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RECOMMENDATIONS

RESPA at 50

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

General Recommendations

	Issue	Problem	Recommendation
SUPERVISORY/GUIDANCE SOLUTIONS			
1	RESPA Section 8 prohibits giving a thing of value for a referral. It does not prohibit someone from making a referral or steering a borrower to a particular outcome.	Structuring RESPA compliant marketing services or related arrangements is challenging because regulators interpret RESPA Section 8 as a general steering prohibition and not a prohibition on the payment of things of value for referrals.	Issue supervisory guidance and revise Regulation X to reflect that RESPA Section 8 only prohibits the payment of things of value for actual referrals of settlement service business.
2	The CFPB must prove three distinct elements to establish a RESPA violation: (i) an agreement or understanding, (ii) a thing of value, and (iii) a referral of settlement services.	The CFPB, in its guidance and enforcement actions, often blurs the elements such that one action will constitute one or more elements. (e.g., Digital Mortgage Comparison Shopping Advisory Opinion.)	Reform examination practices to require CFPB supervisory and enforcement staff to demonstrate the elements of a RESPA violation before it determines that a settlement service provider has committed a violation.
3	The CFPB ignores and rejects several courts' interpretation of RESPA Section 8(c)(2) in its enforcement and regulatory actions.	The CFPB arguably applies its own interpretations of laws and rejects interpretations already adopted by the courts.	Release a statement acknowledging how Freeman, PHH, and other cases have changed the interpretation of RESPA, and revise Regulation X accordingly. (e.g., Regulation X prohibits unearned fees despite the holding of Freeman.)
REGULATORY SOLUTIONS			
1	Housing counseling services and counselor recommendations do not constitute a thing of value.	The CFPB reintroduced uncertainty and risk into the relationship between creditors, counselors, and their mutual customers with the shuttering of the No-Action Letter program in 2022 and the HUD Housing Counselor No-Action Letter.	Clarify that providing housing counseling services with a referral is permissible under RESPA by stating in Regulation X that housing counseling services do not constitute a thing of value.
2	RESPA does not define who is considered an employee. This makes it difficult to rely on the employee/employer exception to RESPA.	This ambiguity makes it difficult to determine whether the Section 8(c)(2) exception for bona fide employee compensation applies to a particular compensation arrangement.	Define "bona fide employee" as, "any individual who qualifies as a part or full-time employee (as opposed to being an independent contractor) under applicable state law."
3	It is unclear when a Section 8 claim accrues.	It is an open question as to which action constitutes a "violation" that triggers the start of the three-year statute of limitations.	The CFPB should define the "date of the violation" as the date of payment by the borrower, usually the date of closing, because that is when the settlement service provider earned the thing of value.

Marketing Services Agreements and Desk Rentals

	Issue	Problem	Recommendation
SUPERVISORY/GUIDANCE SOLUTIONS			
1	Whether the amount paid for a settlement service is a hidden referral fee is judged according to its general market value.	The CFPB determines the reasonableness of the goods, services, or facilities provided under a desk rental agreement according to its general market value, which is the value of the good, service, or facility to a non-settlement service provider.	Replace the general market value standard with a fair market value standard. Under this standard, the compensation paid must be reasonably related to the value of the facilities furnished, considering how valuable the facility is to other settlement service providers.
REGULATORY SOLUTIONS			
1	RESPA's limitations on the ability for settlement service providers to provide compensation to marketers makes it difficult to structure marketing services agreements (MSAs).	The current MSA exception provides little clarity or certainty to lenders who wish to make use of the exception.	Create a required disclosure to consumers for lenders who use a settlement service provider that is party to an MSA, making it clear that the borrower can use other settlement service providers. This disclosure would be required in lieu of limiting the compensation for MSAs to the fair market value of the agreement.

Read the executive summary and full report at mba.org/RESPA8.

