NATIONAL ASSOCIATION OF REALTORS®

MARKETING AND SERVICES AGREEMENTS IN AN ENFORCEMENT ERA

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INTRODUCTION

Real Estate Settlement Procedures Act (RESPA)

- Most important and most controversial statute affecting settlement service industry
- 2. Statute defies BUSINESS LOGIC
- 3. However, lenders that solicit referral fees are subject to severe penalties
 - Criminal penalties
 - Treble damages

4.\`RESPA both

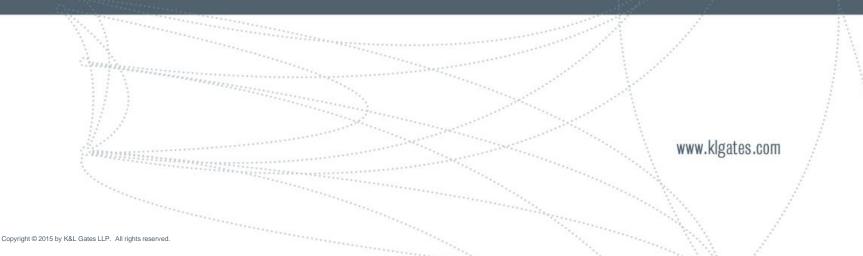
- Consumer disclosure statute
- Anti-kickback statute

Consumer Disclosure Law

- Idea: Give Buyers and Sellers <u>full disclosure</u> of costs of transaction
- 2. Disclosures
 - GFE
 - Special Information Booklets
 - HUD-1 Settlement Statements

- Servicing transfer information
- Escrow Information
- Full disclosure Mortgage Broker Fees
- RESPA disclosures will be integrated into TILA disclosures
 - August 25, 2015
 - Goodbye GFE and initial TIL = Loan Estimate
 - Goodbye HUD-1 and final TIL = Closing Disclosure

Section 8(a) - Anti-Kickback Provisions



Anti-kickback Law

- Idea: Eliminate <u>abusive practices</u> such as payment of <u>kickback fees</u> which drive up cost of product to consumers
- 2. 5 Elements of a Section 8(a) kickback
 - Section 8(a) says it is illegal to <u>Give</u> or <u>Receive</u> any: (i) thing of value pursuant to (ii) an agreement or understanding to (iii) refer (iv) settlement services, in connection with (v) a federally related mortgage loan

Anti-kickback Law (cont'd)

i. Federally Related Mortgage Loan = Any loan secured by a first or subsequent lien on a 1 – 4 family residential property

<u>includes</u>

- ✓ Refinances
- ✓ Purchase money mortgages
- ✓ Second liens
- ✓ ARMs
- ✓ Reverse mortgages
- ✓ Interest only mortgages

<u>excludes</u>

- ✓ Commercial loans
- ✓ Construction loans
- √ Temporary financing
- ✓ Property over 25 acres
- ✓ Business purpose loans

Anti-kickback Law (cont'd)

- ii. Settlement Services = Anything done by Title Agents; Attorneys; Real Estate Agents; Mortgage Brokers; Banks
 - Title searches
 - Credit reports / appraisals
 - Origination of loans
 - Title insurance, etc.

Anti-kickback Law (cont'd)

- iii. Referral = Any conduct intended to influence the selection of a particular settlement service provider
- iv. Agreement or Understanding = Need not be in writing or even articulated or verbalized may include a practice or course of action where the receipt of a THING OF VALUE is understood
 - Wink, wink

Anti-kickback Law (cont'd)

v. Thing of Value = Broadly defined to be virtually anything one receives in consideration for making a referral

\$

- Fax machines
- Free advertising

- Commissions
- Discounts

Trips

Computer

VIAGRA

Property

- Low interest loans
- Ipods

Football tickets

IMPORTANT: ALL <u>5 ELEMENTS</u> MUST BE PRESENT. ANY ONE MISSING: Not a violation of RESPA

Section 8(b) – Splitting of Unearned Fees

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Splitting Fees May Also Be a Problem Section 8(b) says

No <u>person shall give</u> . . . No <u>person shall accept</u> a split or percentage in connection with a real estate settlement service other than for services rendered

A referral is not required to violate Section 8(b).

