



AfBAs & MSAs: Proceed with Caution

LEGAL EDUCATION DEPARTMENT
Attorneys' Title Fund Services, LLC

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Real Estate Settlement Procedures Act Section 8(a)



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Business Referrals

RESPA Sec. 8 provides:

- It is illegal to give or receive
 - A “thing of value” (pursuant to)
 - An agreement or understanding (for the)
 - Referral of settlement service business
- In connection with federally related mortgage loan



See also Sec. 626.9541(1)(h)3., F.S. and Rule 69B-186.010, F.A.C.

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Real Estate Settlement Procedures Act Section 8(b)



Splitting Charges

RESPA 8(b)

See also Sec. 626.9541(1)(h)3., F.S. and Rule 69B-186.010, F.A.C.

Illegal to give or receive

- Portion, split or percentage of any charge
 - For a real estate settlement service
 - Except for services performed

No referral required

- Cannot split a charge to get around referral fee prohibition

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Services

12 C.F.R. Sec. 1024.14 (c)

- Unearned fees violative of this section
 - Charge for which no or nominal services are performed, or
 - Duplicative fees
- Source of payment does not determine whether service compensable
- Prohibition cannot be avoided by splitting fee with purchaser of service



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Real Estate Settlement Procedures Act Section 8(c)



Fees, Salaries, Compensation, or Other Payments

Exemptions from Section 8(a),(b) prohibitions

1. Fees
 - a. Attorneys fees for services rendered
 - b. Title company fee to agent for title insurance services
 - c. Lender to loan originator fee for origination services
2. Cooperative arrangements between real estate agent/broker
3. Bona fide salary, compensation, or other payment for goods or facilities furnished or services performed
4. **8(c)(4) Affiliated Business Arrangements**
5. Payments prescribed in CFPB regulations

Bona Fide Salary, Compensation or Other Payment

12 C.F.R. Sec. 1024.14(g)(3)

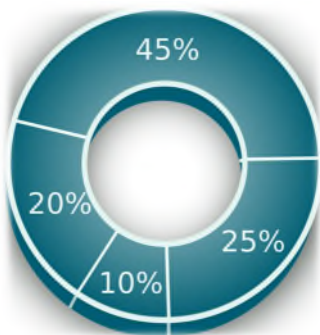
- When a person positioned to refer settlement service business
 - Attorney
 - Mortgage lender
 - Real estate broker/agent
 - Developer or builder
- Is paid to provide additional settlement services
- Services must be **actual, necessary, and distinct** from the primary services provided by the referrer

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Affiliated Business Arrangement Compensation Guidelines

- Return on ownership interest or franchise relationship
 - Bona fide dividends, capital or equity distributions



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Section 8(c)(4) Affiliated Business Arrangements



Three-Part Test

8(c)(4) Affiliated Business Arrangements

AfBA Exemption from Section 8(a),(b) prohibitions

1. **Disclose** arrangement to consumer on separate document
 - Identify relationship
 - Estimate charges
2. Confirm **no requirement** consumer use affiliated service
 - Economic incentive okay
3. Distribution of **profits must mirror ownership interest**
 - Not based on amount of business
 - Okay to pay for actual services performed only



Prior Guidance for Bona-Fide AfBA

HUD Factors still generally relevant to CFPB

1. Capitalization

Both entities share start-up costs plus X-months operating expenses

2. Dedicated employees

Everyone in one business should not be “part-time”

3. Core services performed by each entity

Provided by each entity according to its role

Cannot contract everything out

Cannot have one entity provide to the other without fair compensation

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Bona-Fide AfBA Factors (cont'd)

4. Disclosure

At time of referral so consumer has a clear option to decline

5. Independent entities

Not one entity and a “shell”

Everyone in one business should not be “part-time”

6. Capital invested sufficient to operate each business

7. Dedicated employees work in AfBA's office space

If one entity renting from the other, must pay fair market value (not subsidizing)

8. Membership

Not based on referrals

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Common AfBA Compliance Issues

- Agents may want to substitute referrals for capital contribution
- Buy-in for ownership shares too cheap to properly capitalize
- Operating agreements permit removal of members based on referrals
 - Removal for “no reason” may be seen as functioning the same way
 - “Eligibility” for shares or membership based on referrals
 - Granting more shares based on referrals
- Shared employees
 - Sharing employees with parent entity may suggest “sham” operation



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Notes Based on CFPB Enforcement Actions

- Promotional activities
 - Target to a wide audience rather than referral sources
 - Ensure promotional activities taking place
- Co-advertising costs must be shared proportionately
- Ensure services actually being performed for all payments made
- Avoid paying for exclusive marketing or leads

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Questions

- What prompts RESPA investigations?
 - Likely a complaint
- Is a title company covering e-recording a violation?
 - It depends. Your own fee being waived, or defraying lender expense
 - Unlawful inducement under state law?
- Minimum ownership threshold to trigger RESPA AfBA rules?
 - 1%
- Mortgage brokers paying for 3d party Transaction coordinator a kickback?
 - Probably

