You Better Watch Out
Gifting in the Age of RESPA

LEGAL EDUCATION DEPARTMENT
Attorneys' Title Fund Services, Inc.

Please contact The Fund's Education Registrar
for information about our programs
EducationRegistrar@thefund.com
(888) 407-7775

All references herein to title insurance policy forms and endorsements are intended to refer to the policy forms and endorsements issued by Fund members as duly appointed title agents of Old Republic National Title Insurance Company.

These materials are for educational use in Fund seminars. They should not be relied on without first considering the law and facts of a matter. Legal documents for others can only be prepared by an attorney after consultation with the client.

Table of Contents

You Better Watch Out!
Gifting in the Age of RESPA

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1

"We make a living by what we get. We make a life by what we give."

Winston S. Churchill

2

Overview

- Why, What and Who of Gifting
- Real Estate Settlement Procedures Act (RESPA) Section 8
- Regulation X (RESPA)
- Normal Promotional and Educational Activities
- Florida's Unfair Insurance Trade Practices Act
- Takeaways

Why we gift

- Custom
  - Birthdays/holidays/life events
  - Housewarmings/social rituals
- Interest
- Fostering connection
- Sense of purpose
- Gratitude
- Recipient's role in our life
- Reward
- Reciprocity

What we gift

- Personal
  - Cards, notes; appreciation
  - Trophies and awards
  - Trinkets, keepsakes
- Monetary
  - Charitable donations
  - Gift cards, bonuses, cash
- Activities
  - Event tickets
  - Function invitations

5

To whom we gift

- Family members
  - Custom, gratitude and reward
- Charitable organizations
  - Interest and gratitude
- Work colleagues/business staff
  - Custom, interest, gratitude, reward
- Business associates
  - Interest
- Referral sources
  - Interest and gratitude (not reward)

6

“Don't judge each day by the harvest you reap, but by the seeds you plant.”

Robert Louis Stevenson

7

Real Estate Settlement Procedures Act Section 8(a)

8

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.

9

"Thing of value" Defined

12 USC Sec. 2602(2) and 12 CFR Sec. 1024.14(d)

- Any payment, advance, funds, loan, service, or other consideration
  - Reg. X: "…monies, things, discounts, salaries, commissions, fees…"
    - Expansive definition with many examples
      - Ex) Opportunity to participate in money-making program

10

Agreement or Understanding

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

- Need not be written or verbalized
- May be established by practice, pattern or course of conduct
  - When received repeatedly and
    - Connected in any way with volume or value of business referred
  - Receipt is evidence of agreement or understanding

11

Referral Defined

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

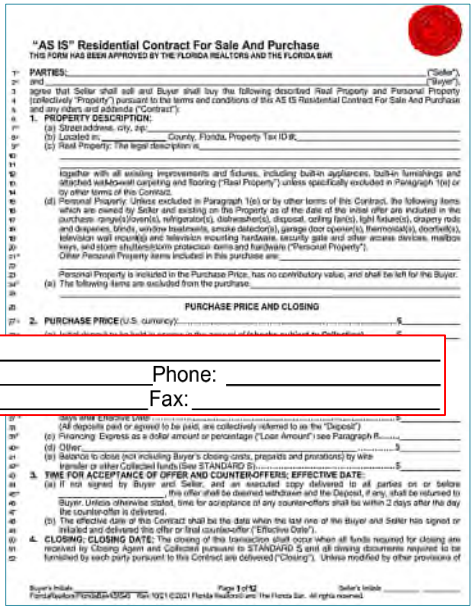
- (1) Oral or written action directed to a person
  - Affirmatively influencing selection of provider of
    - Settlement service or
    - Business incident to settlement service
  - When such person will pay for such
- (2) When a person paying for a settlement service required to use particular provider

12

Referral Defined (cont'd)

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

- Any oral or written action directed to a person affirmatively influencing selection of a provider



"AS IS" Residential Contract For Sale And Purchase

THIS FORM HAS BEEN APPROVED BY THE FLORIDA REALTORS AND THE FLORIDA BAR

PARTIES: _____ ("Seller"), and _____ ("Buyer"), agree that Seller shall sell and Buyer shall buy the following described Real Property and Personal Property (collectively "Property") pursuant to the terms and conditions of this AS IS Residential Contract For Sale And Purchase and any riders and addenda ("Contract").

1. PROPERTY DESCRIPTION:

(a) Street address, city, zip: _____

(b) Located in: _____ County, Florida. Property Tax ID #: _____

(c) Real Property: The legal description is _____

together with all existing improvements and fixtures, including built-in appliances, built-in furnishings and attached wall-to-wall carpeting and flooring ("Real Property") unless specifically excluded in Paragraph 1(e) or by other terms of this Contract.

(d) Personal Property: Unless excluded in Paragraph 1(e) or by other terms of this Contract, the following items which are owned by Seller and existing on this Property as of the date of the initial offer are included in the purchase: range(s)/oven(s), refrigerator(s), dishwasher(s), disposal, ceiling fan(s), light fixture(s), drapery rods and draperies, blinds, window treatments, smoke detector(s), garage door opener(s), thermostat(s), doorbell(s), television wall mount(s) and television mounting hardware, security gate and other access devices, mailbox keys, and storm shutters/storm protection items and hardware ("Personal Property"): Other Personal Property items included in this purchase are: _____

Personal Property is included in the Purchase Price, has no contributory value, and shall be left for the Buyer.

(e) The following items are excluded from the purchase: _____

PURCHASE PRICE AND CLOSING

2. PURCHASE PRICE (U.S. currency): _____ $ _____

Escrow Agent Name: _____

Address: _____ Phone: _____

Email: _____ Fax: _____

days after Effective Date _____ $ _____

(All deposits paid or agreed to be paid, are collectively referred to as the "Deposit")

(c) Financing: Express as a dollar amount or percentage ("Loan Amount") see Paragraph 8 _____ $ _____

(d) Other _____ $ _____

(e) Balance to close (not including Buyer's closing costs, prepaids and prorations) by wire transfer or other Collected funds (See STANDARD B) _____ $ _____

3. TIME FOR ACCEPTANCE OF OFFER AND COUNTER-OFFERS; EFFECTIVE DATE:

(a) If not signed by Buyer and Seller, and an executed copy delivered to all parties on or before _____, this offer shall be deemed withdrawn and the Deposit, if any, shall be returned to Buyer. Unless otherwise stated, time for acceptance of any counter-offers shall be within 2 days after the day the counter-offer is delivered.

(b) The effective date of the Contract shall be the date when the last one of the Buyer and Seller has signed or initialed and delivered this offer or final counter-offer ("Effective Date").

4. CLOSING; CLOSING DATE: The closing of this transaction shall occur when all funds required for closing are received by Closing Agent and Collected pursuant to STANDARD S and all closing documents required to be furnished by each party pursuant to this Contract are delivered ("Closing"). Unless modified by other provisions of

Buyer's Initials _____ Page 1 of 12 Seller's Initials _____

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13

Settlement Services Defined

12 U.S.C. 2602(3)

Any service provided in connection with a real estate settlement

- Title search
- Title examination
- Provision of title certificate
- Title insurance
- Attorney services
- Document preparation
- Property survey
- Credit report or appraisal
- Pest/fungus inspection
- Real estate agent/broker service
- Origination of federally related mortgage loan (including application, processing, underwriting, and funding)
- Handling the processing and closing or settlement

14

Settlement Agent Referrals

Upstream (referrers)

- Real estate agent/broker
- Developer/builder
- Loan originator
  - Lender
  - Mortgage broker
- Attorney/law office

Downstream (referees/referents)

- Surveyor
- Mobile or RON notary
- Appraisals (independent)
- Inspections
- Casualty insurance
- Underwriter

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

17

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

18

Real Estate Settlement Procedures Act Section 8(c)

19

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

20

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 provider by the referrer

21

Affiliated Business Arrangement Compensation Guidelines

- Return on ownership interest or franchise relationship
  - Bona fide dividends, capital or equity distributions
- Illustrative examples in Appendix B
- Written disclosure format in Appendix D

22

Real Estate Settlement Procedures Act Section 8(d)

23

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. Failing to provide AfBA notice may not create liability 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

24

“Do the right thing. It will gratify some people and astonish the rest.”

Mark Twain

25

Real Estate Settlement Procedures Act Regulation X

26

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

***Control* indicates who is an employee vs. an independent contractor**

- Behavioral control
  - Employer controls or has right to control what worker does and how worker performs job duties
- Financial control
  - Employer controls business aspects (compensation, expense reimbursement, provider of tools/supplies)
- Relationship
  - Employee benefits (pension, insurance, vacation pay)

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

"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

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

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?

33

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"

34

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)
  - 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

35

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

36

Florida Restrictions
Unfair Insurance Trade Practices Act

37

RESPA Section 8(a) – Florida Style

Secs. 626.9521(1) and 626.9541(1)(h)3.a., F.S.

Unfair methods of competition, deceptive acts and practices prohibited

- Unlawful rebates
  - No title insurer shall
    - Pay or offer to pay, allow, or give, directly or indirectly
    - As inducement, or after title insurance effected
    - Rebate, abatement, charge, fee, special favor/advantage, or monetary consideration or inducement

RESPA Section 8(b) – Florida Style

Sec. 626.9541(1)(h)3.c., F.S.

No insured, or any other person directly/indirectly connected with the transaction, shall knowingly…

- Receive or accept, directly or indirectly, any portion of
  - Title insurance premium
  - Other charge or fee
  - Monetary consideration or any
  - Inducement "whatsoever"
- Except as otherwise expressly allowed

RESPA Section 8(c) – Florida Style

Sec. 626.9541(1)(h)3.b. and c, F.S.

When not done in exchange for referral of title insurance business, nothing herein shall prohibit

- Attorneys' fees for professional services
  - Nor rebates or abatements of such fees
- Earned premium to appointed agents for services performed
  - Nor rebates or abatements to person responsible to pay
    - Earned premium
    - Any other agent charge or fee

RESPA Section 8(d) – Florida Style

Sec. 626.9521(2) F.S.

1. Fine against person violating the act not greater than $5k each non-willful violation
2. Fine against person violating the act not greater than $40k each willful violation
3. Fines against insurer not to exceed $20k for all non-willful violations arising out of same transaction
4. Fines against insurer not to exceed $200k for all willful violations arising out of same transaction
5. Fines may be imposed in addition to other applicable penalty

Reg. X – Florida Style

Rule 69B-186.010, F.A.C. interprets Sec. 626.9541(1)(h), F.S.

- Defines "referrer of settlement service business"
  - Person in position to refer title insurance business
    - Title insurance agent, agency, company
    - Attorney
    - Real estate broker, agent, licensee
    - Broker/sales associate
    - Mortgage banker, broker, lender
    - Real estate developer/builder
    - Appraiser
    - Surveyor
    - Escrow, closing agent
    - Any other involved person/entity
- Examples of prohibited/exempt activity
- Exceptions for promotional/educational activity

“The more things are forbidden, the more popular they become.”

Mark Twain

43

Rule prohibitions

- As they relate to the transaction of title insurance, these activities are inducements for sale, placement or referral of title insurance business
- Facilitating discount, reduction, credit, or paying any fee or portion of the cost of
  - Inspection, inspection report, appraisal, or survey, including wind inspection
- To or for a purchaser or prospective purchaser of title insurance

Rule 69B-186.010(4)(a), F.A.C.

44

44

Disallowed in FL as Related to Title Insurance

- Making or offering to make charitable or other tax-deductible contribution on behalf of purchaser or prospective purchaser of title insurance
- Providing or paying for gift cards or gift certificates to a purchaser or prospective purchaser of title insurance
- Waiving of fees, costs, or premium for title updates or endorsements requested (by insured) after issuance of title insurance policy

Rule 69B-186.010(4)(c)(j) and (s), F.A.C.

45

Disallowed in FL as Related to Title Insurance

- Providing membership in any organization, society, association, guild, union, alliance or club at discount, reduced rate, or no cost to referrer of settlement service business
- Providing or offering stocks, bonds, securities, property, or any dividend or profit accruing, or to accrue thereon, to referrer of settlement service business
  - But AfBAs permitted by RESPA are allowed

Rule 69B-186.010(4)(b) and (d), F.A.C.

46

Disallowed in FL as Related to Title Insurance

- Providing or offering employment to referrer of settlement service business in exchange for purchase of title insurance
- Providing or paying for printing of bulletins, flyers, post cards, labels, etc. that promote business of referrer of settlement service business
- Furnishing or paying for office equipment (fax machines, telephones, copy machines, etc.) to a referrer of settlement service business

47 Rule 69B-186.010(4)(e)(f) and (g), F.A.C.

Disallowed in FL as Related to Title Insurance

- Providing or paying for cell phone contracts for referrer of settlement service business
- Providing or paying for gift cards or gift certificates to or for referrer of settlement service business
- Paying a referrer of settlement service business to fill out processing (order) forms in exchange for title insurance contracts
- Entering any arrangement to provide unearned compensation to referrer of settlement service business

48 Rule 69B-186.010(4)(h)(j)(o) and (q), F.A.C.

Disallowed in FL as Related to Title Insurance

- Providing simulated panoramic home and property tours to real estate brokers or their sales associates utilized to promote their listings

- Sponsoring and hosting, or paying for the sponsoring and hosting, of open houses for real estate brokers or their associates to promote their listings

- Providing or paying for food, beverages, or room rentals at events designed to promote business of referrer of settlement service business

Rule 69B-186.010(4)(i)(k) and (l), F.A.C.

Disallowed in FL as Related to Title Insurance

- Paying advertising costs to advertise and promote listings of real estate brokers or their sales associates via publications, signs, emails, websites, web pages, banners, other forms of media

- Providing endorsement, designation of preferred status, approved status, or featured partner status on publications, signs, emails, websites, web pages, banners or other forms of media promoting the business of real estate brokers or their sales associates

Rule 69B-186.010(4)(m) and (n), F.A.C.

Disallowed in FL as Related to Title Insurance

- Providing "leads" or mailing lists to or on behalf of referrer of settlement service business at no or reduced cost
- Providing, or offering to provide, non-title services, at less than actual cost, to referrer of settlement service business
- Assuming any party's responsibility to provide refunds to consumers under applicable laws and regulations
  - Ex. Tolerance violations under TRID (see Rule 69B-186.010(6), F.A.C.)

Rule 69B-186.010(4)(p)(r) and (n), F.A.C.

51

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

52

Permitted in Florida
Promotional and Educational Activities

53

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 <u>not</u> include
    - Gift certificates
    - Gift cards, or
    - Other items having specific monetary value on their face, or
    - Exchangeable for another item having specific monetary value

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

54

54

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

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)

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

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

57

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

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

58

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

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

59

“Charity begins at home but should not end there.”

Francis Bacon

Roundup:
Gifts and Promotional Activity

61

Gifts

- Gifts are not prohibited (just suspect)
  - Not conditioned on referral – purpose must be clear
  - Rule of reason
    - Value of gift
    - Pool of recipients
    - Situation

- Promotional and educational activities are not gifts
- FL has specific examples of prohibited items

62

62

Gifting

- You can gift “W-2 employees”
  - But FL prohibits sharing premium with unlicensed persons
- You can gift colleagues, “downstream” vendors and others
  - When unconnected with referrals
- Gift cards
  - May be gifted (if not for referral purposes)
    - Life events and other customary gift-giving situations
    - Pool of recipients' considered
    - Rule of reason (gift v. bribe)

63

Raffles and gift cards

- Can a title agency have a raffle at an event to promote itself?
  - Yes
- Can a title agency donate a gift card to be raffled at an event given by a realtor?
  - Yes, to promote the business of the title agent/agency
    - Not to promote the realtor

Compliance Information: Title Insurance Agencies (myfloridacfo.com)

64

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 could imply improper “understanding or agreement”

65

Holiday Receptions

- Promotional events (“relationship-building”) generally allowed where:
- Invitations
  - Upstream and downstream referral partners
  - Must invite without regard to referral activity
  - Office staff and guests
- Food, beverage and entertainment within reason
- Promotional items
- Door prizes and raffles
- Rule of reason

66

Relationship-building

Examples of this generally allowed:

Wine tasting event (free)

- Invitations to local real estate agents
  - Some current referral sources; others not
- Agency-branded engraved wine glasses ($25 each)
  - Promotional items limited to $25 value
- Event expenses = $35 per person
  - $25 FL limit only applies to promotional items; not event expenses

Compliance Information: Title Insurance Agencies (myfloridacfo.com)

67

"RESPA rules apply, whether it's Christmas, Hanukkah, Valentine's Day or Columbus Day"

Phil Schulman, Esq.
Mayer Brown, LLC

Questions?

