

TITLE INSURANCE & REGULATORY LAW (PREVIEW VIDEO)

The provision of transactional real estate settlement services and the issuance of title insurance policies are business practices regulated by state and federal law. The Rules Regulating The Florida Bar govern licensed attorneys who provide such services.

This chapter introduces the Real Estate Settlement Procedures Act (RESPA) and other federal regulations enforced by the Consumer Financial Protection Bureau (CFPB) which most directly affect a title agent's practice.

In addition, this chapter provides resources related to Florida's regulatory scheme which, among other things, sets premiums for title insurance policies. This chapter also includes Florida Bar Rule 4-5.7 which addresses ancillary businesses.

Resources:

- PowerPoint Presentation Slides
- Take-Aways
- RESPA Examples
- RESPA FAQs (Oct. 2020)

Title Insurance and Regulatory Law



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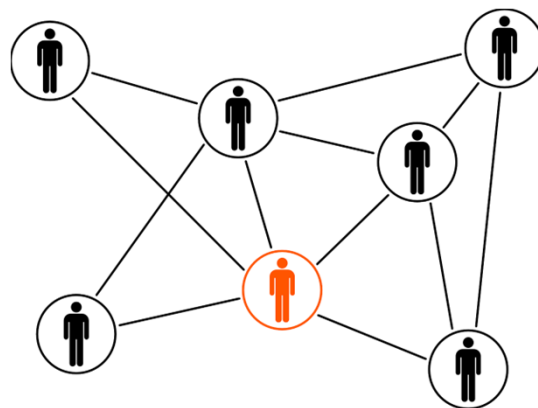


1

Introduction

Regulations affecting your title insurance and closing practice

- Acting as a title insurance agent
- Acting as a settlement agent
- Acting as an attorney
- Marketing



2

2

Three Levels of Regulation

	Title Insurance Products	Settlement Services	Legal Services	Marketing Practices
Federal	None	RESPA, TILA, FIRPTA, GLBA, FinCEN and the IRS	None	RESPA
State of Florida	OIR, DFS and Florida Statutes	DFS and Florida Statutes	None	DFS and Florida Statutes
The Florida Bar	Active license	Active license	RRTFB	RRTFB

3



3

Federal Regulators

- **U.S. Department of the Treasury**
 - **Internal Revenue Service**
 - Foreign Investment in Real Property Tax Act (FIRPTA)
 - Tax deferred like-kind exchange safe harbors
 - Ex) Sec. 1031 Exchange
 - Reporting proceeds from real estate transactions: 1099-S
 - **Financial Crimes Enforcement Network (FinCEN)**
 - Geographic Targeting Orders (GTOs) issued to title insurance underwriters

4



4

Federal Regulators

- **Federal Trade Commission**
 - Gramm-Leach-Bliley Act (GLBA) regulations
 - Safeguards Rule
 - Information security plan
 - Privacy notice
- **Consumer Financial Protection Bureau (CFPB)**
 - Dodd-Frank Wall Street Reform and Modernization Act
 - Real Estate Settlement Procedures Act (RESPA)
 - Truth-in-Lending Act (TILA)

5



5

State Regulators

- **Florida Office of Insurance Regulation (OIR)**
 - Insurance underwriters
 - Title insurance products
 - Forms approval
 - Rating (data call)
- **Florida Department of Financial Services (DFS)**
 - Licensed insurance agents and insurance agencies
 - Annual fees
 - Annual data call reporting

6



6

The Florida Bar Association

Rules Regulating The Florida Bar (RRTFB)

- Rules of Professional Conduct (Chapter 4)
 - Attorney / client relationships
 - Law firms and associations
 - Information about legal services (advertising)
- Rules Regulating Trust Accounts (Chapter 5)
 - IOTA
 - Records and procedures
- Florida Registered Paralegal Program (Chapter 20)



