disclosure to describe the affiliated business relationship. To do so accurately and depending on the ownership structure of the business, this often requires owners of an affiliated business to describe multiple ownership layers with trust structures and/or holding companies that have little meaning to the average consumer. In fact, the language in the Appendix D notice regarding the ownership relationship often is not accurate. The first paragraph of the Appendix D notice provides, "This is to give you notice that [referring party] has a business relationship with [settlement services provider(s)]. [Describe the nature of the relationship between the referring party and the provider(s), including percentage of ownership interest, if applicable.] Because of this relationship, this referral may provide [referring party] a financial or other benefit." Often, a party making a referral to an affiliate does not have an ownership interest in the affiliate, such as when a company refers a consumer to a sister company. In these common situations, the referring party typically does not receive a financial or other benefit.

What is important to the consumer, and satisfies the intent of the disclosure, is to ensure the consumer understands that the person/company that referred him/her to the AfBA is an owner or somehow connected to the owner of the AfBA and, therefore, the referral is likely

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influenced by that fact. Alerting the consumer to this fact can be accomplished by a broad statement that indicates that the referring party has a relationship with the party to whom the consumer is being referred.

➤ Recommendation

The party providing an AfBA notice should only be required to identify that it has some relationship with the party to whom the consumer is being referred and should not have to provide an explanation of that relationship. This change will clearly convey the affiliate relationship to the consumer without causing confusion with superfluous information.

Issue #3. "Required use" should not include disincentives to shop for settlement services.

Why is this a problem?

RESPA prohibits requiring the use of a settlement service provider as part of an affiliated business arrangement under Section 8(c)(4). The current definition of "required use" acknowledges that offering a discount or rebate for the use of an AfBA does not constitute "required use." While there is no minimum or maximum amount associated with such a discount or rebate, regulators in the past have tried to revise the "required use" prohibition to exclude certain parties from the definition or to otherwise interpret the definition to prohibit large discounts or rebates that are alleged to act as a disincentive to consumers shopping. Ultimately, however, consumers in those situations retain the right to choose their own provider and may choose to forgo the discount for a variety of reasons. A particularly attractive discount or a consumer choice to accept a discount or rebate is a freely made decision that does not meet a reasonable understanding of "required use."

➤ Recommendation

Revise the definition of "required use" to state that the term includes a bona fide discount "of any amount." Required use should not be defined to include affiliates offering such a good discount that it creates an economic disincentive for a borrower to shop for other offers. This change will make it easier for a consumer to benefit from the potential savings from using an affiliate.

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STATUTORY SOLUTIONS

Issue #1. TRID requires the consumer to receive accurate fee disclosures, making the fee estimates on the affiliated business disclosure potentially inaccurate and confusing to the consumer.

❃ Why is this a problem?

12 U.S.C. § 2607(c)(4), 12 C.F.R. § 1024.15(b)(1) of Regulation X and the model affiliated business disclosure form in Appendix D of Regulation X require the affiliated business disclosure to include a range or estimate of fees charged by the affiliated business.[75] By definition, this means the disclosure provides less accurate information to a consumer regarding fees than the lender is required to provide the consumer as part of the Loan Estimate. In addition, by imposing waiting periods after a consumer is provided with a Loan Estimate and before a loan can be closed, TRID is designed, in part, to allow the consumer time to shop for settlement services. Rather than confuse a consumer with less precise estimated fees or a range of fees on an affiliated business disclosure, the consumer would be better served by an affiliated business disclosure that simply identifies the affiliate relationship and tells the consumer that he/she is not required to use the AfBA. The consumer then receives a more accurate disclosure of the AfBA's fees when he/she receives the Loan Estimate from the lender.

➤ Recommendation

Revise the language of 12 U.S.C. § 2607(c)(4), 12 C.F.R. § 1024.15(b)(1), and the model disclosure in Appendix D to Part 1024 (Affiliated Business Arrangement Disclosure Statement Format Notice). Remove the estimated fee section since this information is already provided in TRID disclosures and providing similar and redundant notices could lead to consumer confusion. When a lender provides an AfBA notice to a borrower, the notice should alert the borrower that they will receive an estimate of the costs of the applicable providers in the Loan Estimate and in similar disclosures provided by other types of settlement service providers.

V. CONCLUSION

50 years ago, RESPA was intended to prevent settlement service providers from providing quid pro quo things of value for direct referrals of consumers. Over the decades, RESPA has been interpreted to broadly prohibit consumer-beneficial competitive practices based on the inaccurate and awkward attempt to apply a statute governing the business practices from the 1970s to the modern business world. Subsequent statutes, regulations, and market evolutions have arguably made RESPA Section 8 unnecessary or far less important a part of the mortgage regulatory ecosystem. Yet, the costly compliance infrastructure and confusion in how to apply old rules to new markets persists. The CFPB and Congress should work together, in concert with interested stakeholders, to adopt these suggested changes in order to foster competition between settlement service providers, increasing consumer choices and cost-saving opportunities without compromising consumer protection.

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75 Appendix D to Part 1024 — Affiliated Business Arrangement Disclosure Statement Format Notice.

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Appendix A

Please note: Red text indicates a modification to the existing regulatory text.