69

You Better Watch Out!

Gifting in the Age of RESPA

Thank You! for coming

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United States Code Annotated
Title 12. Banks and Banking
Chapter 27. Real Estate Settlement Procedures (Refs & Annos)

12 U.S.C.A. § 2607

§ 2607. Prohibition against kickbacks and unearned fees

Effective: July 21, 2011
Currentness

(a) Business referrals

No person shall give and no person shall accept any fee, kickback, or thing of value pursuant to any agreement or understanding, oral or otherwise, that business incident to or a part of a real estate settlement service involving a federally related mortgage loan shall be referred to any person.

(b) Splitting charges

No person shall give and no person shall accept any portion, split, or percentage of any charge made or received for the rendering of a real estate settlement service in connection with a transaction involving a federally related mortgage loan other than for services actually performed.

(c) Fees, salaries, compensation, or other payments

Nothing in this section shall be construed as prohibiting (1) the payment of a fee (A) to attorneys at law for services actually rendered or (B) by a title company to its duly appointed agent for services actually performed in the issuance of a policy of title insurance or (C) by a lender to its duly appointed agent for services actually performed in the making of a loan, (2) 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, (3) payments pursuant to cooperative brokerage and referral arrangements or agreements between real estate agents and brokers, (4) affiliated business arrangements so long as (A) a disclosure is made of the existence of such an arrangement to the person being referred and, in connection with such referral, such person is provided a written estimate of the charge or range of charges generally made by the provider to which the person is referred (i) in the case of a face-to-face referral or a referral made in writing or by electronic media, at or before the time of the referral (and compliance with this requirement in such case may be evidenced by a notation in a written, electronic, or similar system of records maintained in the regular course of business); (ii) in the case of a referral made by telephone, within 3 business days after the referral by telephone,[1] (and in such case an abbreviated verbal disclosure of the existence of the arrangement and the fact that a written disclosure will be provided within 3 business days shall be made to the person being referred during the telephone referral); or (iii) in the case of a referral by a lender (including a referral by a lender to an affiliated lender), at the time the estimates required under section 2604(c) of this title are provided (notwithstanding clause (i) or (ii)); and any required written receipt of such disclosure (without regard to the manner of the disclosure under clause (i), (ii), or (iii)) may be obtained at the closing or settlement (except that a person making a face-to-face referral who provides the written disclosure at or before the time of the referral shall attempt to obtain any required written receipt of such disclosure at such time and if the person being referred chooses not to acknowledge the receipt of the disclosure at that time, that fact shall be noted in the written, electronic, or similar system of records maintained in the regular course of business by the person making the referral), (B) such person is not required

to use any particular provider of settlement services, and (C) the only thing of value that is received from the arrangement, other than the payments permitted under this subsection, is a return on the ownership interest or franchise relationship, or (5) such other payments or classes of payments or other transfers as are specified in regulations prescribed by the Bureau, after consultation with the Attorney General, the Secretary of Veterans Affairs, the Federal Home Loan Bank Board, the Federal Deposit Insurance Corporation, the Board of Governors of the Federal Reserve System, and the Secretary of Agriculture. For purposes of the preceding sentence, the following shall not be considered a violation of clause (4)(B): (i) any arrangement that requires a buyer, borrower, or seller to pay for the services of an attorney, credit reporting agency, or real estate appraiser chosen by the lender to represent the lender's interest in a real estate transaction, or (ii) any arrangement where an attorney or law firm represents a client in a real estate transaction and issues or arranges for the issuance of a policy of title insurance in the transaction directly as agent or through a separate corporate title insurance agency that may be established by that attorney or law firm and operated as an adjunct to his or its law practice.

(d) Penalties for violations; joint and several liability; treble damages; actions for injunction by Bureau and Secretary and by State officials; costs and attorney fees; construction of State laws

(1) Any person or persons who violate the provisions of this section shall be fined not more than $10,000 or imprisoned for not more than one year, or both.

(2) Any person or persons who violate the prohibitions or limitations of this section shall be jointly and severally liable to the person or persons charged for the settlement service involved in the violation in an amount equal to three times the amount of any charge paid for such settlement service.

(3) No person or persons shall be liable for a violation of the provisions of subsection (c)(4)(A) if such person or persons proves by a preponderance of the evidence that such violation was not intentional and resulted from a bona fide error notwithstanding maintenance of procedures that are reasonably adapted to avoid such error.

(4) The Bureau, the Secretary, or the attorney general or the insurance commissioner of any State may bring an action to enjoin violations of this section. Except, to the extent that a person is subject to the jurisdiction of the Bureau, the Secretary, or the attorney general or the insurance commissioner of any State, the Bureau shall have primary authority to enforce or administer this section, subject to subtitle B of the Consumer Financial Protection Act of 2010.

(5) In any private action brought pursuant to this subsection, the court may award to the prevailing party the court costs of the action together with reasonable attorneys fees.

(6) No provision of State law or regulation that imposes more stringent limitations on affiliated business arrangements shall be construed as being inconsistent with this section.

CREDIT(S)

(Pub.L. 93-533, § 8, Dec. 22, 1974, 88 Stat. 1727; Pub.L. 94-205, § 7, Jan. 2, 1976, 89 Stat. 1158; Pub.L. 98-181, Title I [Title IV, § 461(b), (c)], Nov. 30, 1983, 97 Stat. 1231; Pub.L. 100-242, Title V, § 570(g), Feb. 5, 1988, 101 Stat. 1950; Pub.L. 102-54, § 13(d)(4), June 13, 1991, 105 Stat. 275; Pub.L. 104-208, Div. A, Title II, § 2103(c)(2), (d), Sept. 30, 1996, 110 Stat. 3009-400; Pub.L. 111-203, Title X, § 1098(6), (7), July 21, 2010, 124 Stat. 2104.)

Notes of Decisions (215)

Footnotes

1 So in original.

12 U.S.C.A. § 2607, 12 USCA § 2607

Current through PL 117-52.

Code of Federal Regulations
Title 12. Banks and Banking
Chapter X. Bureau of Consumer Financial Protection (Refs & Annos)
Part 1024. Real Estate Settlement Procedures Act (Regulation X) (Refs & Annos)
Subpart B. Mortgage Settlement and Escrow Accounts (Refs & Annos)

12 C.F.R. § 1024.14

§ 1024.14 Prohibition against kickbacks and unearned fees.

Effective: December 30, 2011
Currentness

(a) Section 8 violation. Any violation of this section is a violation of section 8 of RESPA (12 U.S.C. 2607).

(b) No referral fees. No person shall give and no person shall accept any fee, kickback or other thing of value pursuant to any agreement or understanding, oral or otherwise, that business incident to or part of a settlement service involving a federally related mortgage loan shall be referred to any person. Any referral of a settlement service is not a compensable service, except as set forth in § 1024.14(g)(1). A company may not pay any other company or the employees of any other company for the referral of settlement service business.

(c) No split of charges except for actual services performed. No person shall give and no person shall accept any portion, split, or percentage of any charge made or received for the rendering of a settlement service in connection with a transaction involving a federally related mortgage loan other than for services actually performed. 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. The source of the payment does not determine whether or not a service is compensable. Nor may the prohibitions of this part be avoided by creating an arrangement wherein the purchaser of services splits the fee.

(d) Thing of value. This term is broadly defined in section 3(2) of RESPA (12 U.S.C. 2602(2)). It includes, without limitation, monies, things, discounts, salaries, commissions, fees, duplicate payments of a charge, stock, dividends, distributions of partnership profits, franchise royalties, credits representing monies that may be paid at a future date, the opportunity to participate in a money-making program, retained or increased earnings, increased equity in a parent or subsidiary entity, special bank deposits or accounts, special or unusual banking terms, services of all types at special or free rates, sales or rentals at special prices or rates, lease or rental payments based in whole or in part on the amount of business referred, trips and payment of another person's expenses, or reduction in credit against an existing obligation. The term “payment” is used throughout §§ 1024.14 and 1024.15 as synonymous with the giving or receiving of any “thing of value” and does not require transfer of money.

(e) Agreement or understanding. An agreement or understanding for the referral of business incident to or part of a settlement service need not be written or verbalized but may be established by a practice, pattern or course of conduct. When a thing of value is received repeatedly and is connected in any way with the volume or value of the business referred, the receipt of the thing of value is evidence that it is made pursuant to an agreement or understanding for the referral of business.

(f) Referral.

(1) 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.

(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;

(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.

(2) The Bureau may investigate high prices to see if they are the result of a referral fee or a split of a fee. If the payment of a thing of value bears no reasonable relationship to the market value of the goods or services provided, then the excess is not for services or goods actually performed or provided. These facts may be used as evidence of a violation of section 8 and may serve as a basis for a RESPA investigation. High prices standing alone are not proof of a RESPA violation. The 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. The fact that the transfer of the

thing of value does not result in an increase in any charge made by the person giving the thing of value is irrelevant in determining whether the act is prohibited.

(3) Multiple services. When a person in a position to refer settlement service business, such as an attorney, mortgage lender, real estate broker or agent, or developer or builder, receives a payment for providing additional settlement services as part of a real estate transaction, such payment must be for services that are actual, necessary and distinct from the primary services provided by such person. For example, for an attorney of the buyer or seller to receive compensation as a title agent, the attorney must perform core title agent services (for which liability arises) separate from attorney services, including the evaluation of the title search to determine the insurability of the title, the clearance of underwriting objections, the actual issuance of the policy or policies on behalf of the title insurance company, and, where customary, issuance of the title commitment, and the conducting of the title search and closing.

(h) Recordkeeping. Any documents provided pursuant to this section shall be retained for five (5) years from the date of execution.

(i) Appendix B of this part. Illustrations in appendix B of this part demonstrate some of the requirements of this section.

SOURCE: 76 FR 44242, July 22, 2011; 76 FR 78981, Dec. 20, 2011; 78 FR 10873, Feb. 14, 2013; 78 FR 10875, Feb. 14, 2013; 81 FR 25325, April 28, 2016, unless otherwise noted.

AUTHORITY: 12 U.S.C. 2603–2605, 2607, 2609, 2617, 5512, 5532, 5581.

Notes of Decisions (1)

Current through Nov. 10, 2021; 86 FR 62666.

End of Document

Appendix B to Part 1024 — Illustrations of Requirements of RESPA

THIS VERSION IS THE CURRENT REGULATION

Regulation X

Appendix B

The following illustrations provide additional guidance on the meaning and coverage of the provisions of RESPA. Other provisions of Federal or state law may also be applicable to the practices and payments discussed in the following illustrations.

1. Facts: A, a provider of settlement services, provides settlement services at abnormally low rates or at no charge at all to B, a builder, in connection with a subdivision being developed by B. B agrees to refer purchasers of the completed homes in the subdivision to A for the purchase of settlement services in connection with the sale of individual lots by B.

Comments: The rendering of services by A to B at little or no charge constitutes a thing of value given by A to B in return for the referral of settlement services business, and both A and B are in violation of section 8 of RESPA.

2. Facts: B, a lender, encourages persons who receive federally related mortgage loans from it to employ A, an attorney, to perform title searches and related settlement services in connection with their transaction. B and A have an understanding that in return for the referral of this business A provides legal services to B or B's officers or employees at abnormally low rates or for no charge.

Comments: Both A and B are in violation of section 8 of RESPA. Similarly, if an attorney gives a portion of his or her fees to another attorney, a lender, a real estate broker or any other provider of settlement services, who had referred prospective clients to the attorney, section 8 would be violated by both persons.

3. Facts: A, a real estate broker, obtains all necessary licenses under state law to act as a title insurance agent. A refers individuals who are purchasing homes in transactions in which A participates as a broker to B, an unaffiliated title company, for the purchase of title insurance services. A performs minimal, if any, title services in connection with the issuance of the title insurance policy (such as placing an application with the title company). B pays A a commission (or A retains a portion of the title insurance premium) for the transactions or alternatively B receives a portion of the premium paid directly from the purchaser.

Comments: The payment of a commission or portion of the title insurance premium by B to A, or receipt of a portion of the payment for title insurance under circumstances where no substantial services are being performed by A, is a violation of section 8 of RESPA. It makes no difference whether the payment comes from B or the purchaser. The amount of the payment must bear a reasonable relationship to the services rendered. Here A really is being compensated for a referral of business to B.

4. Facts: A is an attorney who, as a part of his legal representation of clients in residential real estate transactions, orders, and reviews title insurance policies for his clients. A enters into a contract with B, a title company, to be an agent of B under a program set up by B. Under the agreement, A agrees to prepare and forward title insurance applications to B, to re-examine the preliminary title commitment

for accuracy and, if he chooses, to attempt to clear exceptions to the title policy before closing. A agrees to assume liability for waiving certain exceptions to title, but never exercises this authority. B performs the necessary title search and examination work, determines insurability of title, prepares documents containing substantive information in title commitments, handles closings for A's clients and issues title policies. A receives a fee from his client for legal services and an additional fee for his title agent "services" from the client's title insurance premium to B.

Comments: A and B are violating section 8 of RESPA. Here, A's clients are being double billed because the work A performs as a "title agent" is that which he already performs for his client in his capacity as an attorney. For A to receive a separate payment as a title agent, A must perform necessary core title work and may not contract out the work. To receive additional compensation as a title agent for this transaction, A must provide his client with core title agent services for which he assumes liability, and which includes at a minimum, the evaluation of the title search to determine insurability of the title, and the issuance of a title commitment where customary, the clearance of underwriting objections, and the actual issuance of the policy or policies on behalf of the title company. A may not be compensated for the mere re-examination of work performed by B. Here, A is not performing these services and may not be compensated as a title agent under section 8(c)(1)(B). Referral fees or splits of fees may not be disguised as title agent commissions when the core title agent work is not performed. Further, because B created the program and gave A the opportunity to collect fees (a thing of value) in exchange for the referral of settlement service business, it has violated section 8 of RESPA.

5. Facts: A, a "mortgage originator," receives loan applications, funds the loans with its own money or with a wholesale line of credit for which A is liable, and closes the loans in A's own name. Subsequently, B, a mortgage lender, purchases the loans and compensates A for the value of the loans, as well as for any mortgage servicing rights.

Comments: Compensation for the sale of a mortgage loan and servicing rights constitutes a secondary market transaction, rather than a referral fee, and is beyond the scope of section 8 of RESPA. For purposes of section 8, in determining whether a *bona fide* transfer of the loan obligation has taken place, the Bureau examines the real source of funding, and the real interest of the named settlement lender.

6. Facts. A, a credit reporting company, places a facsimile transmission machine (FAX) in the office of B, a mortgage lender, so that B can easily transmit requests for credit reports and A can respond. A supplies the FAX machine at no cost or at a reduced rental rate based on the number of credit reports ordered.

Comments: Either situation violates section 8 of RESPA. The FAX machine is a thing of value that A provides in exchange for the referral of business from B. Copying machines, computer terminals, printers, or other like items which have general use to the recipient, and which are given in exchange for referrals of business also violate RESPA.

7. Facts: A, a real estate broker, refers title business to B, a company that is a licensed title agent for C, a title insurance company. A owns more than 1% of B. B performs the title search and examination, makes determinations of insurability, issues the commitment, clears underwriting objections, and issues a policy of title insurance on behalf of C, for which C pays B a commission. B pays annual dividends to its owners, including A, based on the relative amount of business each of its owners refers to B.

Comments: The facts involve an affiliated business arrangement. The payment of a commission by C to B is not a violation of section 8 of RESPA if the amount of the commission constitutes reasonable compensation for the services performed by B for C. The payment of a dividend or the giving of any other thing of value by B to A that is based on the amount of business referred to B by A does not meet the affiliated business agreement exemption provisions and such actions violate section 8. Similarly, if the amount of stock held by A in B (or, if B were a partnership, the distribution of partnership profits by B to A) varies based on the amount of business referred or expected to be referred, or if B retained any funds for subsequent distribution to A where such funds were generally in proportion to the amount of business A referred to B relative to the amount referred by other owners, such arrangements would violate section 8. The exemption for controlled business arrangements would not be available because the payments here would not be considered returns on ownership interests. Further, the required disclosure of the affiliated business arrangement and estimated charges have not been provided.

8. Facts: Same as illustration 7, but B pays annual dividends in proportion to the amount of stock held by its owners, including A, and the distribution of annual dividends is not based on the amount of business referred or expected to be referred.