7



7

The Florida Bar



ETHICS	- Real Estate	<ul style="list-style-type: none"> • Advertising and Solicitation • Associations, Foundations and Unions • Attorney-Client Relationship • Banks • Barter Exchange • Business Activities of Lawyers • Charity • Client Funds and Property • Collection Agencies • Communications with Represented Person • Community Service and Educational Activities • Confidentiality and Attorney-Client Privilege • Conflict of Interests • Corporate Counsel • Crimes and Fraud • Criminal Defense Attorneys and Prosecutors • Degrees, Diplomas and Titles • Disabled Client • Disciplined Attorneys
Search Ethics Opinions	Closing agent for sale of business 97-2	
Ethics Opinions by Number	Closing attorney for lender disclosing title irregularity to unrepresented purchaser-borrower 65-58	
Subject Index of Ethics Opinions	Condemnation Cases	
Proposed Advisory Opinions	Contingent fee charged in addition to court-awarded fee 67-1	
Ethics Hotline	Landowners association urging members to employ particular lawyer for litigation 74-25	
Ethics Articles	Statutory attorney's fee collected by lawyer on annual retainer 60-33	
Frequently Asked Ethics Questions	Disputed fund held in trust 02-6	
Advertising Regulation and Information	Handling closings for lender for fixed monthly compensation 66-29	
	Helping real estate clients obtain loans 64-77	
	Lender charging attorney's fee to	
	Borrower 63-21 , 69-39 , 87-8	
	Customers 87-8	
	Seller 64-56	
	Member of Lawyer's Title Guaranty Fund representing client on claim against fund 66-11	
	Mortgage foreclosures	
	Fee award sought by lender's in-house counsel 87-8	
	Paralegal preparing documents and attending closings 73-43 , 89-5	
	Participating in client's consulting service for condominium developers 63-37	
	Preparing closing instruments at request of real estate broker 61-1 , 67-14	

8



8

Federal Regulation



9

Real Estate Settlement Procedures Act (RESPA)

- Codified at 12 U.S.C. Secs. 2601-2617
 - Amended numerous times since 1974 passage
 - Purpose (Sec. 2601(b))
 - Effective advance disclosure of settlement costs
 - Elimination of kickbacks or referral fees
 - Caps on requirements to fund escrow accounts
- Implementing regulations at 12 C.F.R. Pt. 1024 (Reg. X)

10



10

Real Estate Settlement Procedures Act (RESPA)

- Purpose (Sec. 2601(b))
 - Ensure advance disclosure of settlement costs
 - Uniform settlement statement (Sec. 2603)
 - Home buying information booklets (Sec. 2604)
 - Elimination of kickbacks and referral fees
 - Prohibition against kickbacks and unearned fees (Sec. 2607) a/k/a “RESPA Section 8”
 - Title companies; liability of seller (Sec. 2608)
 - Prohibition of fees for prep of truth-in-lending, uniform settlement, and escrow account statements (Sec. 2610)

11



11

Real Estate Settlement Procedures Act (RESPA)

- Exempted transactions (Sec. 2606)
 - (a) Transactions involving extensions of credit –
 - Primarily for business, commercial, or agricultural purposes; or
 - To government or governmental agencies or instrumentalities
 - (b) Interpretation requires regulations to mirror exemption provisions found in Truth in Lending Act (TILA)
- Jurisdiction of courts; limitations (Sec. 2614)
 - U.S. district court for actions on Secs. 2605, 2607 or 2608
 - Statute of limitations either 1 or 3 years depending on section

12



12

Real Estate Settlement Procedures Act (RESPA)

- Contracts and liens; validity (Sec. 2615)
 - No effect on validity or enforceability of contracts, mortgages, or liens in connection with federally related mortgage loan
- State laws unaffected; inconsistent Federal and State provisions (Sec. 2616)
 - State laws providing greater protection not inconsistent with RESPA
- Authority of Bureau (Sec. 2617)
 - Prescribe rules, regulations, interpretations and grant exemptions
 - Safe harbor for Bureau when acting in good faith
 - Conduct investigations / hearings and obtain contempt orders

13



13

Real Estate Settlement Procedures Act (Regulation X)

Relevant sections

- Prohibition against kickbacks and unearned fees (Sec. 1024.14)
 - Expanded definitions for referral fees, fee-splitting and thing of value
 - Agreement and thing of value defined broadly
 - List of permissible fees, salaries, compensation, or other payments
 - Title underwriter payments to title agents
 - Real estate broker payments to sales agents
 - Employer to employee payments for referral activities
 - Normal promotional and educational activities not conditioned on referrals and which do not defray expenses otherwise incurred by referrer

