



RESPA AFTER CHEVRON WHAT ARE THE CHALLENGES?

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Agenda

■ RESPA

- Review of the Rules
 - ❖ What is permitted
 - ❖ What isn't
- Working with others
 - ❖ It can be done and in the right way
- Impact of the Loper case
 - ❖ No more Chevron deference
 - ❖ What might that mean?

RESPA and Regulation X

- The basic framework: Section 8 of the law; various sections of Regulation X
 - Prohibited
 - ❖ Kickbacks/Referral Fees
 - ❖ Fee Splitting
 - Permitted
 - ❖ Payments for Services
 - ❖ Affiliated Business Arrangements
 - ❖ Normal Promotional/Educational Expenses



PROHIBITED

Kickbacks and Referral Fees

RESPA §8(a); Reg X §14

■ Illegal for

- A Person
 - ❖ Including Associates
- To
- Give or Receive
 - ❖ Both sides of the transaction
- Anything of Value
 - ❖ Cash → Defrayed Expenses

Kickbacks and Referral Fees

RESPA §8(a); Reg X §14

- Pursuant to an Agreement or Understanding
 - ❖ Including a 'course of conduct'
- To Refer
 - ❖ Required use → exclusive provider
 - ❖ With some exceptions (see later exceptions)
- Settlement Services
 - ❖ Activity performed as part of Loan Origination/Closing
- In a 'federally related mortgage loan' transaction
 - ❖ 1-4 family, 1st or 2nd mortgage
 - ❖ Sale, refinance, HELOC

■ Need all Elements of the Test

Fee splitting

RESPA §8(b)

- No Person shall
- Give or Accept
- A split or percentage
- Of a Fee
- For a Settlement Service
- Other than for a service actually rendered

Even if no referral is involved

Split vs Overcharge vs No Service

■ Freeman vs Quicken Loans (2012)

- Overturned long time HUD Statement of Policy which prohibited 'unearned' fees imposed by one party on the borrower.
 - ❖ In this case Quicken charged a 'discount fee' but did not lower the interest rate (charge for a non-existent service)
- In order to have a violation of 8(b) there must be two parties involved:
 - ❖ A charge imposed on the borrower
 - ❖ Then split with another person who performs no service

■ Don't get overconfident!

- UDAAP rules still exist.

Examples- Is This Okay??

Bank receives postage stamps from title/ settlement agent in exchange for “22 deals” ■ NO

Real estate agent gets voucher for lunch and foursome of golf at expensive club from mortgage broker after sending over the 10th deal ■ NO

Title/settlement agent gives away lock boxes with space for a business card to every real estate agent whose purchase contracts list him as ‘closer’ ■ NO

Builder charges \$2,500 kitchen upgrade fee to buyer but actual cost is \$2,000, sends \$500 office supply gift card to the real estate agent who sent the deal ■ NO

So what can I do???



PERMITTED

Permitted Payments

RESPA §8(c) Reg X §14(g)

- Employers to Employees (salary and referral fees)
- Attorney's fees
- Title agent commission ("Core Title Services")
- Lenders to their Agents for originations
- Real Estate Agents co-brokerage fee
- Services rendered or goods/facilities provided
RESPA §8(c)(2); Reg X §14(g)
- Affiliated Business Arrangements
RESPA §8(c)(4); Reg X §15
- Normal promotional/educational activities
Reg X §14(g)

Goods and Services

RESPA §8(c)(2); Reg X §14 (g)

- Payments between service providers are permitted when there are:
 - Actual services
 - Necessary for the transaction
 - Distinct from other services
 - Actually performed
- And payment is commensurate (Market Value)

Examples

■ Marketing and Advertising

- Marketing/Services Agreements

- ❖ Payment by one service provider (the lender) to another (the real estate broker) to advertise its product(s)
- ❖ Permitted with caveats
 - *Marketing service can not be 'exclusive' to one lender*
 - *Marketing can not demote a lender as 'preferred provider'*
 - *Can not pressure brokers to steer buyers to lender*
 - *Advertising to public not individuals*
 - *Actual marketing service must be performed*
 - *Pricing must be Market Value*

Examples

■ Marketing and Advertising

- Co-Marketing
 - ❖ Joint advertising
 - ❖ Old FAQ from HUD
 - *Payments based on proportion in the ad*
 - ❖ No endorsements (referral)
- Space Rental
 - ❖ Price based on Market Value
 - ❖ Should treat as any other rent decision
 - *Space is used*
 - *Space is needed*
 - *Space isn't redundant*