Comments: If A and B meet the requirements of the affiliated business arrangement exemption there is not a violation of RESPA. Since the payment is a return on ownership interests, A and B will be exempt from section 8 if (1) A also did not require anyone to use the services of B, and (2) A disclosed its ownership interest in B on a separate disclosure form and provided an estimate of B's charges to each person referred by A to B (see appendix D of this part), and (3) B makes no payment (nor is there any other thing of value exchanged) to A other than dividends.

9. Facts: A, a franchisor for franchised real estate brokers, owns B, a provider of settlement services. C, a franchisee of A, refers business to B.

Comments: This is an affiliated business arrangement. A, B and C will all be exempt from section 8 if C discloses its franchise relationship with the owner of B on a separate disclosure form and provides an estimate of B's charges to each person referred to B (see appendix D of this part) and C does not require anyone to use B's services and A gives no thing a value to C under the franchise agreement (such as an adjusted level of franchise payment based on the referrals), and B makes no payments to A other than dividends representing a return on ownership interest (rather than, *e.g.,* an adjusted level of payment being based on the referrals). Nor may B pay C anything of value for the referral.

10. Facts: A is a real estate broker who refers business to its affiliate title company B. A makes all required written disclosures to the homebuyer of the arrangement and estimated charges and the homebuyer is not required to use B. B refers or contracts out business to C who does all the title work and splits the fee with B. B passes its fee to A in the form of dividends, a return on ownership interest.

Comments: The relationship between A and B is an affiliated business arrangement. However, the affiliated business arrangement exemption does not provide exemption between an affiliated entity, B, and a third party, C. Here, B is a mere “shell” and provides no substantive services for its portion of the fee. The arrangement between B and C would be in violation of section 8(a) and (b). Even if B had an affiliate relationship with C, the required exemption criteria have not been met and the relationship would be subject to section 8.

11. Facts: A, a mortgage lender is affiliated with B, a title company, and C, an escrow company and offers consumers a package of mortgage title and escrow services at a discount from the prices at which such services would be sold if purchased separately. Neither A, B, nor C requires consumers to purchase the services of their sister companies and each company sells such services separately and as part of the package. A also pays its employees (*e.g.,* loan officers, secretaries, *etc.*) a bonus for each loan, title insurance or closing that A's employees generate for A, B, or C respectively. A pays such employee bonuses out of its own funds and receives no payments or reimbursements for such bonuses from B or C. At or before the time that customers are told by A or its employees about the services offered by B and C and/or the package of services that is available, the customers are provided with an affiliated business disclosure form.

Comments: A's selling of a package of settlement services at a discount to a settlement service purchaser does not violate section 8 of RESPA. A's employees are making appropriate affiliated business disclosures and since the services are available separately and as part of a package, there is not "required use" of the additional services. A's payments of bonuses to its employees for the referral of business to A or A's affiliates, B and C, are exempt from section 8 under § 1024.14(g)(1). However, if B or C reimbursed A for any bonuses that A paid to its employees for referring business to B or C, such reimbursements would violate section 8. Similarly, if B or C paid bonuses to A's employees directly for generating business for them, such payments would violate section 8.

12. Facts. A is a mortgage broker who provides origination services to submit a loan to a lender for approval. The mortgage broker charges the borrower a uniform fee for the total origination services, as well as a direct up-front charge for reimbursement of credit reporting, appraisal services, or similar charges.

Comment. The mortgage broker's fee must be reflected in the Good Faith Estimate and on the HUD-1 Settlement Statement. Other charges which are paid for by the borrower and paid in advance are listed as P.O.C. on the HUD-1 Settlement Statement and reflect the actual provider charge for such services.

13. Facts. A is a dealer in home improvements who has established funding arrangements with several lenders. Customers for home improvements receive a proposed contract from A. The proposal requires that customers both execute forms authorizing a credit check and employment verification, and frequently, execute a dealer consumer credit contract secured by a lien on the customer's (borrower's) 1- to 4-family residential property. Simultaneously with the completion and certification of the home improvement work, the note is assigned by the dealer to a funding lender.

Comments. The loan that is assigned to the funding lender is a loan covered by RESPA, when a lien is placed on the borrower's 1- to 4-family residential structure. The dealer loan or consumer credit contract originated by a dealer is also a RESPA-covered transaction, except when the dealer is not a "creditor" under the definition of "federally related mortgage loan" in § 1024.2. The lender to whom the loan will be assigned is responsible for assuring that the lender or the dealer delivers to the borrower a Good Faith Estimate of closing costs consistent with Regulation X, and that the HUD-1 or HUD-1A Settlement Statement is used in conjunction with the settlement of the loan to be assigned. A dealer who, under § 1024.2, is covered by RESPA as a creditor is responsible for the Good Faith Estimate of Closing Costs and the use of the appropriate settlement statement in connection with the loan.

Appendix D—Affiliated Business Arrangement Disclosure Statement Format Notice

To:_____
From:_____

(Entity Making Statement)

Property:_____
Date:_____

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.

[A.] Set forth below is the estimated charge or range of charges for the settlement services listed. You are NOT required to use the listed provider(s) as a condition for [settlement of your loan on] [or] [purchase, sale, or refinance of] the subject property. THERE ARE FREQUENTLY OTHER SETTLEMENT SERVICE PROVIDERS AVAILABLE WITH SIMILAR SERVICES. YOU ARE FREE TO SHOP AROUND TO DETERMINE THAT YOU ARE RECEIVING THE BEST SERVICES AND THE BEST RATE FOR THESE SERVICES.

[*provider and settlement service*]_____
_____
_____
[*charge or range of charges*]_____
_____
_____

[B.] Set forth below is the estimated charge or range of charges for the settlement services of an attorney, credit reporting agency, or real estate appraiser that we, as your lender, will require you to use, as a condition of your loan on this property, to represent our interests in the transaction.

[*provider and settlement service*]_____
_____
_____
[*charge or range of charges*]_____
_____
_____

ACKNOWLEDGMENT

I/we have read this disclosure form and understand that *referring party* is referring me/us to purchase the above-described settlement service(s) and may receive a financial or other benefit as the result of this referral.

_____

Signature

[INSTRUCTIONS TO PREPARER:] [Use paragraph A for referrals other than those by a lender to an attorney, a credit reporting agency, or a real estate appraiser that a lender is requiring a borrower to use to represent the lender's interests in the transaction. Use paragraph B for those referrals to an attorney, credit reporting agency, or real estate appraiser that a lender is requiring a borrower to use to represent the lender's interests in the transaction. When applicable, use both paragraphs. Specific timing rules for delivery of the affiliated business disclosure statement are set forth in 12 CFR 1024.15(b)(1) of Regulation X). These INSTRUCTIONS TO PREPARER should not appear on the statement.]

Consumer Financial Protection Bureau

Real Estate Settlement Procedures Act FAQs

The questions and answers below pertain to compliance with the Real Estate Settlement Procedures Act (RESPA) and certain provisions of Regulation X.

RESPA Section 8 General

QUESTION 1:

What are the provisions of RESPA Section 8?

ANSWER (UPDATED 10/7/2020)**:**

RESPA Section 8 prohibits certain actions related to federally related mortgage loans.

RESPA Section 8(a) prohibits kickbacks for business referrals related to or part of settlement services involving federally related mortgage loans. 12 USC § 2607(a); 12 CFR § 1024.14(b).

RESPA Section 8(b) prohibits unearned fee arrangements, i.e., splitting charges made or received for settlement services, except for services actually performed, in connection with federally related mortgage loan transactions. 12 USC § 2607(b); 12 CFR § 1024.14(c).

RESPA Section 8(c) identifies certain payments that are not prohibited by Section 8. 12 USC § 2607(c); 12 CFR § 1024.14(g).

This is a Compliance Aid issued by the Consumer Financial Protection Bureau. The Bureau published a Policy Statement on Compliance Aids, available at https://www.consumerfinance.gov/policy-compliance/rulemaking/final-rules/policy-statement-compliance-aids/, that explains the Bureau's approach to Compliance Aids.

Appendix B to Regulation X provides examples to illustrate the application of RESPA to particular fact patterns, including fact patterns under Section 8(a), 8(b), and 8(c) indicating whether or not a violation occurred. Appendix B to 12 CFR part 1024.

RESPA Section 8(d) details specific penalties for violations of Section 8, including for Sections 8(a) and 8(b). 12 USC § 2607(d).

RESPA Sections 8(a), 8(b), and 8(c) are discussed in more detail in RESPA Section 8 General FAQs 2 through FAQ 4 and RESPA Section 8(a) FAQ 1 below.

QUESTION 2:

What is RESPA Section 8(a)?

ANSWER (UPDATED 10/7/2020)**:**

RESPA Section 8(a) prohibits kickbacks for business referrals involving a federally related mortgage loan. RESPA Section 8(a) prohibits the giving and accepting of kickbacks (e.g., cash or other "things of value" as defined in RESPA and Regulation X) pursuant to any agreement or understanding to refer settlement service business or business incident to a real estate settlement service in connection with those loans. 12 USC § 2607(a).

For more information on RESPA Section 8(a), see RESPA Section 8(a) FAQ 1 below.

QUESTION 3:

What is RESPA Section 8(b)?

ANSWER (UPDATED 10/7/2020)**:**

RESPA Section 8(b) prohibits unearned fee arrangements in connection with federally related mortgage loans. RESPA Section 8(b) prohibits the giving and accepting of any portion, split, or percentage of charges made or received for real estate settlement service business, unless for services actually performed. 12 USC § 2607(b).

QUESTION 4:

What payments are not prohibited under RESPA Section 8(c)?

ANSWER (UPDATED 10/7/2020)**:**

RESPA Section 8(c) provides a list of payments (provided or received) and arrangements that are not prohibited under RESPA Section 8. These include:

1. Fees paid to attorneys for services actually rendered. 12 USC § 2607(c)(1)(A).
2. Fees paid by a title company to its duly appointed agent for services actually performed in the issuance of a title insurance policy. 12 USC § 2607(c)(1)(B).
3. Fees paid by a lender to its duly appointed agent for services actually performed in the making of the loan. 12 USC § 2607(c)(1)(C).
4. Bona fide salary or compensation or other payment for goods or facilities actually furnished or for services actually performed. 12 USC § 2607(c)(2).
5. Payments under "cooperative brokerage and referral arrangements or agreements between real estate agents and brokers." 12 USC § 2607(c)(3).
6. Affiliated business arrangements, subject to specified conditions. 12 USC § 2607(c)(4).
7. Other payments and classes of payments adopted by regulation after consultation with other specified federal agencies and officials. 12 USC § 2607(c)(5).

Regulation X, 12 CFR §§ 1024.14(g)(1) and 1024.15 implement these RESPA Section 8 provisions and provide details on the payments that are not prohibited by RESPA Section 8, identified above. These provisions also specify additional payments and activities that are not prohibited by Section 8, such as: (1) normal promotional and educational activities, subject to certain conditions, and (2) an employer's payments to its own employees for any referral activities. 12 CFR §§ 1024.14(g)(1)(vi) and 14(g)(1)(vii). Appendix B to Regulation X provides further guidance on these payments and activities.

QUESTION 5:

Which individuals, entities, and transactions are covered by RESPA Section 8?

ANSWER (UPDATED 10/7/2020)**:**

RESPA Section 8 prohibitions generally apply to any person, which RESPA defines to include individuals, corporations, associations, partnerships, and trusts. 12 USC § 2602(5).

RESPA does not apply to extensions of credit to government or governmental agencies or instrumentalities. It also does not apply to extensions of credit primarily for business, commercial, or agricultural purposes. 12 USC § 2606.

Regulation X, 12 CFR § 1024.5 provides additional limits on the coverage of RESPA.

QUESTION 6:

Under RESPA Section 8, can a lender or other settlement service provider give a gift, refund, or discount to a consumer for using that lender or provider?

ANSWER (UPDATED 10/7/2020)**:**

Generally, yes.

RESPA Section 8 does not prohibit a lender or other settlement service provider from giving a consumer a gift or an incentive (e.g., a discount, refund of fees, chance to win a prize, etc.) for doing business with that entity. However, RESPA Section 8 prohibits, for example, giving an incentive to a consumer in exchange for the consumer referring other business to that lender or other settlement service provider.

Other federal and state laws may also have restrictions that apply and should be consulted.

RESPA Section 8(a)

QUESTION 1:

What activities are prohibited under RESPA Section 8(a)?

ANSWER (UPDATED 10/7/2020)**:**

RESPA Section 8(a) and Regulation X, 12 CFR § 1024.14(b), prohibit giving or accepting a fee, kickback, or thing of value pursuant to an agreement or understanding (oral or otherwise), for referrals of business incident to or part of a settlement service involving a federally related mortgage loan.

- *Fee, kickback, or thing of value.* Thing of value is broadly defined in RESPA and Regulation X. 12 USC § 2602(2); 12 CFR § 1024.14(d). Regulation X defines the term to include, without limitation: monies, things, discounts, salaries, commissions, fees, duplicate payments of a charge, stock, dividends, distributions of partnership profits, franchise royalties, credits representing monies that may be paid at a future date, the opportunity to participate in a money-making program, retained or increased earnings, increased equity in a parent or subsidiary entity, special bank deposits or accounts, special or unusual banking terms, services of all types at special or free rates, sales or rentals at special prices or rates, lease or rental payments based in whole or in part on the amount of business referred, trips

and payment of another person's expenses, or reduction in credit against an existing obligation. "Payment" is used synonymously with the giving or receiving of a "thing of value" in Regulation X, 12 CFR §§ 1024.14 and 1024.15, and does not require the transfer of money. 12 CFR § 1024.14(d).

- *Pursuant to an agreement or understanding, oral or otherwise.* An agreement or understanding need not be written or verbalized. It may be established by practice, pattern, or course of conduct. For example, when a thing of value is received repeatedly, and connected in any way with the volume or value of business referred, receipt of the thing of value is evidence that it is made pursuant to an agreement or understanding. 12 CFR § 1024.14(e).

- *For referrals of business.* Referrals include oral or written action directed to a person that has the effect of affirmatively influencing a person's selection of a provider of a settlement service or business incident to or part of a settlement service. That effect can be on any person in connection with the settlement service or business incident thereto who will pay for the service or a charge attributable, in whole or in part, to that service or service provider. 12 CFR § 1024.14(f)(1). Additionally, referrals include requiring the use by the person paying for the service of a particular provider of settlement service-related business. 12 CFR §§ 1024.14(f)(2) and 1024.2(b) ("required use"). Finally, note that prohibited referrals are not limited to those directed to consumers. They might be directed to a number of sources, such as appraisers, real estate agents, title companies and agents, lenders, mortgage brokers, or companies that provide information in connection with settlements, such as credit reports and flood determinations. 12 CFR § 1024.14(b) and (f).

- *Incident to or part of a real estate settlement service involving a federally related mortgage loan.* To be a violation, the referral(s) must be directly or indirectly incident to or part of a real estate settlement service involving a federally related mortgage loan. 12 USC § 2602(1); 12 CFR § 1024.2(b). Settlement service is defined broadly as any service provided in connection with a real estate settlement, which includes (but is not limited to) origination of a loan, closing services, title services, title insurance, document preparation, property surveys, inspections and appraisals, the rendering of credit reports and appraisals, and services of attorneys, real estate agents, and mortgage brokers. 12 USC § 2602(3); 12 CFR § 1024.2(b).

RESPA Section 8: Gifts and Promotional Activity

QUESTION 1:

Are gifts and promotions allowed under RESPA Section 8?

ANSWER (UPDATED 10/7/2020)**:**

It depends.

Under RESPA Section 8(a), gifts and promotions generally are "things of value" and therefore could, depending on the circumstances, violate RESPA Section 8(a). If the gifts or promotion are given or accepted, as part of an agreement or understanding, for referral of business incident to or part of a real estate settlement service involving a federally related mortgage loan, they are prohibited.

For example, if a settlement service provider gives current or potential referral sources tickets to attend professional sporting events, trips, restaurant meals, or sponsorship of events (or the opportunity to win any of these items in a drawing or contest) in exchange for referrals as part of an agreement or understanding, such conduct violates RESPA Section 8(a). 12 CFR § 1024.14(b). Such an agreement or understanding need not be written or oral and can be established by a practice, pattern, or course of conduct. 12 CFR § 1024.14(e).

There is no exception to RESPA Section 8 solely based on the value of the gift or promotion. Accordingly, settlement service providers should carefully analyze whether providing gifts or opportunities to win prizes to referral sources could violate the prohibitions under RESPA Section 8.

However, in certain circumstances, gifts or promotions directed to a referral source are not prohibited if they are a "normal promotional or educational activity" meeting the conditions in Regulation X. 12 CFR § 1024.14(g)(1)(vi).