14



14

Truth in Lending Act (Regulation Z)

Title 12: Banks and Banking, Ch. X, Pt. 1026 (12 C.F.R. Pt. 1026)

- **Subpart A – General**
- Subpart B – Open-End Credit
- **Subpart C – Closed-End Credit**
- Subpart D – Miscellaneous
- **Subpart E – Special Rules for Certain Home Mortgage Transactions**
- Subpart F – Private Education Loans
- Subpart G – Credit Card Accounts and Student Loans
- **Appendix H – Closed-End Model Forms and Clauses**
- **Supplement I – Official Interpretations**

15



15

Truth in Lending Act (Regulation Z)

Subpart E – Special Rules for Certain Home Mortgage Transactions

- 1026.36—Prohibited acts or practices and certain requirements for credit secured by a dwelling
 - Dodd-Frank mandate: Loan Originator Compensation rule (LOC)
 - Loan originator v. creditor
 - Seller financing exemptions (1 property; 3 property requirements)
 - Business, commercial, agricultural; institutional owner exemptions
- 1026.37—Content of Loan Estimate
- 1026.38—Content of Closing Disclosure

16



16

Federal Restrictions on Referral Fees, etc.



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17

Business Referrals / “Affiliated Business Relationships”

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.

18

Settlement Agent Referrals

Upstream (referrers)

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



Downstream (referents)

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

19

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

20



20

What Kinds of Promotions/Business Arrangements ARE Allowed?



21

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/facilities furnished/services performed
4. **8(c)(4) Affiliated Business Arrangements**
5. Payments prescribed in CFPB regulations

22



22

Allowed Under RESPA 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



23



23

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
- (You may not give incentives for consumers referring other business)
- State law may limit such practices as well

24



24

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



25



25

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”



26
26



26

Drawing Promotion Example from CFPB FAQ

POP QUIZ: Okay or not okay?

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

A: **Probably okay under RESPA**

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



27

27

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



28

28

State Regulation



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29

Florida Administrative Code (F.A.C.)

Rule Chapter 69B-186: Title Insurance

- 69B-186.008 Escrow Disbursements
 - OIR response to inaccurate premium disclosure on CD
 - Accurate premium disclosure
 - Acknowledgement by settlement agent; authorization by parties
- 69B-186.010 Unlawful Rebates and Inducements Related to Title Insurance Transactions
 - Interprets paragraph 626.9541(1)(h), F.S.
 - Non-exclusive list of prohibited practices
 - Lists safe harbors (e.g., promotional items; educational materials)

A screenshot of the Florida Administrative Code & Florida Administrative Register website. The page displays the title 'Rule Chapter 69B-186' and 'Chapter Title: Title Insurance'. Below this, there is a table titled 'View Individual Rules'. The table has columns for 'Rule No.', 'Rule Title', and 'Effective Date'. Two rules are listed: '69B-186.008' with the title 'Escrow Disbursements' and an effective date of '01/01/2011', and '69B-186.010' with the title 'Unlawful Rebates and Inducements Related to Title Insurance Transactions' and an effective date of '01/01/2011'.

30

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30

Florida Administrative Code (F.A.C.)

Rule Chapter 69O-186: Title Insurance Rates

- 69O-186.003 Title Insurance Rates
 - Original issue (owner; leasehold; mortgage); Reissue; Simultaneous etc.
 - Unlawful rebates or abatements
- 69O-186.005 Premium Schedule Applicable to...Endorsements
- 69O-186.008 Escrow Requirements
 - Deposits; disbursement of certain forms of uncollected funds
- 69O-186.013 and .014 Statistical Gathering (i.e., data call)

31



31

Florida Statutes (F.S.)

Florida Insurance Code: Administration and General Provisions

- Ch. 626 Insurance Field Representatives and Operations
 - Part V: Title Insurance Agents
 - Sec. 626.841(1), F.S. defines "Title insurance agent" as a person appointed by title insurer (i.e., underwriter)
 - Sec. 626.8473(8), F.S. requires attorney have separate trust account
 - Part IX: Unfair Trade Practices
 - Sec. 626.9521, F.S. prohibits and prescribes penalties
 - Sec. 626.9541, F.S. defines unfair or deceptive acts or practices
 - (h)3. applicable to title insurance

32



32

Florida Statutes (F.S.)

