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EXECUTIVE SUMMARY

# RESPA at 50

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

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.

In the full paper, Part I describes how the current regulatory regime controlling referrals between settlement providers often leaves settlement 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.

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 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 space is 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 arrangement 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 Platforms 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 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.

**Read the full report at [mba.org/respa8](https://mba.org/respa8).**

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