For more information about the analysis under RESPA Section 8(a), see RESPA Section 8(a) FAQ 1, above. For more information about "normal promotional and educational activities" under RESPA and Regulation X, see RESPA Section 8: Gifts and Promotional Activities FAQ 2 and FAQ 3, below.

QUESTION 2:

What conditions does Regulation X establish for gifts and promotions to be "normal promotional and educational activities" allowed under RESPA?

ANSWER (UPDATED 10/7/2020)**:**

Regulation X allows "normal promotional and educational activities" directed to a referral source if the activities meet two conditions:

- The activities are not conditioned on referral of business; and
- The activities do not involve defraying expenses that otherwise would be incurred by the referral source.

12 CFR § 1024.14(g)(1)(vi).

Whether a particular item or activity meets each of these two conditions is a factual question.

The first condition is that normal promotional and educational activities must not be conditioned on referral of business. Factors that are relevant to whether the first condition is met may include the following:

- *Whether the item or activity is targeted to referral sources*. If an item or activity is targeted narrowly towards prior, ongoing, or future referral sources, this could indicate the item or activity is conditioned on referrals of business. For example, if a promotional item is provided only to a limited set of settlement service providers who also happen to be current referral sources or an intentionally targeted group of future referral sources, this may suggest that the recipient is receiving the promotional item because of past or future referrals and, thus, the promotional item may be conditioned on referrals. If, instead, a promotional item is provided to a broader set of recipients, such as the general public or all settlement service providers offering similar services in a given locality, then that may indicate that the promotional item is not conditioned on referral of business.
- *How often the item or activity is given to the referral source.* If a referral source is routinely and frequently provided with an item or included in an activity, and particularly if that referral source is provided with the item or included in the activity more often than other persons, this could indicate the item or activity is conditioned on referrals.

The second condition is that normal promotional and educational activities must not involve the defraying of expenses that otherwise would be incurred by persons in a position to refer

settlement services or business incident thereto. Factors that may be relevant to whether the second condition is met may include the following:

- *Whether the item or activity involves a good or service that the referral source would otherwise have to pay for themselves.* If, for example, a promotional activity involves paying for mandatory continuing education expenses, certifications, licenses, or other items that the referral source would otherwise need to pay for on their own, the promotional item or activity is more likely to defray expenses. Similarly, if the activity involves paying for the referral source's office supplies branded with the referral source's name, contact information, or logo, this is more likely to defray expenses of the referral source. But if the activity involves providing the referral source with office supplies featuring the name, contact information, or logo of the entity providing the supplies, this is less likely to defray expenses, since it is unlikely that the referral source would otherwise use its own funds to purchase office supplies featuring the name and information of another entity.

If the particular item or activity does not meet either of these conditions, it is not a "normal promotional or educational activity" meeting the conditions in Regulation X, 12 CFR § 1024.14(g)(1)(vi). See RESPA Section 8: Gifts and Promotional Activities FAQ 3 below for discussion of "normal promotional or educational activities" as applied to examples.

QUESTION 3:

What are examples of "normal promotional and educational activities" meeting the conditions in Regulation X?

ANSWER (UPDATED 10/7/2020)**:**

Regulation X allows "normal promotional and educational activities" that are not conditioned on the referral of business and do not involve "defraying" expenses otherwise incurred by that recipient who is in a position to make a referral. 12 CFR § 1024.14(g)(1)(vi).

Whether a particular item or activity meets the conditions in Regulation X for "normal promotional and educational activities" depends on the facts and circumstances. For example:

- A settlement agent hosts a one-time-only drawing for a mini basketball set (backboard, rim, net, and ball). The settlement agent includes an announcement of the drawing in an email to all previous customers and all loan originators in the city summarizing the settlement agent's services and providing the agent's contact information. The entries to the drawing are automatically made for every previous customer and loan originator in the city, regardless of whether the prior customer or loan originator has made or will

make a referral to the settlement agent. The agent also includes a drawing entry submission form on their website. The drawing is more likely to meet the conditions for a "normal promotional and educational activity" under Regulation X because 1) the drawing entry is not conditioned on referrals and 2) the prize would not defray expenses as the basketball set is not an expense that persons in a position to refer business to the settlement agent would otherwise incur.

- A title company hosts a continuing education course for real estate agents who must meet mandatory continuing education requirements to maintain their license. The title company charges a course admission fee equivalent to the fair market value of the course and invites all of the local real estate agents, regardless of their status as referral sources. The real estate agents pay for their own admission to the course. Under these facts, the activity is more likely to meet the conditions for a "normal promotional and educational activity" under Regulation X because 1) the course admission is not provided conditioned on referrals and 2) the course admission fee is the fair market value, meaning the title company is not defraying the real estate agent's expenses for the course.
- A title company routinely hosts free seminars on recent real estate market developments. The seminars are open to the public, and they are advertised to all of the area's real estate agents, regardless of their status as referral sources. The seminars are more likely to meet the conditions of a "normal promotional and educational activity" under Regulation X, because 1) admission to the courses are not conditioned on referrals and 2) the courses are not defraying expenses that otherwise would be incurred by persons in a position to make referrals, as they are routinely provided free of charge for everyone, not just referral sources.

However, with slight changes to these fact patterns, the activities can fail to meet the conditions for "normal promotional and educational activity" under Regulation X. For example:

- A settlement agent's drawing for a mini basketball set where the agent's announcement and promotion email is sent only to select mortgage loan originators, who are given drawing entries for each referral the loan originator makes directing others to the settlement agent is likely not a "normal promotional or educational activity" meeting the conditions established in Regulation X. This is because the facts and circumstances indicate the opportunity to win the mini basketball set, or the mini basketball set itself, is conditioned on the referral of business, given that the persons in the drawing pool are only those persons who made referrals and also that the number of entries (which affect

the odds of winning the mini basketball set) are based on the number of referrals. In fact, as a reminder, this may implicate a RESPA Section 8(a) violation, as discussed in RESPA Section 8: Gifts and Promotional Activity FAQ 1, above.

- A title company's continuing education course that real estate agents use to meet their license requirements, for which the admission fee is waived if the real estate agent makes a specified number of referrals, is likely not a "normal promotional or educational activity" meeting the conditions established in Regulation X. This is because the course admission fee waiver is conditioned on referrals to the title company (which could also implicate a RESPA Section 8(a) violation), and the fee waiver is defraying the real estate agent's expenses. Similarly, if the title company opens the same continuing education course to the public and charges an admission fee, but waives the fee for all real estate agents (regardless of referrals), the activity is still likely not a "normal promotional or educational activity" meeting the conditions established in Regulation X. This is because the course fee waiver is defraying expenses that the real estate agents otherwise would incur, as the course is meeting their license requirements and the fee waiver reduces their license-related expenses.

For more information about the conditions for meeting the "normal promotional and educational activities" under Regulation X, see RESPA Section 8: Gifts and Promotional Activities FAQ 2. For more information about the application of RESPA Section 8(a) to promotional or educational activities, see RESPA Section 8: Gifts and Promotional Activities FAQ 1.

RESPA Section 8: Marketing Services Agreements (MSAs)

QUESTION 1:

What are marketing services agreements?

ANSWER (UPDATED 10/7/2020)**:**

Marketing services agreements, or "MSAs," are agreements that commonly involve an arrangement where one person (or entity) agrees to market or promote the services of another and receives compensation in return. MSAs may involve only settlement service providers or may also involve third parties who are not settlement service providers. For example, an MSA exists when a mortgage loan originator agrees to market or promote the services of a real estate agent in return for compensation.

A lawful MSA is an agreement for the performance of marketing services where the payments under the MSA are reasonably related to the value of services actually performed. 12 USC § 2607(c)(2); 12 CFR § 1024.14(g)(1)(iv). This is distinguished from an MSA that—whether oral, written, or indicated by a course of conduct, and looking to both how the MSA is structured and how it is implemented—involves an agreement for referrals. Unlike referrals, as described in RESPA Section 8: Marketing Services Agreement FAQ 2, below, marketing services are compensable services under RESPA. 12 CFR § 1024.14(b) and (g)(2).

Moreover, when a person performing settlement services receives payment for performing marketing services as part of a real estate transaction, the marketing services must be actual, necessary, and distinct from the primary services performed by the person. These marketing services cannot be nominal, and the payments cannot be for a duplicative charge or referrals. 12 CFR § 1024.14(b), (c), and (g)(3).

QUESTION 2:

What is the distinction between referrals and marketing services for purposes of analyzing MSAs under RESPA Section 8?

ANSWER (UPDATED 10/7/2020)**:**

Whether a particular activity is a referral or a marketing service is a fact-specific question for purposes of the analysis under RESPA Section 8(a).

As discussed in RESPA Section 8(a) FAQ 1, referrals 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 incident thereto by a person paying a charge attributable to the service or business. 12 CFR § 1024.14(f)(1). For example, referrals include a settlement service provider directly handing clients the contact information of another settlement service provider that happens to result in the client using that other settlement service provider.

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.

MSAs that involve payments for referrals are prohibited under RESPA Section 8(a), whereas MSAs that involve payments for marketing services may be permitted under RESPA Section 8(c)(2), based on the facts and circumstances of the structure and implementation. More

information on this analysis is discussed in RESPA Section 8: Marketing Services Agreement FAQ 3 and FAQ 4, below.

QUESTION 3:

How do the provisions of RESPA Section 8 apply when analyzing whether an MSA is lawful?

ANSWER (UPDATED 10/7/2020)**:**

Entering into, performing services under, and making payments under MSAs are not, by themselves, prohibited acts under RESPA or Regulation X. In fact, MSAs are not referenced in RESPA or Regulation X. Ultimately, the determination of whether an MSA itself or the payments or conduct under an MSA is lawful depends on whether it violates the prohibitions under RESPA Section 8(a) or RESPA Section 8(b), or is permitted under RESPA Section 8(c). The analysis under RESPA Section 8 depends on the facts and circumstances, including the details of the MSA and how it is both structured and implemented. The following describes how specific provisions of RESPA frame that analysis.

Under RESPA Section 8(a), if an MSA involves an agreement or understanding to refer business incident to or part of a settlement service in exchange for a fee, kickback, or thing of value, then the MSA or conduct under the MSA is **prohibited**. For example, this can include (but is not limited to) agreements structured or implemented to provide payments based on the number of referrals received. For more information about the analysis under RESPA Section 8(a), see RESPA Section 8(a) FAQ 1, above.

Under RESPA Section 8(b), if the MSA serves as a method of splitting charges made or received for real estate settlement services in connection with a federally related mortgage loan, other than for services actually performed, the MSA or the conduct under the MSA is **prohibited**. MSAs violate RESPA Section 8(b) if they disguise kickbacks by purporting to provide payment for services, but a split charge is paid even though the person receiving the split charge does not actually perform services. Similarly, a violation of RESPA Section 8(b) occurs if the services are performed, but the amount of the split charge exceeds the value of the services performed by the person receiving the split. For more information about the analysis under RESPA Section 8(b), see RESPA Section 8 General FAQ 3, above.

However, under RESPA Section 8(c)(2), if the MSA or conduct under the MSA reflects an agreement for the payment for bona fide salary or compensation or other payment for goods or facilities actually furnished or for services actually performed, the MSA or the conduct is **not**

prohibited. 12 USC § 2607(c)(2); 12 CFR § 1024.14(g)(1)(iv). RESPA Section 8(c)(2) does not apply to MSAs that involve payments for referrals because they are not agreements for marketing services actually performed. However, RESPA Section 8 does not prohibit payments under MSAs if the purported marketing services are actually provided, and if the payments are reasonably related to the market value of the provided services only. Note that under Regulation X, the value of the referral, i.e., any additional business that might be provided by the referral, cannot be taken into consideration when determining whether the payment has a reasonable relationship to the value of the services provided. 12 CFR § 1024.14(g)(2). *See also* 12 CFR § 1024.14(b).

QUESTION 4:

What are some examples of MSAs prohibited by RESPA Section 8?

ANSWER (UPDATED 10/7/2020)**:**

As stated previously, an MSA can be lawful under RESPA if it is structured and implemented consistently as an agreement for the performance of actual marketing services and where the payments under the MSA are reasonably related to the value of the services performed. 12 USC § 2607(c)(2); 12 CFR § 1024.14(g)(1)(iv) and (g)(2).

However, as discussed in the FAQs above, MSAs can be unlawful when entered into based on their structure or can become unlawful based on how they are implemented. The Bureau's Office of Enforcement has identified violations of RESPA Section 8 in investigations that involved the use of oral or written MSAs. An MSA is or can become unlawful if the facts and circumstances show that the MSA as structured, or the parties' implementation of the MSA—in form or substance, and including as a matter of course of conduct—involves, for example:

- An agreement to pay for referrals.
- An agreement to pay for marketing services, but the payment is in excess of the reasonable market value for the services performed.
- An agreement to pay for marketing services, but either as structured or when implemented, the services are not actually performed, the services are nominal, or the payments are duplicative.
- An agreement designed or implemented in a way to disguise the payment for kickbacks or split charges.

For example, assume a lender enters into an MSA with a real estate agent that also makes referrals to the lender. The MSA requires the real estate agent to perform marketing services, including deciding on and coordinating direct mail campaigns and media advertising for the lender. However, the real estate agent either does not actually perform the MSA's identified marketing services or the real estate agent is paid compensation that is in excess of the reasonable market value of those marketing services.

In this scenario, the lender and real estate agent would not meet the standard in RESPA Section 8(c)(2), because the marketing services are not actually provided, or the payments are not reasonably related to the value of the marketing services provided. 12 CFR § 1024.14(g)(1)(iv). Further, if in the example the MSA was structured or implemented as a way for the lender to compensate the real estate agent for client referrals to the lender, the MSA would violate RESPA Section 8(a).

More information about analyzing MSAs under RESPA Section 8 is available in RESPA Section 8: Marketing Services Agreement FAQ 3, above.

IRS

What employers need to know when classifying workers as employees or independent contractors

IRS Tax Tip 2021-140, September 22, 2021

It is critical for business owners to correctly determine whether the individuals providing services are employees or independent contractors.

An employee is generally considered anyone who performs services, if the business can control what will be done and how it will be done. What matters is that the business has the right to control the details of how the worker's services are performed. Independent contractors are normally people in an independent trade, business or profession in which they offer their services to the public. Doctors, dentists, veterinarians, lawyers, accountants, contractors, subcontractors, public stenographers or auctioneers are generally independent contractors.

Independent contractor vs. employee

Whether a worker is an independent contractor, or an employee depends on the relationship between the worker and the business. Generally, there are three categories to consider.

- **Behavioral control** – Does the company control or have the right to control what the worker does and how the worker does the job?
- **Financial control** – Does the business direct or control the financial and business aspects of the worker's job. Are the business aspects of the worker's job controlled by the payer? Things like how the worker is paid, are expenses reimbursed, who provides tools/supplies, etc.
- **Relationship of the parties** – Are there written contracts or employee type benefits such as pension plan, insurance, vacation pay? Will the relationship continue and is the work performed a key aspect of the business?

Misclassified worker

Misclassifying workers as independent contractors adversely affects employees because the employer's share of taxes is not paid, and the employee's share is not withheld. If a business misclassified an employee without a reasonable basis, the business can be held liable for employment taxes for that worker. Generally, an employer must withhold and pay income taxes, Social Security and Medicare taxes, as well as unemployment taxes.

Workers who believe they have been improperly classified as independent contractors can use Form 8919, Uncollected Social Security and Medicare Tax on Wages PDF to figure and report their share of uncollected Social Security and Medicare taxes due on their compensation.

Voluntary Classification Settlement Program

The Voluntary Classification Settlement Program is an optional program that provides taxpayers with an opportunity to reclassify their workers as employees for future employment tax purposes. This program offers partial relief from federal employment taxes for eligible taxpayers who agree to prospectively treat their workers as employees. Taxpayers must meet certain eligibility requirements and apply by filing Form 8952, Application for Voluntary Classification Settlement Program, and enter into a closing agreement with the IRS.

Who is self-employed?

Generally, someone is self-employed if any of the following apply to them.

- They carry on a trade or business as a sole proprietor or an independent contractor.
- They are a member of a partnership that carries on a trade or business.
- They are otherwise in business for themselves, including a part-time business.

Self-employed individuals, including those who earn money from gig economy work, are generally required to file an tax return and make estimated quarterly tax payments. They also generally must pay self-employment tax which is Social Security and Medicare tax as well as income tax. These taxpayers qualify for the home office deduction if they use part of a home for business.