Ch. 627, F.S. Insurance Rates and Contracts: Title Insurance Contracts

- Sec. 627.7711, F.S. defines “closing services,” “primary title services,” “premium,” “title insurer,” and “title search”
- Sec. 627.7841, F.S. requires insuring “the gap”
- Sec. 627.7842, F.S. requires deletion of certain standard exceptions where survey and affidavits are provided as long as agent has no adverse knowledge
- Sec. 627.798, F.S. requires notification to purchaser-mortgagor in situations where loan policy issued but owner policy declined (form at 690-186.002)

33



33

Department of Financial Services (DFS) FAQ

Myfloridacfo.com > Division > Agents

- Title Agency – General Issues
 - \$200 annual surcharge
- Settlement Statement Charges
 - Fiduciary responsibilities
 - Bait and switch
- Marketing, Referrals & Unlawful Inducements
 - Referral fee prohibition examples
 - Truthful advertising
 - Promoting agency v. promoting referrer

✓ AGENT AND ADJUSTER GENERAL LICENSING AND COMPLIANCE
✓ AGENCY LICENSING AND COMPLIANCE
✓ BAIL BOND AGENTS
✓ BAIL BOND AGENCY
✓ CONTINUING EDUCATION (CE)
✓ EAPPOINT AND APPOINTMENTS
✓ EXAMINATIONS
✓ NAVIGATORS
✓ PROVIDERS (EDUCATION)
✓ PUBLIC ADJUSTERS
✓ TITLE AGENTS
✓ TITLE AGENCY
✓ TITLE CLOSINGS
✓ TITLE ESCROW ACCOUNTS
✓ WARRANTY LICENSES

34



34

The Florida Bar Association



Rules Regulating The Florida Bar

- Rule 4-5.7 Responsibilities Regarding Nonlegal Services
 - (a) Services Not Distinct From Legal Services
 - (b) Services Distinct From Legal Services
 - (c) Services by Nonlegal Entity
 - (d) Effect of Disclosure of Nature of Service
 - Goal: avoid misunderstanding by recipient of services

35



35

Questions?

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36

36

Title Insurance and Regulatory Law Take-Aways

1. Regulators
 - a. Federal
 - i. Treasury
 1. IRS
 - a. FIRPTA
 - b. Section 1031 like-kind exchanges
 - c. Form 1099-S (Proceeds from real estate)
 - d. Form W-9 (Request for SS#)
 2. FinCEN
 - a. Geographic Targeting Orders
 - ii. Federal Trade Commission
 1. Gramm-Leach-Bliley Act (GLBA) privacy notice
 - iii. Bureau of Consumer Financial Protection (CFPB)
 1. RESPA and Regulation X
 2. TRID and Regulation Z
 - a. Loan Originator Compensation (LOC) rule
 - b. State
 - i. Financial Services Commission
 1. Office of Insurance Regulation (OIR)
 - a. Regulates underwriters
 - i. Sets rates/data call
 - ii. Approves insurance forms
 2. Department of Financial Services (DFS)
 - a. Regulates licensed title agents and agencies
 - b. Data call (agency compliance)
 - c. The Florida Bar
 - i. Trust account compliance
 - ii. Advertising restrictions
 - iii. Ethical – customer communication of representation/non-representation
2. RESPA - 12 USC Secs. 2601-2617 and 12 CFR Pt. 1024
 - a. Applies to federally related residential mortgage loan transactions –Prohibits kickbacks and referral fees
 - i. No paying unearned fees
 - ii. No payment or receipt of a “thing of value” for referral of business
 - b. Seller cannot require buyer to use a particular title agent if buyer is paying for title insurance
 - c. Affiliated Business Arrangements (AfBA) – 12 CFR 1024.15
 - i. Must be legitimate business