PROPOSED REGULATION X SOLUTIONS

SECTION 1024.2 — DEFINITIONS

Add language to 12 C.F.R. 1024.2(b) after "HUD-1 or HUD-1A settlement state" and before "Lender:"

> **Bona fide employee** means any individual who qualifies as a part- or full-time employee under applicable state law.
>
> **Lead generator** means any person or entity who, for compensation or gain or with the expectation of compensation or gain in the role of a lead generator: sells, assigns, or otherwise transfers one or more leads for a residential mortgage loan; generates or augments one or more leads for another person; or directs a consumer to another person for a residential mortgage loan by performing marketing services, including, but not limited to, online marketing, direct response advertising, or telemarketing. A bona fide employee that provides leads to their employer or another bona fide employee of the same employer is not a lead generator.
>
> **Lead** means any information identifying a potential consumer of a residential mortgage loan that is provided without any endorsement from the Lead Generator.

Add language to 12 C.F.R. 1024.2(b) after "manufactured home" and before "mortgage broker" to define marketing services:

> **Marketer** means any person or entity that is paid to provide actual marketing services.
>
> **Marketing services** means a commercial or advertising message in any medium that promotes, directly or indirectly, a settlement service but does not include any affirmative and specific endorsement from the marketer. Fees for marketing services cannot exceed the fair market value of such services. Examples include but are not limited to:

- Messages in a newspaper, magazine, leaflet, promotional flyer, or catalog.
- Announcements on radio, television, or public address system.
- Electronic advertisements, such as on the Internet or an electronic bulletin board.
- Direct mail literature, such as letters sent to customers or potential customers as part of an organized solicitation of business.
- Printed material on any exterior or interior sign.
- Open House materials.
- Telephone solicitations.
- Letters sent to customers or potential customers as part of an organized solicitation of business.

The term does not include:

- Referrals, as that term is defined in 1024.14(f).
- Other permissible communications such as:
  - Informational material distributed only to business entities.
  - Notices required by federal or state law, if the law mandates that specific information be displayed and only the information so mandated is included in the notice.
  - News articles, the use of which is controlled by the news medium.

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+ Market research or educational materials that do not solicit business.

Messages customized for a consumer remain marketing services and are not referrals if they otherwise are commercial messages.

Add new paragraph to 12 C.F.R. 1024.2 definition of settlement service to identify that marketing services and lead generation are not settlement services:

Settlement service means any service provided in connection with a prospective or actual settlement, including, but not limited to, any one or more of the following:

1. 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 such loans);
2. Rendering of services by a mortgage broker (including counseling, taking of applications, obtaining verifications and appraisals, and other loan processing and origination services, and communicating with the borrower and lender);
3. Provision of any services related to the origination, processing, or funding of a federally related mortgage loan;
4. Provision of title services, including title searches, title examinations, abstract preparation, insurability determinations, and the issuance of title commitments and title insurance policies;
5. Rendering of services by an attorney;
6. Preparation of documents, including notarization, delivery, and recordation;
7. Rendering of credit reports and appraisals;
8. Rendering of inspections, including inspections required by applicable law or any inspections required by the sales contract or mortgage documents prior to transfer of title;
9. Conducting of settlement by a settlement agent and any related services;
10. Provision of services involving mortgage insurance;
11. Provision of services involving hazard, flood, or other casualty insurance or homeowner's warranties;
12. Provision of services involving mortgage life, disability, or similar insurance designed to pay a mortgage loan upon disability or death of a borrower, but only if such insurance is required by the lender as a condition of the loan;
13. Provision of services involving real property taxes or any other assessments or charges on the real property;
14. Rendering of services by a real estate agent or real estate broker; and
15. Provision of any other services for which a settlement service provider requires a borrower or seller to pay.

Lead generation and marketing services as defined in 1024.2 are not a settlement service.

Add new paragraphs (3) and (4) to 12 C.F.R. 1024.14(f) to clarify that (i) shopping sites (digital or human brokers) provide marketing services and not referrals and RESPA does not require non-neutral presentation:

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.

(2) A referral also occurs whenever a person paying for a settlement service or business incident thereto is required to use (see 1024.2, "required use") a particular provider of a settlement service or business incident thereto.

(3) Referrals include:

(i) any affirmative and specific endorsement intended to influence the consumer to use the settlement service provider from the marketer in providing marketing services; or

(ii) a settlement service provider directly providing consumers with the contact information of another settlement service provider and that results in the consumer using that other settlement service provider. Lead generators, marketers, and housing

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counselors, however, do not engage in referral activity when directly or indirectly providing consumer contact information to a settlement service provider.

(4) Marketing services are not referrals. Marketing services can be provided by referral sources to consumers and other referral sources in accordance with RESPA 8(c)(2). Non-neutral use or presentation of information about one or more settlement service providers by a marketer is not a referral.

Add subparagraph (viii), (ix) and (x) to 12 C.F.R. § 1024.14(g) to permit marketing services, lead generation, and housing counselor referrals:

(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, including, without limitation licensed or exempt mortgage brokers.

(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;

(viii) A payment to any person for marketing services that are actually furnished;

(ix) A payment to a lead generator for leads; or

(x) A payment to a housing counselor for services that are actually furnished.

Add new paragraph (j) under 12 C.F.R. § 1024.14:

(j) A violation of this section does not exist unless the person gives or receives a fee, kickback or thing of value that is separate and distinct from the referral of a settlement service.

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