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Page Last Reviewed or Updated: 22-Sep-2021

Select Year: 2020 Go

The 2020 Florida Statutes

Title XXXVII INSURANCE | Chapter 626 INSURANCE FIELD REPRESENTATIVES AND OPERATIONS | View Entire Chapter

626.9521 Unfair methods of competition and unfair or deceptive acts or practices prohibited; penalties.[1]—

(1) No person shall engage in this state in any trade practice which is defined in this part as, or determined pursuant to s. 626.951 or s. 626.9561 to be, an unfair method of competition or an unfair or deceptive act or practice involving the business of insurance.

(2) Except as provided in subsection (3), any person who violates any provision of this part is subject to a fine in an amount not greater than $5,000 for each nonwillful violation and not greater than $40,000 for each willful violation. Fines under this subsection imposed against an insurer may not exceed an aggregate amount of $20,000 for all nonwillful violations arising out of the same action or an aggregate amount of $200,000 for all willful violations arising out of the same action. The fines may be imposed in addition to any other applicable penalty.

(3)(a) If a person violates s. 626.9541(1)(l), the offense known as "twisting," or violates s. 626.9541(1)(aa), the offense known as "churning," the person commits a misdemeanor of the first degree, punishable as provided in s. 775.082, and an administrative fine not greater than $5,000 shall be imposed for each nonwillful violation or an administrative fine not greater than $75,000 shall be imposed for each willful violation. To impose an administrative fine for a willful violation under this paragraph, the practice of "churning" or "twisting" must involve fraudulent conduct.

(b) If a person violates s. 626.9541(1)(ee) by willfully submitting fraudulent signatures on an application or policy-related document, the person commits a felony of the third degree, punishable as provided in s. 775.082, and an administrative fine not greater than $5,000 shall be imposed for each nonwillful violation or an administrative fine not greater than $75,000 shall be imposed for each willful violation.

(c) Administrative fines under this subsection may not exceed an aggregate amount of $50,000 for all nonwillful violations arising out of the same action or an aggregate amount of $250,000 for all willful violations arising out of the same action.

(4) A licensee must make all reasonable efforts to ascertain the consumer's age at the time an insurance application is completed.

(5) If a consumer who is a senior citizen is a victim, a video deposition of the victim may be used for any purpose in any administrative proceeding conducted pursuant to chapter 120 if all parties are given proper notice of the deposition in accordance with the Florida Rules of Civil Procedure.

History.—s. 9, ch. 76-260; s. 807, ch. 82-243; ss. 206, 207, ch. 90-363; s. 4, ch. 91-429; s. 37, ch. 92-146; s. 7, ch. 2008-66; ss. 5, 6, ch. 2008-237; s. 50, ch. 2010-175.

[1] **Note.**—Section 12, ch. 2008-237, provides in part that "[e]ffective [June 30, 2008,] the Department of Financial Services may adopt rules to implement this act."

Select Year: 2020 Go

The 2020 Florida Statutes

Title XXXVII INSURANCE | Chapter 626 INSURANCE FIELD REPRESENTATIVES AND OPERATIONS | View Entire Chapter

626.9541 Unfair methods of competition and unfair or deceptive acts or practices defined.—

(1) UNFAIR METHODS OF COMPETITION AND UNFAIR OR DECEPTIVE ACTS.—The following are defined as unfair methods of competition and unfair or deceptive acts or practices:

(a) *Misrepresentations and false advertising of insurance policies.*—Knowingly making, issuing, circulating, or causing to be made, issued, or circulated, any estimate, illustration, circular, statement, sales presentation, omission, comparison, or property and casualty certificate of insurance altered after being issued, which:

1. Misrepresents the benefits, advantages, conditions, or terms of any insurance policy.
2. Misrepresents the dividends or share of the surplus to be received on any insurance policy.
3. Makes any false or misleading statements as to the dividends or share of surplus previously paid on any insurance policy.
4. Is misleading, or is a misrepresentation, as to the financial condition of any person or as to the legal reserve system upon which any life insurer operates.
5. Uses any name or title of any insurance policy or class of insurance policies misrepresenting the true nature thereof.
6. Is a misrepresentation for the purpose of inducing, or tending to induce, the lapse, forfeiture, exchange, conversion, or surrender of any insurance policy.
7. Is a misrepresentation for the purpose of effecting a pledge or assignment of, or effecting a loan against, any insurance policy.
8. Misrepresents any insurance policy as being shares of stock or misrepresents ownership interest in the company.
9. Uses any advertisement that would mislead or otherwise cause a reasonable person to believe mistakenly that the state or the Federal Government is responsible for the insurance sales activities of any person or stands behind any person's credit or that any person, the state, or the Federal Government guarantees any returns on insurance products or is a source of payment of any insurance obligation of or sold by any person.

(b) *False information and advertising generally.*—Knowingly making, publishing, disseminating, circulating, or placing before the public, or causing, directly or indirectly, to be made, published, disseminated, circulated, or placed before the public:

1. In a newspaper, magazine, or other publication,
2. In the form of a notice, circular, pamphlet, letter, or poster,
3. Over any radio or television station, or
4. In any other way,

an advertisement, announcement, or statement containing any assertion, representation, or statement with respect to the business of insurance, which is untrue, deceptive, or misleading.

(c) *Defamation.*—Knowingly making, publishing, disseminating, or circulating, directly or indirectly, or aiding, abetting, or encouraging the making, publishing, disseminating, or circulating of, any oral or written statement, or any pamphlet, circular, article, or literature, which is false or maliciously critical of, or derogatory to, any person and which is calculated to injure such person.

(d) *Boycott, coercion, and intimidation.*—Entering into any agreement to commit, or by any concerted action committing, any act of boycott, coercion, or intimidation resulting in, or tending to result in, unreasonable restraint of, or monopoly in, the business of insurance.

(e) *False statements and entries.*—

1. Knowingly:

a. Filing with any supervisory or other public official,

b. Making, publishing, disseminating, circulating,

c. Delivering to any person,

d. Placing before the public,

e. Causing, directly or indirectly, to be made, published, disseminated, circulated, delivered to any person, or placed before the public,

any false material statement.

2. Knowingly making any false entry of a material fact in any book, report, or statement of any person, or knowingly omitting to make a true entry of any material fact pertaining to the business of such person in any book, report, or statement of such person.

(f) *Stock operations and advisory board contracts.*—Issuing or delivering, promising to issue or deliver, or permitting agents, officers, or employees to issue or deliver, agency company stock or other capital stock, benefit certificates or shares in any common-law corporation, or securities or any special or advisory board contracts or other contracts of any kind promising returns or profits as an inducement to insurance.

(g) *Unfair discrimination.*—

1. Knowingly making or permitting unfair discrimination between individuals of the same actuarially supportable class and equal expectation of life, in the rates charged for a life insurance or annuity contract, in the dividends or other benefits payable thereon, or in any other term or condition of such contract.

2. Knowingly making or permitting unfair discrimination between individuals of the same actuarially supportable class, as determined at the time of initial issuance of the coverage, and essentially the same hazard, in the amount of premium, policy fees, or rates charged for a policy or contract of accident, disability, or health insurance, in the benefits payable thereunder, in the terms or conditions of such contract, or in any other manner.

3. For a health insurer, life insurer, disability insurer, property and casualty insurer, automobile insurer, or managed care provider to underwrite a policy, or refuse to issue, reissue, or renew a policy, refuse to pay a claim, cancel or otherwise terminate a policy, or increase rates based upon the fact that an insured or applicant who is also the proposed insured has made a claim or sought or should have sought medical or psychological treatment in the past for abuse, protection from abuse, or shelter from abuse, or that a claim was caused in the past by, or might occur as a result of, any future assault, battery, or sexual assault by a family or household member upon another family or household member as defined in s. 741.28. A health insurer, life insurer, disability insurer, or managed care provider may refuse to underwrite, issue, or renew a policy based on the applicant's medical condition, but may not consider whether such condition was caused by an act of abuse. For purposes of this section, the term "abuse" means the occurrence of one or more of the following acts:

a. Attempting or committing assault, battery, sexual assault, or sexual battery;

b. Placing another in fear of imminent serious bodily injury by physical menace;

c. False imprisonment;

d. Physically or sexually abusing a minor child; or

e. An act of domestic violence as defined in s. 741.28.

This subparagraph does not prohibit a property and casualty insurer or an automobile insurer from excluding coverage for intentional acts by the insured if such exclusion is not an act of unfair discrimination as defined in this paragraph.

4. For a personal lines property or personal lines automobile insurer to:

a. Refuse to issue, reissue, or renew a policy; cancel or otherwise terminate a policy; or charge an unfairly discriminatory rate in this state based on the lawful use, possession, or ownership of a firearm or ammunition by the insurance applicant, insured, or a household member of the applicant or insured. This sub-subparagraph does not prevent an insurer from charging a supplemental premium that is not unfairly discriminatory for a separate rider voluntarily requested by the insurance applicant to insure a firearm or a firearm collection whose value exceeds the standard policy coverage.

b. Disclose the lawful ownership or possession of firearms of an insurance applicant, insured, or household member of the applicant or insured to a third party or an affiliated entity of the insurer unless the insurer discloses to the applicant or insured the specific need to disclose the information and the applicant or insured expressly consents to the disclosure, or the disclosure is necessary to quote or bind coverage, continue coverage, or adjust a claim. For purposes of underwriting and issuing insurance coverage, this sub-subparagraph does not prevent the sharing of information between an insurance company and its licensed insurance agent if a separate rider has been voluntarily requested by the policyholder or prospective policyholder to insure a firearm or a firearm collection whose value exceeds the standard policy coverage.

(h) *Unlawful rebates.*—

1. Except as otherwise expressly provided by law, or in an applicable filing with the office, knowingly:

a. Permitting, or offering to make, or making, any contract or agreement as to such contract other than as plainly expressed in the insurance contract issued thereon;

b. Paying, allowing, or giving, or offering to pay, allow, or give, directly or indirectly, as inducement to such insurance contract, any unlawful rebate of premiums payable on the contract, any special favor or advantage in the dividends or other benefits thereon, or any valuable consideration or inducement whatever not specified in the contract;

c. Giving, selling, or purchasing, or offering to give, sell, or purchase, as inducement to such insurance contract or in connection therewith, any stocks, bonds, or other securities of any insurance company or other corporation, association, or partnership, or any dividends or profits accrued thereon, or anything of value whatsoever not specified in the insurance contract.

2. Nothing in paragraph (g) or subparagraph 1. of this paragraph shall be construed as including within the definition of discrimination or unlawful rebates:

a. In the case of any contract of life insurance or life annuity, paying bonuses to all policyholders or otherwise abating their premiums in whole or in part out of surplus accumulated from nonparticipating insurance; provided that any such bonuses or abatement of premiums is fair and equitable to all policyholders and for the best interests of the company and its policyholders.

b. In the case of life insurance policies issued on the industrial debit plan, making allowance to policyholders who have continuously for a specified period made premium payments directly to an office of the insurer in an amount which fairly represents the saving in collection expenses.

c. Readjustment of the rate of premium for a group insurance policy based on the loss or expense thereunder, at the end of the first or any subsequent policy year of insurance thereunder, which may be made retroactive only for such policy year.

d. Issuance of life insurance policies or annuity contracts at rates less than the usual rates of premiums for such policies or contracts, as group insurance or employee insurance as defined in this code.

e. Issuing life or disability insurance policies on a salary savings, bank draft, preauthorized check, payroll deduction, or other similar plan at a reduced rate reasonably related to the savings made by the use of such plan.

3.a. No title insurer, or any member, employee, attorney, agent, or agency thereof, shall pay, allow, or give, or offer to pay, allow, or give, directly or indirectly, as inducement to title insurance, or after such insurance has been effected, any rebate or abatement of the premium or any other charge or fee, or provide any special favor or advantage, or any monetary consideration or inducement whatever.

b. Nothing in this subparagraph shall be construed as prohibiting the payment of fees to attorneys at law duly licensed to practice law in the courts of this state, for professional services, or as prohibiting the payment of earned portions of the premium to duly appointed agents or agencies who actually perform services for the title

insurer. Nothing in this subparagraph shall be construed as prohibiting a rebate or abatement of an attorney fee charged for professional services, or that portion of the premium that is not required to be retained by the insurer pursuant to s. 627.782(1), or any other agent charge or fee to the person responsible for paying the premium, charge, or fee.

c. No insured named in a policy, or any other person directly or indirectly connected with the transaction involving the issuance of such policy, including, but not limited to, any mortgage broker, real estate broker, builder, or attorney, any employee, agent, agency, or representative thereof, or any other person whatsoever, shall knowingly receive or accept, directly or indirectly, any rebate or abatement of any portion of the title insurance premium or of any other charge or fee or any monetary consideration or inducement whatsoever, except as set forth in sub-subparagraph b.; provided, in no event shall any portion of the attorney fee, any portion of the premium that is not required to be retained by the insurer pursuant to s. 627.782(1), any agent charge or fee, or any other monetary consideration or inducement be paid directly or indirectly for the referral of title insurance business.

(i) *Unfair claim settlement practices.*—

1. Attempting to settle claims on the basis of an application, when serving as a binder or intended to become a part of the policy, or any other material document which was altered without notice to, or knowledge or consent of, the insured;

2. A material misrepresentation made to an insured or any other person having an interest in the proceeds payable under such contract or policy, for the purpose and with the intent of effecting settlement of such claims, loss, or damage under such contract or policy on less favorable terms than those provided in, and contemplated by, such contract or policy; or

3. Committing or performing with such frequency as to indicate a general business practice any of the following:

a. Failing to adopt and implement standards for the proper investigation of claims;

b. Misrepresenting pertinent facts or insurance policy provisions relating to coverages at issue;

c. Failing to acknowledge and act promptly upon communications with respect to claims;

d. Denying claims without conducting reasonable investigations based upon available information;

e. Failing to affirm or deny full or partial coverage of claims, and, as to partial coverage, the dollar amount or extent of coverage, or failing to provide a written statement that the claim is being investigated, upon the written request of the insured within 30 days after proof-of-loss statements have been completed;

f. Failing to promptly provide a reasonable explanation in writing to the insured of the basis in the insurance policy, in relation to the facts or applicable law, for denial of a claim or for the offer of a compromise settlement;

g. Failing to promptly notify the insured of any additional information necessary for the processing of a claim; or

h. Failing to clearly explain the nature of the requested information and the reasons why such information is necessary.

i. Failing to pay personal injury protection insurance claims within the time periods required by s. 627.736(4)(b). The office may order the insurer to pay restitution to a policyholder, medical provider, or other claimant, including interest at a rate consistent with the amount set forth in s. 55.03(1), for the time period within which an insurer fails to pay claims as required by law. Restitution is in addition to any other penalties allowed by law, including, but not limited to, the suspension of the insurer's certificate of authority.

4. Failing to pay undisputed amounts of partial or full benefits owed under first-party property insurance policies within 90 days after an insurer receives notice of a residential property insurance claim, determines the amounts of partial or full benefits, and agrees to coverage, unless payment of the undisputed benefits is prevented by an act of God, prevented by the impossibility of performance, or due to actions by the insured or claimant that constitute fraud, lack of cooperation, or intentional misrepresentation regarding the claim for which benefits are owed.

(j) *Failure to maintain complaint-handling procedures.*—Failure of any person to maintain a complete record of all the complaints received since the date of the last examination. For purposes of this paragraph, "complaint"

means any written communication primarily expressing a grievance.

(k) *Misrepresentation in insurance applications.*—

1. Knowingly making a false or fraudulent written or oral statement or representation on, or relative to, an application or negotiation for an insurance policy for the purpose of obtaining a fee, commission, money, or other benefit from any insurer, agent, broker, or individual.

2. Knowingly making a material omission in the comparison of a life, health, or Medicare supplement insurance replacement policy with the policy it replaces for the purpose of obtaining a fee, commission, money, or other benefit from any insurer, agent, broker, or individual. For the purposes of this subparagraph, a material omission includes the failure to advise the insured of the existence and operation of a preexisting condition clause in the replacement policy.

(l) *Twisting.*—Knowingly making any misleading representations or incomplete or fraudulent comparisons or fraudulent material omissions of or with respect to any insurance policies or insurers for the purpose of inducing, or tending to induce, any person to lapse, forfeit, surrender, terminate, retain, pledge, assign, borrow on, or convert any insurance policy or to take out a policy of insurance in another insurer.