- ii. Disclosure to the customer
 - iii. Only “thing of value” is return on ownership interest
 - d. Appendix B to Part 1024 – Illustrations of Requirements of RESPA
- 3. 12 CFR Sec. 1026.36 (TILA – Regulation Z) – Loan originators
 - a. Restrictions on private financing
 - i. Seller-financing exceptions (one/three properties rules)
 - ii. Other exceptions
 - 1. Entity in title
 - 2. Business, commercial or agricultural purpose loans
- 4. Florida Statutes and Regulations
 - a. Florida Unfair Methods of Competition and Unfair or Deceptive Acts applies to all transactions
 - i. Prohibits paying unlawful rebates
 - ii. Butler Rebate is lawful
 - iii. 69B-186.010 F.A.C. – clarifies Unlawful Inducements related to title insurance transactions
 - b. Chapter 627
 - i. Primary Title Services – determining insurability, clearing title objections, issuing the policy – paid with share of title insurance premium which is set by the state
 - ii. Closing Services – services to close the transaction (preparing documents, disbursing funds, conducting the closing, etc.) - paid by charging a closing fee, determined by title agent
 - 1. Services may be itemized if not misleading or deceptive
 - iii. Minimize the gap between date of Commitment and date of Policy
 - 1. Update the title search and Commitment right before closing
 - 2. Record documents immediately after closing
 - iv. Remove standard policy exceptions when required
 - 1. Remove survey exception if you have a survey, and make specific exceptions for matters shown on the survey
 - 2. Remove parties in possession and construction lien standard exceptions if you have a Seller’s affidavit addressing those matters
 - v. Keep evidence of your title search for 7 years
- 5. Florida Bar Rules
 - a. 4-5.7 – Providing services separate from legal services
 - i. If someone thinks you are their lawyer, you are their lawyer
 - ii. Make clear to clients who you do and who you do not represent and what services you will and will not provide
 - iii. Best to do in writing.
 - iv. Recommend they seek independent counsel

RESPA Examples

Promotional Items v. Defraying Expenses

Q. Can a title company give a real estate agent note pads with the title agent's name on them?

A. Yes. Note pads with the title company's name on them would be considered normal promotional items and would not be prohibited under RESPA. However, note pads with the real estate agent's name on them would likely violate RESPA as they would "defray" the real estate agent's marketing expenses.

Joint Events/Sponsorship

Q. A local real estate agent hosts a group of clients for a golf tournament. They ask the title company to sponsor a hole. Is it OK?

A. Depends. Probably OK. The title company should make sure it can put signage up at the hole and be present at the tournament, and that it is paying to market its services.

Pro rata Marketing

Q. A real estate broker and a title company agree to jointly place a full-page advertisement in a local newspaper. Each company gets exactly one-half of the page to advertise its services. Each company pays one-half of the cost of the advertisement. Does this comply with RESPA?

A. Yes. As long as each is paying their proportionate share.

Markup or Overcharge

Q. A lender collects from the borrower an appraisal fee of \$200, listing the fee as \$200 on the closing disclosure. If the appraisal is performed by a third party, and only costs \$175, can the lender keep \$25?

A. Not unless the lender is being paid for services performed. It would violate Section 8(b) for the lender to keep a portion of the appraisal fee other than for services rendered. If the lender keeps \$25, and does not perform services, it would violate RESPA.

(This example also applies when substituting title agent for lender, and title search fee for appraisal fee.)

Prizes and Gifts

Q. Can a lender set up a contest for real estate agents under which the agent who provides the lender with the most business will win a trip to Hawaii?

A. No. Under RESPA, the trip itself, and even the opportunity to win the trip, would be a thing of value given in exchange for the referral of business.

Prizes and Gifts to the Borrower

Q. Can a title company give the borrower an incentive, such as a chance to win a trip, for doing business with the title company?

A. Depends. RESPA does not prohibit a lender or settlement service provider from giving the borrower an incentive for doing business with it. However, this assumes the incentive is not based on the borrower referring business to the lender or settlement service provider.

Education

Q. A title company sponsors a continuing education class for real estate agents. At the class, the title company provides sandwiches from a local deli and provides the agents with company branded materials. RESPA compliant?

A. Depends. A title company can sponsor an educational event as a way to promote its services, so long as the costs associated with the event do not defray expenses that the real estate agent would otherwise encounter and are not conditioned on the referral of business. An event at a title company office with a basic lunch would be different from an all-expenses paid educational event at a high-end resort.

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).

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.