Digital Marketing and Lead Generation

	Issue	Problem	Recommendation
SUPERVISORY/GUIDANCE SOLUTIONS			
1	The Digital Mortgage Comparison Shopping Advisory Opinion's reliance on RESPA to prohibit non-neutral displays of lenders is based on the erroneous view that RESPA prohibits steering.	The CFPB may believe that the presentation of settlement service provider choices could raise UDAAP concerns. However, these concerns do not constitute a RESPA violation because under RESPA paying fair market value for marketing services is permissible.	Repeal the Digital Mortgage Comparison Shopping Advisory Opinion — leaving in place Digital Marketing Circular 2024-1. The Circular reflects that the appropriate focus is UDAAP and not RESPA.
REGULATORY SOLUTIONS			
1	Mortgage lenders are often introduced to borrowers through referrals from other professionals, but the CFPB seems to view suspiciously marketing to anyone other than the consumer directly.	The CFPB has raised issues with marketing to referral sources in consent orders without any clarity as to what made it problematic.	Amend Regulation X to provide an exception to RESPA's anti-kickback provision for advertising and marketing to referral sources.
2	Lead generation is not a referral.	The CFPB fails to make it clear that the purchase of leads not coupled with a recommendation (i.e., absent an affirmative endorsement) is not a referral.	Amend Regulation X to provide an exception to RESPA's anti-kickback provision for lead generation activities that do not include an affirmative endorsement.
3	Targeted mass marketing is still mass marketing.	Mass marketing is not a referral that affirmatively influences a consumer just because the marketing is targeted towards a particular consumer profile.	Clarify in Regulation X that the definition of referral does not include a mass marketing advertisement that is tailored for individual borrowers.

Affiliated Business Arrangements

	Issue	Problem	Recommendation
SUPERVISORY/GUIDANCE SOLUTIONS			
1	The factors for determining whether an Affiliated Business Arrangement (AfBA) is bona fide and compliant with RESPA are outdated.	Settlement service providers that try to establish and operate a RESPA-compliant AfBA must rely on 28-year-old standards to structure their businesses. (HUD's 1996-2 Guidance.)	Eliminate certain outdated factors, including whether the affiliate has dedicated office space, whether the affiliate does business with parties other than those that created the affiliate, and whether the workforce of the affiliate is made up of employees or independent contractors.
2	Neither the opportunity to invest or purchase shares in an AfBA nor the possibility of receiving profit distributions should be considered a thing of value that violates RESPA Section 8.	If investing in a business by a person in a position to refer business is a violation of RESPA, it would be impossible for parties to create AfBAs to compliantly share profit distributions with owners.	Recognize that the offer of an investment opportunity and anticipated profit distributions are not a thing of value in the context of AfBAs.
3	The profitability of an AfBA should not be an indicator of the AfBA's compliance with RESPA.	The extent to which an AfBA is successful, and its owners make a profit exceeding initial capital contributions, should not be an indicator of noncompliance.	Provide guidance making it clear that a positive rate of return on an investment is not evidence of an improper AfBA.
REGULATORY SOLUTIONS			
1	An affiliated business disclosure can only be delivered after satisfying E-Sign Act requirements.	The party providing the affiliated business disclosure must first provide disclosures required under the E-Sign Act and obtain the consumer's consent to receive the affiliated business disclosure electronically.	Amend Regulation X to permit an affiliated business disclosure to be provided electronically without needing to comply with the E-Sign Act.
2	Describing an organizational chart in the AfBA disclosure is often confusing and provides more information than a consumer needs to understand there is an affiliated relationship.	Regulation X requires an affiliated business disclosure to describe the affiliated business relationship. This often requires owners of an affiliated business to describe multiple ownership layers with trust structures and/or holding companies that have little meaning to the average consumer.	The party providing an affiliated business notice should only need to identify that it has some relationship with the party to whom the consumer is being referred.
3	"Required use" should not include disincentives to shop for settlement services.	Regulators have interpreted the definition to exclude large discounts or rebates that are alleged to act as a disincentive to consumers shopping. This interpretation requires the consumer to forego the discount.	Revise the definition of "required use" to emphasize that the term includes a bona fide discount of any amount. Additionally, create an exception to the definition of "required use" for creditors that refer borrowers to their AfBAs for settlement services.
STATUTORY SOLUTIONS			
1	TRID requires the consumer to receive accurate fee disclosures, making the fee estimates on the affiliated business disclosure potentially inaccurate and confusing to the consumer.	Regulation X requires the affiliated business disclosure to include a range or estimate of fees charged by the AfBA. This means the affiliated business disclosure provides less accurate information to a consumer regarding fees than the lender is required to provide as part of the loan estimate.	Revise statute, Regulation X, and the model disclosure to remove the estimated fee section.

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