(m) *Advertising and promotional gifts and charitable contributions permitted.*—

1. The provisions of paragraph (f), paragraph (g), or paragraph (h) do not prohibit a licensed insurer or its agent from:

a. Giving to insureds, prospective insureds, or others any article of merchandise, goods, wares, store gift cards, gift certificates, event tickets, anti-fraud or loss mitigation services, or other items having a total value of $100 or less per insured or prospective insured in any calendar year.

b. Making charitable contributions, as defined in s. 170(c) of the Internal Revenue Code, on behalf of insureds or prospective insureds, of up to $100 per insured or prospective insured in any calendar year.

2. The provisions of paragraph (f), paragraph (g), or paragraph (h) do not prohibit a title insurance agent or title insurance agency, as those terms are defined in s. 626.841, or a title insurer, as defined in s. 627.7711, from giving to insureds, prospective insureds, or others, for the purpose of advertising, any article of merchandise having a value of not more than $25. A person or entity governed by this subparagraph is not subject to subparagraph 1.

(n) *Free insurance prohibited.*—

1. Advertising, offering, or providing free insurance as an inducement to the purchase or sale of real or personal property or of services directly or indirectly connected with such real or personal property.

2. For the purposes of this paragraph, “free” insurance is:

a. Insurance for which no identifiable and additional charge is made to the purchaser of such real property, personal property, or services.

b. Insurance for which an identifiable or additional charge is made in an amount less than the cost of such insurance as to the seller or other person, other than the insurer, providing the same.

3. Subparagraphs 1. and 2. do not apply to:

a. Insurance of, loss of, or damage to the real or personal property involved in any such sale or services, under a policy covering the interests therein of the seller or vendor.

b. Blanket disability insurance as defined in s. 627.659.

c. Credit life insurance or credit disability insurance.

d. Any individual, isolated, nonrecurring unadvertised transaction not in the regular course of business.

e. Title insurance.

f. Any purchase agreement involving the purchase of a cemetery lot or lots in which, under stated conditions, any balance due is forgiven upon the death of the purchaser.

g. Life insurance, trip cancellation insurance, or lost baggage insurance offered by a travel agency as part of a travel package offered by and booked through the agency.

4. Using the word “free” or words which imply the provision of insurance without a cost to describe life or disability insurance, in connection with the advertising or offering for sale of any kind of goods, merchandise, or services.

(o) *Illegal dealings in premiums; excess or reduced charges for insurance.*—

1. Knowingly collecting any sum as a premium or charge for insurance, which is not then provided, or is not in due course to be provided, subject to acceptance of the risk by the insurer, by an insurance policy issued by an insurer as permitted by this code.

2. Knowingly collecting as a premium or charge for insurance any sum in excess of or less than the premium or charge applicable to such insurance, in accordance with the applicable classifications and rates as filed with and approved by the office, and as specified in the policy; or, in cases when classifications, premiums, or rates are not required by this code to be so filed and approved, premiums and charges collected from a Florida resident in excess of or less than those specified in the policy and as fixed by the insurer. Notwithstanding any other provision of law, this provision shall not be deemed to prohibit the charging and collection, by surplus lines agents licensed under part VIII of this chapter, of the amount of applicable state and federal taxes, or fees as authorized by s. 626.916(4), in addition to the premium required by the insurer or the charging and collection, by licensed agents, of the exact amount of any discount or other such fee charged by a credit card facility in connection with the use of a credit card, as authorized by subparagraph (q)3., in addition to the premium required by the insurer. This subparagraph shall not be construed to prohibit collection of a premium for a universal life or a variable or indeterminate value insurance policy made in accordance with the terms of the contract.

3.a. Imposing or requesting an additional premium for a policy of motor vehicle liability, personal injury protection, medical payment, or collision insurance or any combination thereof or refusing to renew the policy solely because the insured was involved in a motor vehicle accident unless the insurer's file contains information from which the insurer in good faith determines that the insured was substantially at fault in the accident.

b. An insurer which imposes and collects such a surcharge or which refuses to renew such policy shall, in conjunction with the notice of premium due or notice of nonrenewal, notify the named insured that he or she is entitled to reimbursement of such amount or renewal of the policy under the conditions listed below and will subsequently reimburse him or her or renew the policy, if the named insured demonstrates that the operator involved in the accident was:

(I) Lawfully parked;

(II) Reimbursed by, or on behalf of, a person responsible for the accident or has a judgment against such person;

(III) Struck in the rear by another vehicle headed in the same direction and was not convicted of a moving traffic violation in connection with the accident;

(IV) Hit by a "hit-and-run" driver, if the accident was reported to the proper authorities within 24 hours after discovering the accident;

(V) Not convicted of a moving traffic violation in connection with the accident, but the operator of the other automobile involved in such accident was convicted of a moving traffic violation;

(VI) Finally adjudicated not to be liable by a court of competent jurisdiction;

(VII) In receipt of a traffic citation which was dismissed or nolle prossed; or

(VIII) Not at fault as evidenced by a written statement from the insured establishing facts demonstrating lack of fault which are not rebutted by information in the insurer's file from which the insurer in good faith determines that the insured was substantially at fault.

c. In addition to the other provisions of this subparagraph, an insurer may not fail to renew a policy if the insured has had only one accident in which he or she was at fault within the current 3-year period. However, an insurer may nonrenew a policy for reasons other than accidents in accordance with s. 627.728. This subparagraph does not prohibit nonrenewal of a policy under which the insured has had three or more accidents, regardless of fault, during the most recent 3-year period.

4. Imposing or requesting an additional premium for, or refusing to renew, a policy for motor vehicle insurance solely because the insured committed a noncriminal traffic infraction as described in s. 318.14 unless the infraction is:

a. A second infraction committed within an 18-month period, or a third or subsequent infraction committed within a 36-month period.

b. A violation of s. 316.183, when such violation is a result of exceeding the lawful speed limit by more than 15 miles per hour.

5. Upon the request of the insured, the insurer and licensed agent shall supply to the insured the complete proof of fault or other criteria which justifies the additional charge or cancellation.

6. No insurer shall impose or request an additional premium for motor vehicle insurance, cancel or refuse to issue a policy, or refuse to renew a policy because the insured or the applicant is a handicapped or physically disabled person, so long as such handicap or physical disability does not substantially impair such person's mechanically assisted driving ability.

7. No insurer may cancel or otherwise terminate any insurance contract or coverage, or require execution of a consent to rate endorsement, during the stated policy term for the purpose of offering to issue, or issuing, a similar or identical contract or coverage to the same insured with the same exposure at a higher premium rate or continuing an existing contract or coverage with the same exposure at an increased premium.

8. No insurer may issue a nonrenewal notice on any insurance contract or coverage, or require execution of a consent to rate endorsement, for the purpose of offering to issue, or issuing, a similar or identical contract or coverage to the same insured at a higher premium rate or continuing an existing contract or coverage at an increased premium without meeting any applicable notice requirements.

9. No insurer shall, with respect to premiums charged for motor vehicle insurance, unfairly discriminate solely on the basis of age, sex, marital status, or scholastic achievement.

10. Imposing or requesting an additional premium for motor vehicle comprehensive or uninsured motorist coverage solely because the insured was involved in a motor vehicle accident or was convicted of a moving traffic violation.

11. No insurer shall cancel or issue a nonrenewal notice on any insurance policy or contract without complying with any applicable cancellation or nonrenewal provision required under the Florida Insurance Code.

12. No insurer shall impose or request an additional premium, cancel a policy, or issue a nonrenewal notice on any insurance policy or contract because of any traffic infraction when adjudication has been withheld and no points have been assessed pursuant to s. 318.14(9) and (10). However, this subparagraph does not apply to traffic infractions involving accidents in which the insurer has incurred a loss due to the fault of the insured.

(p) *Insurance cost specified in "price package".—*

1. When the premium or charge for insurance of or involving such property or merchandise is included in the overall purchase price or financing of the purchase of merchandise or property, the vendor or lender shall separately state and identify the amount charged and to be paid for the insurance, and the classifications, if any, upon which based; and the inclusion or exclusion of the cost of insurance in such purchase price or financing shall not increase, reduce, or otherwise affect any other factor involved in the cost of the merchandise, property, or financing as to the purchaser or borrower.

2. This paragraph does not apply to transactions which are subject to the provisions of part I of chapter 520, entitled "The Motor Vehicle Sales Finance Act."

3. This paragraph does not apply to credit life or credit disability insurance which is in compliance with s. 627.681(4).

(q) *Certain insurance transactions through credit card facilities prohibited.—*

1. Except as provided in subparagraph 3., no person shall knowingly solicit or negotiate insurance; seek or accept applications for insurance; issue or deliver any policy; receive, collect, or transmit premiums, to or for an insurer; or otherwise transact insurance in this state, or relative to a subject of insurance resident, located, or to be performed in this state, through the arrangement or facilities of a credit card facility or organization, for the purpose of insuring credit card holders or prospective credit card holders. The term "credit card holder" as used in this paragraph means a person who may pay the charge for purchases or other transactions through the credit card facility or organization, whose credit with such facility or organization is evidenced by a credit card identifying such person as being one whose charges the credit card facility or organization will pay, and who is identified as such upon the credit card by name, account number, symbol, insignia, or other method or device of identification.

This subparagraph does not apply as to health insurance or to credit life, credit disability, or credit property insurance.

2. If any person does or performs in this state any of the acts in violation of subparagraph 1. for or on behalf of an insurer or credit card facility, such insurer or credit card facility shall be deemed to be doing business in this state and, if an insurer, shall be subject to the same state, county, and municipal taxes as insurers that have been legally qualified and admitted to do business in this state by agents or otherwise are subject, the same to be assessed and collected against such insurers; and such person so doing or performing any of such acts is personally liable for all such taxes.

3. A licensed agent or insurer may solicit or negotiate insurance; seek or accept applications for insurance; issue or deliver any policy; receive, collect, or transmit premiums, to or for an insurer; or otherwise transact insurance in this state, or relative to a subject of insurance resident, located, or to be performed in this state, through the arrangement or facilities of a credit card facility or organization, for the purpose of insuring credit card holders or prospective credit card holders if:

a. The insurance or policy which is the subject of the transaction is noncancelable by any person other than the named insured, the policyholder, or the insurer;

b. Any refund of unearned premium is made to the credit card holder by mail or electronic transfer; and

c. The credit card transaction is authorized by the signature of the credit card holder or other person authorized to sign on the credit card account.

The conditions enumerated in sub-subparagraphs a.-c. do not apply to health insurance or to credit life, credit disability, or credit property insurance; and sub-subparagraph c. does not apply to property and casualty insurance if the transaction is authorized by the insured.

4. No person may use or disclose information resulting from the use of a credit card in conjunction with the purchase of insurance if such information is to the advantage of the credit card facility or an insurance agent, or is to the detriment of the insured or any other insurance agent; except that this provision does not prohibit a credit card facility from using or disclosing such information in a judicial proceeding or consistent with applicable law on credit reporting.

5. Such insurance may not be sold through a credit card facility in conjunction with membership in any automobile club. The term “automobile club” means a legal entity that, in consideration of dues, assessments, or periodic payments of money, promises its members or subscribers to assist them in matters relating to the ownership, operation, use, or maintenance of a motor vehicle; however, the term does not include persons, associations, or corporations that are organized and operated solely for the purpose of conducting, sponsoring, or sanctioning motor vehicle races, exhibitions, or contests upon racetracks, or upon race courses established and marked as such for the duration of such particular event. The words “motor vehicle” used herein shall be the same as defined in chapter 320.

(r) *Interlocking ownership and management.*—

1. Any domestic insurer may retain, invest in, or acquire the whole or any part of the capital stock of any other insurer or insurers, or have a common management with any other insurer or insurers, unless such retention, investment, acquisition, or common management is inconsistent with any other provision of this code, or unless by reason thereof the business of such insurers with the public is conducted in a manner which substantially lessens competition generally in the insurance business.

2. Any person otherwise qualified may be a director of two or more domestic insurers which are competitors, unless the effect thereof is substantially to lessen competition between insurers generally or materially tend to create a monopoly.

3. Any limitation contained in this paragraph does not apply to any person who is a director of two or more insurers under common control or management.

(s) *Prohibited arrangements as to funerals.*—

1. No life insurer shall designate in any life insurance policy the person to conduct the funeral of the insured, or organize, promote, or operate any enterprise or plan to enter into any contract with any insured under which

the freedom of choice in the open market of the person having the legal right to such choice is restricted as to the purchase, arrangement, and conduct of a funeral service or any part thereof for any individual insured by the insurer. No life insurer shall designate in any life insurance policy the person to conduct the funeral of the insured as the owner of the policy.

2. No insurer shall contract or agree to furnish funeral merchandise or services in connection with the disposition of any person upon the death of any person insured by such insurer.

3. No insurer shall contract or agree with any funeral director or direct disposer to the effect that such funeral director or direct disposer shall conduct the funeral of any person insured by such insurer.

4. No insurer shall provide, in any insurance contract covering the life of any person in this state, for the payment of the proceeds or benefits thereof in other than legal tender of the United States and of this state, or for the withholding of such proceeds or benefits, all for the purpose of either directly or indirectly providing, inducing, or furthering any arrangement or agreement designed to require or induce the employment of a particular person to conduct the funeral of the insured.

(t) *Certain life insurance relations with funeral directors prohibited.*—

1. No life insurer shall permit any funeral director or direct disposer to act as its representative, adjuster, claim agent, special claim agent, or agent for such insurer in soliciting, negotiating, or effecting contracts of life insurance on any plan or of any nature issued by such insurer or in collecting premiums for holders of any such contracts except as prescribed in s. 626.785(3).

2. No life insurer shall:

a. Affix, or permit to be affixed, advertising matter of any kind or character of any licensed funeral director or direct disposer to such policies of insurance.

b. Circulate, or permit to be circulated, any such advertising matter with such insurance policies.

c. Attempt in any manner or form to influence policyholders of the insurer to employ the services of any particular licensed funeral director or direct disposer.

3. No such insurer shall maintain, or permit its agent to maintain, an office or place of business in the office, establishment, or place of business of any funeral director or direct disposer in this state.

(u) *False claims; obtaining or retaining money dishonestly.*—

1. Any agent, physician, claimant, or other person who causes to be presented to any insurer a false claim for payment, knowing the same to be false; or

2. Any agent, collector, or other person who represents any insurer or collects or does business without the authority of the insurer, secures cash advances by false statements, or fails to turn over when required, or satisfactorily account for, all collections of such insurer,

shall, in addition to the other penalties provided in this act, be guilty of a misdemeanor of the second degree and, upon conviction thereof, shall be subject to the penalties provided by s. 775.082 or s. 775.083.

(v) *Proposal required.*—If a person simultaneously holds a securities license and a life insurance license, he or she shall prepare and leave with each prospective buyer a written proposal, on or before delivery of any investment plan. “Investment plan” means a mutual funds program, and the proposal shall consist of a prospectus describing the investment feature and a full illustration of any life insurance feature. The proposal shall be prepared in duplicate, dated, and signed by the licensee. The original shall be left with the prospect, the duplicate shall be retained by the licensee for a period of not less than 3 years, and a copy shall be furnished to the department upon its request. In lieu of a duplicate copy, a receipt for standardized proposals filed with the department may be obtained and held by the licensee.

(w) *Soliciting or accepting new or renewal insurance risks by insolvent or impaired insurer prohibited; penalty.*—

1. Whether or not delinquency proceedings as to the insurer have been or are to be initiated, but while such insolvency or impairment exists, no director or officer of an insurer, except with the written permission of the office, shall authorize or permit the insurer to solicit or accept new or renewal insurance risks in this state after

such director or officer knew, or reasonably should have known, that the insurer was insolvent or impaired. "Impaired" includes impairment of capital or surplus, as defined in s. 631.011(12) and (13).

2. Any such director or officer, upon conviction of a violation of this paragraph, is guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(x) *Refusal to insure.*—In addition to other provisions of this code, the refusal to insure, or continue to insure, any individual or risk solely because of:

1. Race, color, creed, marital status, sex, or national origin;

2. The residence, age, or lawful occupation of the individual or the location of the risk, unless there is a reasonable relationship between the residence, age, or lawful occupation of the individual or the location of the risk and the coverage issued or to be issued;

3. The insured's or applicant's failure to agree to place collateral business with any insurer, unless the coverage applied for would provide liability coverage which is excess over that provided in policies maintained on property or motor vehicles;

4. The insured's or applicant's failure to purchase noninsurance services or commodities, including motor vehicle services as defined in s. 624.124 except for motor vehicle services purchased from a membership organization that, as of January 1, 2018, is affiliated with an admitted property and casualty insurer;

5. The fact that the insured or applicant is a public official; or

6. The fact that the insured or applicant had been previously refused insurance coverage by any insurer, when such refusal to insure or continue to insure for this reason occurs with such frequency as to indicate a general business practice.