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Bona Fide Salary, Compensation or Other Payment

12 C.F.R. Sec. 1024.14(g)(3)

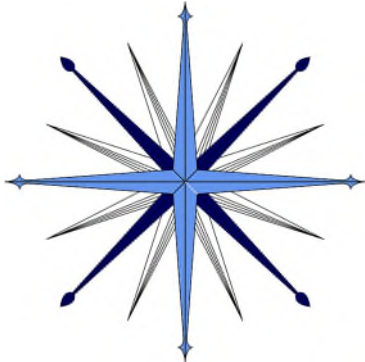
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Affiliated Business Arrangement Compensation Guidelines

- Return on ownership interest or franchise relationship
 - Bona fide dividends, capital or equity distributions



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Is an Affiliated Business Arrangement Right for You?

- Are you planning and willing to treat the AfBA like a new business with a long term strategy and exit plan?
- Are you fully aware of all expenses that come with a start-up title operation?
- Do you have a viable sales model, beyond expecting all new business from the parent company of the AfBA?
- Have you arranged for sufficient capitalization?
- Do you have qualified people and effective systems in place?



Real Estate Settlement Procedures Act Section 8(d)



Penalties

1. Not more than \$10,000 or one year in prison, or both
2. Joint/several liability equal to three times (3x) amount paid for settlement service to consumer who paid for service
3. Court costs and attorneys' fees for private causes of action
4. Liability avoided for failing to provide AfBA notice if not intentional and resulting from bona fide error
5. CFPB, HUD, or States' attorneys general or insurance commissioners may enjoin violations
6. More stringent state law limitations on AfBAs allowed

Real Estate Settlement Procedures Act Regulation X



What IS Allowed Under Section 8?

12 C.F.R. Sec. 1024.14(g)(1)

Additional permitted activity based upon RESPA Section 8(c)

- (vii) An employer's payment to its own employees for any referral activities
- (vi) Normal promotional and educational activities not conditioned on the referral of business and do not involve defraying of expenses that otherwise would be incurred by persons in a position to refer settlement services or business incident thereto



Employee Referral Activity (cont'd)

McCullough v. Howard Hanna Co. 2010 WL 1258112 (N.D. Ohio)

R.E. brokerage (Hanna) refers buyer (McCullough) to its AfBA title agency (Barristers)

- Hanna rewards its employees for referrals
- Barristers does not participate in rewards program; Hanna's sole compensation is return on AfBA investment
- Held: Hanna may reward its employees for referral activity

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“Normal Promotional & Educational Activities”



Consumer Incentives

CFPB's RESPA FAQs (Oct. 7, 2020)

- Settlement service providers (including lenders) can gift, refund, or discount services to consumers for using their services
- May not give incentive for consumers referring other business
- State law may limit such practices as well

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Promotions Targeting Referral Sources

CFPB's RESPA FAQs (Oct. 7, 2020)

- Regulation X allows “normal promotional and educational activities” directed to a referral source if the activities meet 2 conditions:
 - Not conditioned on referral of business
 - Do not defray referral source expenses



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Factors to Consider

CFPB's RESPA FAQs (Oct. 7, 2020)

- How are recipients of promotion targeted?
 - **Problematic:**
 - Narrowly targeted
 - Prior, ongoing, or future referral sources
 - **Better**
 - Broadly targeted
 - Targeted to the general public
 - All providers offering similar service in locality
- Frequency of promotional or educational activity
 - Does referral source receive items/activities regularly or more often than others?



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Defraying Expenses Not Permitted

CFPB's RESPA FAQs (Oct. 7, 2020)

Disallowed:

- Goods or services referral sources must otherwise pay for themselves
 - Mandatory continuing education expenses, certifications, licenses
 - **Problematic:** Referral source-branded office supplies vs.
 - **Better:** Provider-branded office supplies which do not “defray expenses”



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Drawing Promotion Example from CFPB FAQ

POP QUIZ: Okay or not okay?

- Email to all previous customers and all local loan originators (broad set of recipients)
 - Drawing for basketball set
 - Email summarizes agent's services
 - Entries automatically made for each email recipient
 - Blank entry form on promoter's website

A: **Probably okay under RESPA**

- Meets conditions for normal promotional activity
 - Not conditioned on referrals
 - Not an expense recipient would otherwise incur



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Drawing Promotion Example 2

POP QUIZ: Okay or not okay?