Affiliated Business Arrangements

RESPA §8(c)(4); Reg X §15

- Two (or more) service providers create mutually owned third
 - Example: Real Estate Agent “A” and Bank “B” form Mortgage Company “C”
- Is not considered a referral fee if “A” and “B” get paid by “C” as long as Rules are followed
- Sham Businesses are RESPA violations

AfBA- Do it right

■ 3 Part Test- required

- Disclosure on HUD mandated form within HUD mandated timing
 - ❖ Identify relationship
 - ❖ Estimate charges
 - ❖ State no required use
- Can't require use of the AfBA
- Returns (dividends) paid on percentage of ownership
 - ❖ Not number or value of referrals

AfBA- Do it right

- 10 point test- don't have to have all 10-may be challenged (see later discussion of Loper)
 - Capitalize appropriately
 - Have management in place
 - Have actual employees
 - Have separate office space
 - Provide appropriate/substantive services
 - Don't contract out all services
 - Don't contract out to 'owners'
 - Don't overpay for contract services
 - Don't service only the owners
 - Market to all

AfBA Don't do it wrong

- Full Capitalization
- Have as many employees as the work requires
- Make Dividend payments in business like fashion
 - Not based on referrals
 - Not paid on a transaction by transaction basis
- Use the right form- always provide
- Don't use pre-printed forms with default to AfBA

Promotional/Educational Activities

Reg X §14(g)

- Normal promotional and educational activities permitted, if
 - not conditioned on the referral of business and
 - do not involve the defraying of expenses that otherwise would be incurred
 - Most recent example: Freedom Mortgage consent decree

Examples- Promotional

- Modest giveaways with 'giver's logo on it
- Contribution to golf tournaments
- Sponsorship of awards events
- Occasional meals together
- Joint attendance at sporting events
- Donuts and coffee at an open house
- Simple holiday 'thank-you' gifts to business partners

Examples- Educational

- Conducting training for business partners on industry topics
- Sponsoring education for business partners
- Creating educational pieces for partners to give to consumers

Combination is Permitted:

Lunch and Learn with sandwiches, chips, soft drinks, trinkets, hand outs and a short discussion of 'what I do', and 'why it is needed in our business'
- all paid by me

Promotional/Education- Do it right

As the provider:

- Your logo, not the recipient's
- Attend any event where you are doing marketing
- Don't overpay for a fungible item (sponsorship ad)
- Keep the meals, gifts and trinkets modest in cost
- Don't pay for normal business expenses
- Caution: providing 'free' mandatory CE credits
 - Is there a business reason for the education?

“Required Use” Allowed or Not?

RESPA Sections 8(c)(4) and 9; Reg X Sections 2(b) 22 and 15 (b)

■ Permitted to ‘Require Use’

- A lender may require borrower to use and pay for its chosen:
 - ❖ Attorney
 - ❖ Credit Reporting Agency
 - ❖ Appraiser
- An attorney may require borrower to use and pay for:
 - ❖ Title insurance from its agency
- Parties to contract may agree to use settlement service provider
- Provider may give a consumer a discount (effectively capturing customer)

■ Not permitted to ‘Require Use’

- When making referral to AfBA
 - ❖ *But note exceptions above*
- If Seller is requiring use of a title company for which Buyer will pay

Post 'Chevron' – Loper Decision

- Carter v Welles-Bowen Realty Inc. (2013)
 - Affiliated Business Arrangement
 - US Circuit Court held HUD's 1996 rulemaking exceeded law's requirements and cut a 10-point test for compliance back to three (original in law)
 - Not widely followed
- Loper decision curtailing requirement that Courts defer to an agency's interpretation of a law in its rule making
 - Will AfBA rules be attacked again, more widely?
 - Will deference still prevail – see Townstone outcome to date

Regulators and Penalties

■ State Enforcement

- Attorney general
- Insurance commissioner (title insurance agents)
- Real estate licensing board (real estate agents)
- Financial services regulator (mortgage companies and banks)

■ Federal Enforcement

- CFPB (RESPA)
- FDIC (prudential regulator for banks)
- OCC (regulator for banks)

■ Civil Fines

■ Class Action Damages (consumers)

■ Criminal Penalties

■ Loss of Licenses



Q&A

Any Questions?