(y) *Powers of attorney.*—Except as provided in s. 627.842(2):

1. Requiring, as a condition to the purchase or continuation of an insurance policy, that an applicant for insurance or an insured execute a power of attorney in favor of an insurance agent or agency or employee thereof; or

2. Presenting to the applicant or the insured, as a routine business practice, a form that authorizes the insurance agent or agency to sign the applicant's or insured's name on any insurance-related document or application for the purchase of motor vehicle services as described in s. 624.124. To be valid, a power of attorney must be an act or practice other than as described in this paragraph, must be a separate writing in a separate document, must be executed with the full knowledge and consent of the applicant or insured who grants the power of attorney, must be in the best interests of the insured or applicant, and a copy of the power of attorney must be provided to the applicant or insured at the time of the transaction.

(z) *Sliding.*—Sliding is the act or practice of:

1. Representing to the applicant that a specific ancillary coverage or product is required by law in conjunction with the purchase of insurance when such coverage or product is not required;

2. Representing to the applicant that a specific ancillary coverage or product is included in the policy applied for without an additional charge when such charge is required; or

3. Charging an applicant for a specific ancillary coverage or product, in addition to the cost of the insurance coverage applied for, without the informed consent of the applicant.

[1](aa) *Churning.*—

1. Churning is the practice whereby policy values in an existing life insurance policy or annuity contract, including, but not limited to, cash, loan values, or dividend values, and in any riders to that policy or contract, are directly or indirectly used to purchase another insurance policy or annuity contract with that same insurer for the purpose of earning additional premiums, fees, commissions, or other compensation:

a. Without an objectively reasonable basis for believing that the replacement or extraction will result in an actual and demonstrable benefit to the policyholder;

b. In a fashion that is fraudulent, deceptive, or otherwise misleading or that involves a deceptive omission;

c. When the applicant is not informed that the policy values including cash values, dividends, and other assets of the existing policy or contract will be reduced, forfeited, or used in the purchase of the replacing or additional policy or contract, if this is the case; or

d. Without informing the applicant that the replacing or additional policy or contract will not be a paid-up policy or that additional premiums will be due, if this is the case.

Churning by an insurer or an agent is an unfair method of competition and an unfair or deceptive act or practice.

2. Each insurer shall comply with sub-subparagraphs 1.c. and 1.d. by disclosing to the applicant at the time of the offer on a form designed and adopted by rule by the commission if, how, and the extent to which the policy or contract values (including cash value, dividends, and other assets) of a previously issued policy or contract will be used to purchase a replacing or additional policy or contract with the same insurer. The form must include disclosure of the premium, the death benefit of the proposed replacing or additional policy, and the date when the policy values of the existing policy or contract will be insufficient to pay the premiums of the replacing or additional policy or contract.

3. Each insurer shall adopt written procedures to reasonably avoid churning of policies or contracts that it has issued, and failure to adopt written procedures sufficient to reasonably avoid churning shall be an unfair method of competition and an unfair or deceptive act or practice.

(bb) *Deceptive use of name.*—Using the name or logo of a financial institution, as defined in s. 655.005(1), or its affiliates or subsidiaries when marketing or soliciting existing or prospective customers if such marketing materials are used without the written consent of the financial institution and in a manner that would lead a reasonable person to believe that the material or solicitation originated from, was endorsed by, or is related to or the responsibility of the financial institution or its affiliates or subsidiaries.

(cc) *Unfair rate increases for persons in military service.*—Charging an increased premium for reinstating a motor vehicle insurance policy that was canceled or suspended by the insured solely for the reason that he or she was transferred out of this state while serving in the United States Armed Forces or on active duty in the National Guard or United States Armed Forces Reserve. It is also an unfair practice for an insurer to charge an increased premium for a new motor vehicle insurance policy if the applicant for coverage or his or her covered dependents were previously insured with a different insurer and canceled that policy solely for the reason that he or she was transferred out of this state while serving in the United States Armed Forces or on active duty in the National Guard or United States Armed Forces Reserve. For purposes of determining premiums, an insurer shall consider such persons as having maintained continuous coverage.

(dd) *Life insurance limitations based on past foreign travel experiences or future foreign travel plans.*—

1. An insurer may not refuse life insurance to; refuse to continue the life insurance of; or limit the amount, extent, or kind of life insurance coverage available to an individual based solely on the individual's past lawful foreign travel experiences.

2. An insurer may not refuse life insurance to; refuse to continue the life insurance of; or limit the amount, extent, or kind of life insurance coverage available to an individual based solely on the individual's future lawful travel plans unless the insurer can demonstrate and the Office of Insurance Regulation determines that:

a. Individuals who travel are a separate actuarially supportable class whose risk of loss is different from those individuals who do not travel; and

b. Such risk classification is based upon sound actuarial principles and actual or reasonably anticipated experience that correlates to the risk of travel to a specific destination.

3. The commission may adopt rules pursuant to ss. 120.536(1) and 120.54 necessary to implement this paragraph and may provide for limited exceptions that are based upon national or international emergency conditions that affect the public health, safety, and welfare and that are consistent with public policy.

4. Each market conduct examination of a life insurer conducted pursuant to s. 624.3161 shall include a review of every application under which such insurer refused to issue life insurance; refused to continue life insurance; or limited the amount, extent, or kind of life insurance issued, based upon future lawful travel plans.

5. The administrative fines provided in s. 624.4211(2) and (3) shall be trebled for violations of this paragraph.

6. The Office of Insurance Regulation shall report to the President of the Senate and the Speaker of the House of Representatives by March 1, annually, on the implementation of this paragraph. The report shall include, but not be limited to, the number of applications under which life insurance was denied, continuance was refused, or

coverage was limited based on future travel plans; the number of insurers taking such action; and the reason for taking each such action.

1(ee) *Fraudulent signatures on an application or policy-related document.*—Willfully submitting to an insurer on behalf of a consumer an insurance application or policy-related document bearing a false or fraudulent signature.

1(ff) *Unlawful use of designations; misrepresentation of agent qualifications.*—

1. A licensee may not, in any sales presentation or solicitation for insurance, use a designation or title in such a way as to falsely imply that the licensee:

a. Possesses special financial knowledge or has obtained specialized financial training; or

b. Is certified or qualified to provide specialized financial advice to senior citizens.

2. A licensee may not use terms such as "financial advisor" in such a way as to falsely imply that the licensee is licensed or qualified to discuss, sell, or recommend financial products other than insurance products.

3. A licensee may not, in any sales presentation or solicitation for insurance, falsely imply that he or she is qualified to discuss, recommend, or sell securities or other investment products in addition to insurance products.

4. A licensee who also holds a designation as a certified financial planner (CFP), chartered life underwriter (CLU), chartered financial consultant (ChFC), life underwriter training council fellow (LUTC), or the appropriate license to sell securities from the Financial Industry Regulatory Authority (FINRA) may inform the customer of those licenses or designations and make recommendations in accordance with those licenses or designations, and in so doing does not violate this paragraph.

(gg) *Out-of-network reimbursement.*—Willfully failing to comply with s. 627.64194 with such frequency as to indicate a general business practice.

(2) ALTERNATIVE RATES OF PAYMENT.—Nothing in this section shall be construed to prohibit an insurer or insurers from negotiating or entering into contracts with licensed health care providers for alternative rates of payment, or from limiting payments under policies pursuant to agreements with insureds, as long as the insurer offers the benefit of such alternative rates to insureds who select designated providers.

(3) INPATIENT FACILITY NETWORK.—This section may not be construed to prohibit a Medicare supplement insurer from granting a premium credit to insureds for using an in-network inpatient facility.

(4) PARTICIPATION IN A WELLNESS OR HEALTH IMPROVEMENT PROGRAM.—

(a) *Authorization to offer rewards or incentives for participation.*—An insurer issuing a group or individual health benefit plan may offer a voluntary wellness or health improvement program and may encourage or reward participation in the program by authorizing rewards or incentives, including, but not limited to, merchandise, gift cards, debit cards, premium discounts, contributions to a member's health savings account, or modifications to copayment, deductible, or coinsurance amounts. Any advertisement of the program is not subject to the limitations set forth in paragraph (1)(m).

(b) *Verification of medical condition by nonparticipants due to medical condition.*—An insurer may require a member of a health benefit plan to provide verification, such as an affirming statement from the member's physician, that the member's medical condition makes it unreasonably difficult or inadvisable to participate in the wellness or health improvement program in order for that nonparticipant to receive the reward or incentive.

(c) *Disclosure requirement.*—A reward or incentive offered under this subsection shall be disclosed in the policy or certificate.

(d) *Other incentives.*—This subsection does not prohibit insurers from offering other incentives or rewards for adherence to a wellness or health improvement program if otherwise authorized by state or federal law.

(5) LOSS CONTROL AND LOSS MITIGATION.—This section does not prohibit an insurer or agent from offering or giving to an insured, for free or at a discounted price, services or other merchandise, goods, wares, or other items of value that relate to loss control or loss mitigation with respect to the risks covered under the policy.

History.—s. 9, ch. 76-260; s. 1, ch. 77-174; s. 19, ch. 77-468; s. 1, ch. 78-377; s. 1, ch. 79-289; s. 1, ch. 80-152; s. 1, ch. 80-373; s. 1, ch. 82-235; s. 807, ch. 82-243; s. 90, ch. 83-216; ss. 1, 2, ch. 83-342; s. 1, ch. 84-157; s. 14, ch. 85-62; s. 3, ch. 85-182; s. 1, ch. 85-233; s. 4, ch. 86-160; s. 27, ch. 87-226; s. 13, ch. 88-370; ss. 60, 65, ch. 89-360; s. 1, ch. 90-85; s. 33, ch. 90-119; ss. 186, 206, 207, ch. 90-363; s. 58, ch. 91-110; s. 256, ch. 91-224; s. 4, ch. 91-429; s. 38, ch. 92-146; s. 6, ch. 95-187; s. 1, ch. 95-219; s. 314, ch. 97-102; s. 24, ch. 99-3; s. 5, ch. 99-286; s. 1, ch. 99-388; s. 2, ch. 2000-192; s. 1, ch. 2001-178; s. 2, ch. 2002-25; s. 7, ch. 2002-55; s. 65, ch. 2002-206; s. 88, ch.

2003-1; s. 2, ch. 2003-139; s. 1028, ch. 2003-261; ss. 4, 65, ch. 2003-267; ss. 58, 80, ch. 2003-281; s. 4, ch. 2004-340; s. 87, ch. 2004-390; s. 1, ch. 2005-41; s. 2, ch. 2006-277; s. 2, ch. 2007-44; s. 8, ch. 2008-66; s. 7, ch. 2008-237; s. 6, ch. 2010-175; s. 1, ch. 2011-167; s. 10, ch. 2012-151; s. 5, ch. 2012-197; s. 7, ch. 2014-103; s. 1, ch. 2014-180; s. 14, ch. 2015-180; s. 11, ch. 2016-222; s. 83, ch. 2018-110; s. 1, ch. 2018-149; s. 1, ch. 2018-153; s. 11, ch. 2019-108.

[1]**Note.**—Section 12, ch. 2008-237, provides in part that "[e]ffective [June 30, 2008,] the Department of Financial Services may adopt rules to implement this act."

69B-186.010 Unlawful Rebates and Inducements Related to Title Insurance Transactions.

(1) The purpose of this rule is to interpret paragraph 626.9541(1)(h), F.S., which provides that it is an unfair method of competition and unfair or deceptive act or practice prohibited by section 626.9521, F.S., to engage in certain activities related to title insurance.

(2) All lists contained within this rule are intended as examples and are not exhaustive. This rule does not prohibit inducements or rebates provided by filed or approved rates or rating manuals, advertising gifts allowed by paragraph 626.9541(1)(m), F.S., or inducements and rebates otherwise expressly allowed by law.

(3) For purposes of this rule, the term "referrer of settlement service business" means any person who is in a position to refer title insurance business incident to or part of a real estate transaction, or an associate of such person. A referrer of settlement service business may be a title insurance agent, title insurance agency, title insurance company, attorney, real estate broker, real estate agent, real estate licensee, broker associate, sales associate, mortgage banker, mortgage broker, lender, real estate developer, builder, property appraiser, surveyor, escrow agent, closing agent, or any other person or entity involved in a real estate transaction for which title insurance could be issued; or any employee, officer, director, or representative of such a person or entity.

(4) As they relate to the transaction of title insurance, the following activities, whether performed directly or indirectly, for or by any referrer of settlement service business, are inducements for the sale, placement or referral of title insurance business in violation of section 626.9521 and paragraph 626.9541(1)(h), F.S.:

(a) Facilitating any discount, reduction, credit, or paying any fee or portion of the cost of an inspection, inspection report, appraisal, or survey, including wind inspection, to or for a purchaser or prospective purchaser of title insurance.

(b) Providing membership in any organization, society, association, guild, union, alliance or club at a discount, reduced rate, or at no cost to a referrer of settlement service business.

(c) Making or offering to make a charitable or other tax-deductible contribution on behalf of the purchaser or prospective purchaser of title insurance.

(d) Providing or offering stocks, bonds, securities, property, or any dividend or profit accruing or to accrue thereon to a referrer of settlement service business. However, the use of lawful affiliated business arrangements that are permitted under the Federal Real Estate Settlement Procedure Act would not violate this subparagraph and would be allowable under subsection (2) of this rule.

(e) Providing or offering employment to a referrer of settlement service business in exchange for the purchase of title insurance.

(f) Providing or paying for the printing of bulletins, flyers, post cards, labels, etc. that promote the business of a referrer of settlement service business.

(g) Furnishing or paying for the furnishing of office equipment (fax machines, telephones, copy machines, etc.) to a referrer of settlement service business.

(h) Providing or paying for cellular telephone contracts for a referrer of settlement service business.

(i) Providing simulated panoramic home and property tours to real estate brokers or real estate sales associates that they utilize to promote their listings.

(j) Providing or paying for gift cards or gift certificates to or for a referrer of settlement service business or to a purchaser or prospective purchaser of title insurance.

(k) Sponsoring and hosting, or paying for the sponsoring and hosting, of open houses for real estate brokers or real estate sales associates to promote their listings.

(l) Providing or paying for food, beverages, or room rentals at events designed to promote the business of a referrer of settlement service business other than the title insurance agent or agency.

(m) Paying advertising costs to advertise and promote the listings of real estate brokers or real estate sales associates via publications, signs, emails, websites, web pages, banners, or other forms of media.

(n) Providing an endorsement, designation of preferred status, approved status, or featured partner status on publications, signs, emails, websites, web pages, banners or other forms of media promoting the business of real estate brokers or real estate sales associates.

(o) Paying a referrer of settlement service business to fill out processing (order) forms in exchange for title

insurance contracts.

(p) Providing “leads” or mailing lists to or on behalf of a referrer of settlement service business at no cost or a reduced cost.

(q) Entering into any arrangement to provide unearned compensation to a referrer of settlement service business.

(r) Providing, or offering to provide, non-title services, without a charge that is commensurate with the actual cost, to a referrer of settlement service business.

(s) Waiving of fees, costs, or premium for title updates or endorsements requested after the issuance of the title insurance policy.

(t) Assuming any party’s responsibility to provide refunds to consumers under applicable laws and regulations.

(5) Except as prohibited by section 626.9541, F.S., expenditures for the following are not in violation of section 626.9521 and paragraph 626.9541(1)(h), F.S., or in violation of this rule:

(a) Promotional items with a company logo of the title insurance agent or agency, with a value not to exceed the amount allowed by paragraph 626.9541(1)(m), F.S., per item. “Promotional item” does not include a gift certificate, gift card, or other item that has a specific monetary value on its face, or that may be exchanged for any other item having a specific monetary value.

(b) Furnishing educational materials, such as fliers, brochures, pamphlets, or Frequently Asked Question sheets, exclusively related to title insurance for a referrer of settlement service business that are not conditioned on the referral of business and that do not involve the defraying of expenses that otherwise would be incurred by a referrer of settlement service business.

(c) Compensation paid to a referrer of settlement service business for goods and services actually performed at amounts not exceeding the reasonable fair market value of the goods and services and that is not intended to induce the referral of title insurance business.

(d) Any advertising or marketing activities that directly promote the title insurance business of the title insurance agent or agency, which may include joint participation in marketing with another party provided that the agent or agency pays the proportionate share or fair market value of the costs, and does not violate paragraph (5)(a) of this rule.

(e) A payment by a title insurance company to its duly appointed agent for services actually performed in the issuance of a title insurance policy.

(f) 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.