- Email to select loan originators (narrow set of recipients)
 - Basketball set
 - Email summarizes agent's services
 - One entry for each previous referral

A: **Illegal promotional activity**

- Conditioned on referrals
- RESPA 8(a) violation
 - Opportunity is a "thing of value"
 - Gift functionality irrelevant



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Florida Restrictions Unfair Insurance Trade Practices Act



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Sharing premium

- **Sec. 626.753(1)(a), F.S.**
 - Agent may divide or share commissions only with other agents appointed and licensed to write the same kinds of insurance
- **Sec. 626.8411(1), F.S.**
 - The following also applies to title insurance agents or agencies
 - (d) Section 626.753, relating to sharing of commissions



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Permitted in Florida Promotional and Educational Activities



Referral sources

- Federal and Florida regulations provide safe harbor for “Normal promotional and educational activities”
 - Must promote the agency; not referral source
 - Activity or gift cannot defray necessary expense
 - Agency (not referral source) branding
 - Costs capped
 - Don’t “require” referral of business
 - Scope of activity may imply “understanding or agreement”

Promotional items

- Except as prohibited by Sec. 626.9541, F.S., the following are not violations
 - Promotional items w/company logo of
 - Title insurance agent or
 - Title agency, so long as
 - Value does not exceed \$25 per item
 - Promotional items do not include
 - Gift certificates
 - Gift cards, or
 - Other items having specific monetary value on their face, or
 - Exchangeable for another item having specific monetary value

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Rule 69B-186.010(5)(a), F.A.C.



Trinkets, Tchotchkes and Knick-knacks

- Promotional items ideally promote brand awareness
 - Remind past customers and encourage future customers
 - Themed to your company when possible
 - Useful or fun tools
 - Provide to referral sources to gift their customers



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Educational Materials

Generally okay to give to a referrer of settlement service business if

- Exclusively related to title insurance
- Not conditioned on referral of business and
- Do not defray expenses otherwise incurred by referrer of settlement service business
- Examples
 - Fliers, brochures, pamphlets, Frequently Asked Question (FAQ)

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Rule 69B-186.010(5)(b), F.A.C.



Promoting Agent or Agency

- Advertising/Marketing activities allowed where:
 - Directly promoting title insurance business of agent or agency
 - Agent/agency pays proportionate share/fair market costs where for any joint participation in marketing with another party
 - Does not violate paragraph (5)(a) of this rule
 - 5(a) \$25 limit on promotional items

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Rule 69B-186.010(5)(d), F.A.C.



Compensation Permitted

- To referrer for goods/services performed at amounts not exceeding reasonable fair market value
- Payment by title insurance company to duly appointed agent for services performed issuing title insurance policy
- Payment to any person of
 - Bona fide salary or
 - Compensation or other payment for goods or facilities furnished or services performed

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Rule 69B-186.010(5)(c)(e) and (f), F.A.C.



Educational Presentations

Allowed:

- Title agency invites potential referral sources to “lunch and learn” presentation by, for example:
 - CPA (FIRPTA expert)
 - Surveyor
 - Home inspector
- Invitees not selected solely because of business referrals
- Lunch and refreshments served
- Speaker paid for time, not referral activity

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<https://www.myfloridacfo.com/Division/Agents/Compliance/TitleAgents.htm>



Marketing Services Agreements



“We are deeply concerned about how marketing services agreements are undermining important consumer protections against kickbacks,” said CFPB Director Richard Cordray. “Companies do not seem to be recognizing the extent of the risks posed by implementing and monitoring these agreements within the bounds of the law.”

- 2015 Consumer Financial Protection Bureau

Definitions

- Agreement by which one person/entity markets or promotes the services of another for a fee
- Examples:
 - Real estate broker promotes loan originator
 - Developer markets title agency



Recent Enforcement Actions

In 2023 CFPB took action against Freedom Mortgage Corporation for providing illegal incentives to real estate brokers and agents

- In exchange for mortgage loan referrals
- Freedom provided RE agents and brokers incentives including
 - Cash payments
 - Paid subscription services, and
 - Catered parties
 - With the understanding they would refer prospective homebuyers to Freedom for mortgage loans
- Violated RESPA and its implementing regulation

Recent Enforcement Actions

CFPB ordered Freedom to

- Cease its illegal activities
- Pay \$1.75 million into the CFPB's victim relief fund

CFPB separately issued an order against a real estate brokerage firm, Realty Connect USA Long Island for accepting numerous illegal kickbacks from Freedom

Realty Connect will pay a \$200,000 penalty and cease its unlawful conduct

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Recent Enforcement Actions

“Freedom provided kickbacks to real estate brokers and agents — including those at Realty Connect — in return for mortgage referrals, a clear violation of federal law,”

“The CFPB will be vigilant in rooting out anti-competitive behavior that interferes with consumers’ ability to choose financial products and services.”



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Key Takeaways

- MSAs not per se illegal
 - March 2021 CFPB announced guidance
 - Subject to RESPA Section 8 analysis
- MSAs focus on marketing, not referrals
 - Referrals are directed to one person; MSA targets wide audience
- Payments must be for actual marketing services
 - Receipts ought to be kept
- Compensation must reasonably relate to services performed
 - Not tied to number of successful referrals
 - Can't charge more than normally charge others

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Best Practices

- Operate under a well-drafted agreement
 - Clearly state no agreement for referrals
 - “There shall be no payments made for direct sales pitches to any particular client”
 - Avoid “exclusive” arrangements
 - Document how fee was determined & that service was *actually performed*
- Employ common “public facing” advertising
 - Signage, website banners, social media links

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Questions?



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CLE Credits

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Certification Credits

Real Estate	1.0
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