(6) A licensed and appointed title insurance agent is not prohibited under this rule to affix a notice to any contract or agreement, stating, “The terms of this contract are agreed to, but only to the extent that they do not violate the provisions of rule 69B-186.010, F.A.C., or paragraph 626.9541(1)(h), F.S.,” or substantially similar language.

Rulemaking Authority 624.308(1), 626.9611 FS. Law Implemented 626.9521, 626.9541(1)(h), (m) FS. History–New 2-9-16, Amended 5-13-18.

Florida Division of Insurance Agent and Agency Services Frequently Asked Questions

Marketing, Referrals & Unlawful Inducements

Can I pay real estate agents, brokers, or others for each piece of business they send to me?

No. The Florida Statutes prohibit title insurance agents and agencies from paying, allowing, giving, or offering to pay, allow or give a direct or indirect inducement for the purchase of title insurance. Paying someone for each piece of business they send to you would be considered an inducement, which would be a violation of the statutes. [Florida Statutes §626.9541(1)(h)3.a. and Rule 69B-186.010, F.A.C.]

Referral fees

The Florida Statutes prohibit title insurance agents and agencies from paying, allowing, giving, or offering to pay, allow or give a direct or indirect inducement for the purchase of title insurance. Paying someone for each piece of business they send to you could be considered an inducement, which would be a violation of the statutes. See subsection 626.9541(1)(h)3.a., F.S. This section does include paying employees of the title agency who are not licensed and appointed as title insurance agents. An example would be a title insurance agency that pays a marketing representative who is not licensed for each title insurance policy sold.

My title agent was supposed to provide me a gift card for referring business to them.

Rule 69B-186-010(4), Florida Administrative Code, provides a complete list of unfair and/or deceptive acts as they pertain to title insurance agents and agencies. Here are a few items listed in the Florida Administrative Codes which title agents cannot do:

- Provide or pay for food, drinks or room rentals at events designed to promote the business of a referrer of settlement service business other than the title insurance agent or agency.
- Pay advertising costs of real estate brokers, etc. for business referrals.
- Sponsor and host any open houses for real estate brokers etc. for business referrals.
- Provide or pay for gift cards or gift certificates for referral of business.
- Provide or pay for cellular contracts for business referrals.
- Offer any discount or reduction of any fee of the cost of an inspection, inspection report, appraisal or survey, including wind inspections, to a purchaser or prospective purchaser of title insurance.

Rebates And Unlawful Inducements:

Title agents and agencies are permitted to rebate all or part of their share of the title insurance premium as the result of a Florida Supreme Court decision in the case of Chicago Title Insurance Company v. Butler, No. 95312 (Fla. Oct. 19, 2000). This decision allows a title insurance agent or agency to rebate any portion of the agent's share of the premium to the person responsible for paying that premium. However, a rebate may not be provided to any third party as an inducement for the referral of business to the title insurance agent or agency.

Can a title agency advertise?
Yes. The ad must be honest and accurate. It should promote the title agency and not any other business. If the title agency places an ad that solicits customers for any other business, it may be viewed as an unfair trade practice and an inducement for the future purchase of insurance.

Can I or my agency advertise they offer rebates?
Yes. The advertisement must be truthful and not be misleading. The advertisement cannot say the agency is discounting the title insurance premium, as that is misleading and inaccurate. The agency must charge the promulgated rate for title insurance and then the agency may rebate any portion of their share of the premium. Some examples: Advertising that your agency charges the lowest rates is misleading in that everyone must charge the same rates in Florida. Stating your agency reduces the title insurance premium by 20% is deceptive. You must charge the same rate, but you could provide a rebate of your portion of the premium that equates to 20% of the full premium. The rebate must be given to the person/entity who pays the premium.

Is it acceptable for a vendor that a title agency does business with (i.e. an appraiser, termite company, home inspection company, etc.) to provide coupons for a discount to the title agencies customers?
It is acceptable for the vendor to do so.

Can a title agency print bulletins for a real estate agent if it charges actual cost?
Yes and you can make a profit you wish.

Can a title agency email its contacts Realtor flyers for listings and open houses which do not contain the title agency's name?
No because you're providing the Realtor free leads and doing the work for the Realtor for free.

Can a title agency have a raffle at an event to promote its own business?
Yes.

Can a title agency donate a gift card to be raffled off at an event given by a realtor?
Yes if it is to promote the business of the title agent/agency and not the realtor.

Can a title agency attend an open house and provide refreshments, and if so, is there a dollar limit on the refreshments?
Yes, if it is to promote the business of the title agent/agency. No, if it is to promote the business of the realtor or their open house.

There is no dollar limit on food. However, if you wish to share in the costs of the food and drink for an open house with a realtor, you must pay a proportional share of those costs. You cannot provide food and drinks for the realtor's open house at no cost to them.

Can a title agency contribute towards the cost of publicizing an open house?
Yes if it is to promote the business of the title agent/agency, not the realtor, and is proportionately split among the parties hosting or putting on the open house.

Would it be a violation for a title agency to sponsor and cater realtor open houses?
Yes. This answer also applies to attorney-owned title agencies, affiliated-business title agencies, and title insurers.

Is there a limit on how many $25 promotional items that a title agency can give to any particular referrer of settlement business?
No, however, promotional items may not be given in exchange for business referred.

Can my title agency invite real estate professionals to our office to hear an educational presentation by an expert in some field related to real estate closings, such as a CPA with expertise in FIRPTA (Foreign Investment in Real Property Tax Act) or a surveyor?
Yes, however, the invitation should not be based solely on business referrals.

During the presentation, can we serve lunch or other refreshments?
Yes because this is part of the event you are putting on to educate and promote yourself.

Is paying the speaker allowable?
Yes because you are paying the expert for their time. However, you cannot over pay a speaker as a way to reward them for sending business to you.

Our title agency would like to have a monthly networking, relationship-building event with local real estate agents, such as a wine tasting, a cooking class etc. Some invitees already give us business, some would be real estate agents we would like to get business from. Is this permissible as long as our per person cost does not exceed the $25 limit?
Yes but the $25 limit does not apply here because the limit only applies to items of articles of merchandise for the purposes of advertising, which these are not.

What if our per person cost is say $35, and the real estate agent pays $10 per person; would that be okay?
If you want to have them pay some of the costs of these events, that would be okay, however it is not mandatory that you do so.

Can our title agency participate in a program like "Homes for Heroes"?
You can offer a rebate to the “heroes” that meet the classification. Consider including a statement on your marketing material that this is a rebate of your agency portion of the title premium in case a competitor feels you are offering an unlawful inducement. The rebate must be properly documented in your file and on the Closing Disclosure. The Florida Insurance Code does not regulate the amount a title agency can charge for closing services; however, the fee charged must at minimum include the actual costs, fees or charges the agency must pay related to the closing.

FLORIDA BAR ETHICS OPINION
OPINION 89-4
August 15, 1989

Advisory ethics opinions are not binding.

Law firm may not allow its nonlawyer marketing director to solicit business for the firm in any manner forbidden to lawyers themselves. Nonlawyer marketing director may not be paid commissions representing a percentage of fees generated from business brought to the firm by him.

RPC: 4-5.3; 4-5.3(c); 4-5.4(a)(3); 4-7.1; 4-7.4(a) [*See* 4-7.18(a)]; 4-7.6(a); 4-7.1 through 4-7.7 [*See* 4-7.11 through 4-7.22]
Opinion: 86-4

The inquiring attorney's law firm wishes to hire a nonlawyer to solicit legal business for the firm. The lawyer expresses his view that while advertising is unprofessional and should not be allowed, straightforward solicitation should be permitted. In this regard the attorney presents several questions:

1. Can the firm hire a nonlawyer to solicit business?

2. Can the firm pay the nonlawyer either a straight salary, a salary plus commission or a straight commission?

3. Are there any new rules, regulations or guidelines that govern?

4. May the firm provide the nonlawyer with a business card indicating that the nonlawyer is a solicitor, a sales person, a production manager, or is involved in marketing?

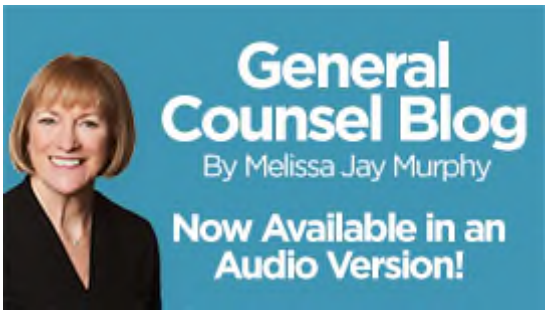
1. An attorney may hire a nonlawyer to do only such solicitation as the attorney himself is permitted to do by the Rules of Professional Conduct. The rules do not permit in-person solicitation or telephone solicitation by a lawyer or by any agent of the lawyer. The prohibition against in-person and telephone solicitation is set forth in Rule 4-7.4(a) [*See* current Rule 4-7.18(a)]. If a lawyer orders a nonlawyer employee to engage in conduct that would be a violation of the rules if engaged in by the lawyer, or if the lawyer ratifies such misconduct, under Rule 4-5.3(c) the lawyer is held responsible for the misconduct. All that the rules would allow a nonlawyer "solicitor" to do on behalf of the inquiring attorney's firm is manage whatever marketing activities the firm may wish to undertake in conformance with Rules 4-7.1 through 4-7.7 [*See* current Rules 4-7.11 through 4-7.22] of the Rules of Professional Conduct. These include advertising in public media and through direct mail campaigns.

2. A nonlawyer hired to engage in permissible marketing activities on behalf of a lawyer may be paid a straight salary. If commissions would be tied to legal fees derived from business brought to the firm by the nonlawyer's efforts, payment of those commissions would constitute a violation of Rule 4-5.4(a)(3), which forbids a lawyer to divide a legal fee with a nonlawyer.

3. The rules that govern are those identified above: Rules 4-7.1 through 4-7.7 (advertising and solicitation) [*See* current Rules 4-7.11 through 4-7.22]; Rule 4-5.3 (conduct of nonlawyer employees); and Rule 4-5.4(a)(3) (dividing a legal fee with a nonlawyer).

4. It is permissible for nonlawyer employees to be issued business cards that clearly indicate their nonlawyer status. This Committee so ruled in Opinion 86-4. Thus the nonlawyer "solicitor's" business cards must carry a disclaimer such as "not a member of the Bar" or "not a lawyer." Neither of the titles suggested by the inquiring attorney—"solicitor," "sales person," "production manager"—is permissible for the nonlawyer's business card. The first two refer to activities that the attorney cannot ethically permit the nonlawyer to do, and thus are misleading in violation of Rule 4-7.1 and 4-7.6(a) [*See* current Rule 4-7.13]. Neither permissible advertising nor impermissible solicitation is synonymous with production management, so the third term also is misleading. "Marketing director" would be an appropriate title for a nonlawyer employee responsible for permitted marketing functions.

RESPA Compliance For the Holidays: Don’t Shoot Your Eye Out!



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With an eye on RESPA, and an eye out for Florida’s Unlawful Inducements Rule, here’s a reminder on what you can and cannot do for folks that contributed to your success and prosperity in 2018.

Dear Members,

If the movie “Christmas Story” is one of your holiday traditions, you will understand the reference in the subject line of this email. Your aim may be straight and your target may be true. But when it comes to RESPA compliance you’ll shoot your eye out if you give a *Red Ryder*, carbine action, two-hundred shot air rifle to your referral sources. It’s a “thing of value!” With an eye on RESPA, and an eye out for Florida’s Unlawful Inducements Rule, here’s a reminder on what you can and cannot do for folks that contributed to your success and prosperity in 2018.

RESPA 8(a) prohibits giving anything of value pursuant to an agreement or understanding for the referral of settlement service business. In *Freeman v. Quicken Loans* (566 U.S. 624 (2012)) Justice Scalia opined that “an exchange of valuable tickets to a sporting event in return for a referral of business” would be a violation. Please. No jokes about whether tickets to the bowl game to which the Gators may be invited are a “thing of value.”

Regulation X provides a safe harbor for “normal promotional and educational activities…not conditioned on the referral of business and…and not involv(ing) the defraying of expenses that would otherwise be incurred” by the referring party.

Based upon the foregoing, gifts to only those who referred business to you is a violation unless the gift otherwise falls under the safe harbor for promotional and educational activities. Note pads, coffee mugs, desk calendars, umbrellas and the like are permitted as long as your company logo is on the gift. Hosting a holiday party and inviting both those who did and did not refer business to you would also not be a RESPA violation. But don’t give away party gifts that could be seen as defraying legitimate business expenses (e.g., new fax machine) or extravagant gifts (new Smart TV). Also be sure your referral sources are not singled out for special treatment or additional swag. And even if you are not too worried about the “RESPA police” don’t forget that RESPA Section 8(d)(5) authorizes a private cause of action.

Florida's Unlawful Inducements Rule (69B-186.010) contains many of the same prohibitions as RESPA and also provides a significant number of examples.

What is forbidden: Cash or cash equivalents such as merchant gift cards; paying membership dues; paying for a referrer's promotional materials (e.g., bulletins, flyers, post cards, labels) or office equipment; providing or paying the costs of an event which promotes the referrer's business but not your own. Under Florida law, some gifts to prospective insureds (i.e., customers) are also forbidden (e.g., offers of employment; gift cards). Also, waiver of fees, costs or premium for title updates requested ***after issuance of the title insurance policy*** are not allowed. And some prohibitions are limited to real estate brokers and sales associates (e.g., providing virtual reality tours of listed homes; sponsoring and hosting, or paying for sponsoring and hosting, of open houses to promote their listings).

What is allowed: Promotional items with your company logo which do not exceed $25 in value. (There is no limit on the number of promotional items which can be given.) Educational materials related to title insurance which do not defray expenses the referrer would otherwise incur. And advertising or marketing activities that directly promote your business even where there is joint participation in the activity by referral sources as long as they pay their fair share.

Also allowed are gifts to your employees who may have assisted in your obtaining referrals. There are no limits on the type or amount, but this exception cannot be used to funnel otherwise illegal gifts to referral sources. The activities of your employees are the activities of their employer.

Finally, lawyers are reminded that Florida Bar Rule 4-7.17(b) prohibits giving anything of value to another person for recommending the lawyer or for referrals. Also, be mindful that if an employee is tasked with marketing duties their compensation cannot be based upon the amount of legal fees derived from business brought to the firm by their efforts (Rule 4-5.4(a)(3) and Ethics Opinion 89-4). Lawyer outreach to referral sources can take the form of event sponsorships, charitable giving, and other promotional activities provided the law firm complies with the advertising rules of The Florida Bar.

Some of this is confusing and sometimes contradictory. The key is to use common sense and exercise discretion in handing out gifts of appreciation over the holidays.

I hope that this holiday season blesses you and yours and that this reminder does not cause you to look like the Grinch! Better that than shooting your eye out!

Let me know how we can help you.

Melissa Jay Murphy
Executive Vice President, Chief Legal Officer,
General Counsel and Secretary

NALA | THE PARALEGAL ASSOCIATION

CERTIFICATE OF ATTENDANCE

Certified Paralegals are required to record evidence of 50 hours of continuing legal education hours to renew the CP credential every 5 years. CLE hours are recorded in CPs' accounts through the NALA online portal. Of the 50 hours, 5 hours must be in legal ethics, and no more than 10 hours may be recorded in non-substantive areas. If attending a non-NALA sponsored educational event, this certificate may be used to obtain verification of attendance. Please be sure to obtain the required signatures for verification of attendance. The requirements to maintain the CP credential are available from NALA's web site at https://www.nala.org/certification/certtest2view. Please keep this certificate in the event of a CLE audit or further information is needed.

PLEASE COMPLETE THE SPACES BELOW AND ATTACH A PROGRAM

Session Length In Hours	Session Topics (Description and Speakers)	Validation of Attendance
1.0 Ethics	You Better Watch Out - Gifting in the Age of RESPA	JBS

Name of CP (Please Print)				NALA Account Number (On Mailing Label)
				149113
Signature of CP				Name of Seminar/Program Sponsor
				Attorneys' Title Fund Services, LLC
Address				Authorized Signature of Sponsor Representative
				John B. St. Lawrence
				Date of Educational Event:
City:		State (XX):		
Preferred e-mail address				Location:
				Online Webinar

For Office Use Only	
Substantive hours	
Non-substantive hours	
Ethics	

FL BAR Reference Number: 2410225N

Title: You Better Watch Out – Gifting in the Age of RESPA

Level: Intermediate

Approval Period: 01/01/2025 - 07/31/2026

CLE Credits

General 1.0

Ethics 1.0

Certification Credits

Real Estate 1.0