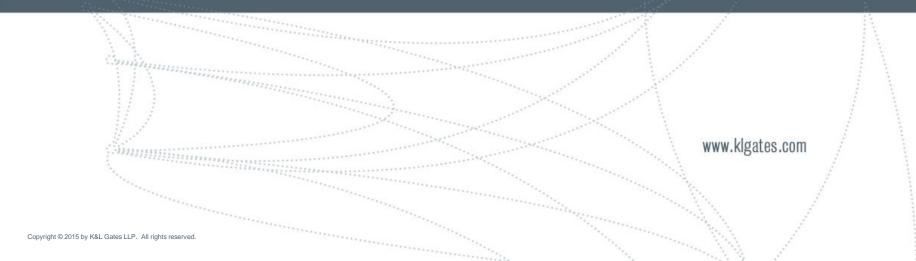
Circuit Courts Split on Fee Splitting

- 4 Circuit Courts (7, 4, 8 and 5) say if you don't split mark-up = no violation of 8(b)
- 2. 3 Circuit Courts (11, 2 and 3) say if you mark up a third-party fee without doing any service = violation of 8(b)
- 3. U.S. Supreme Court settles the split

Freeman v. Quicken Loans

- Supreme Court holds two or more parties must split unearned fee to violate Section 8(b)
- Settlement service providers may mark up third party fees, so long as provider does not split mark-up with another party
- If mark-up is split with another party split must be based upon services rendered

Section 8(c) – Exceptions to RESPA Anti-Kickback Provisions



Exceptions - Section 8(c)

Congress recognized certain exceptions where paying a referral fee is ok

- To an Attorney for services actually performed
- By a Title Company to its duly appointed <u>Title</u>
 Agent for services performed in issuance of a title policy
- By a Lender to its duly appointed Agent
- Cooperative Agreements between listing and selling agents

Exceptions - Section 8(c) (cont'd)

Congress recognized certain exceptions where paying a referral fee is ok (cont'd)

- Payments by <u>Employer</u> to <u>Employee</u>
- Secondary Market Transactions
- Affiliated Business Arrangements
- Section 8(c)(2) payments for <u>services</u> <u>rendered</u> or <u>goods/facilities actually</u> <u>provided</u>

Elements of Section 8(c)(2)

- Payment for Goods Provided and/or Services Performed
- 2 Part Test
 - Good/Services must be <u>actual</u>, <u>necessary</u> and <u>distinct</u>
 - Payment must be commensurate with the value of goods/services

Interest In MSAs Has Increased

- 1. Significant increase in FHA net worth requirements soured many prospective AfBA members
- 2. New QM Rules
 - affiliated charges counted toward 3% cap
- 3. Advantages to MSAs
 - no capitalization
 - no infrastructure
 - payment not tied to volume

RESPA Interpretive Rule

- A. Marketing and Service Agreements
 - 1. Been around forever
 - 2. HUD finally weights in June 25, 2010
 - 3. Claims per-transaction agreements suspect

RESPA Interpretive Rule (cont'd)

B. Two Types of Marketing Agreements

- 1. Flat Fee Agreements
 - most prevalent
 - payment <u>not</u> for referral of particular transaction
 - services include signage, web banners, brochures, customer lists, co-advertising, etc.
- 2. Per-Transaction Agreements
 - Market to particular customers
 - no sale = no fee earned

RESPA Interpretive Rule (cont'd)

C. HUD Interpretive Rule June 2010

- 1. HUD stuck with 8(c)(2) Exemption
- 2. But HUD chips away at Exemption
 - opposes direct consumer solicitations
 - opposes directly handing consumer information
 - opposes exclusivity
 - prefers referrer be an agent
 - prefers written agreement
 - prefers written disclosure
- 3. Individual analysis required

CFPB Weighs In: Lighthouse Title Consent Order

A. Background

- 1. Lighthouse enters into series of MSAs with various real estate brokers
 - in return, brokers would refer title business
 - without MSAs, Lighthouse feared loss of business
 - no determination of FMV under the MSA

2. CFPB alleges

- monthly fee based upon revenues generated
- monthly fee based on what competitors willing to pay brokers
- failure to monitors brokers to confirm services actually provided

all evidence payments made for referral of business

CFPB Weighs In: Lighthouse Title Consent Order

B. CFPB Prouncements in Lighthouse Consent Order

- 1. Brokers with MSA referred more title business to Lighthouse than brokers that had no agreement
- 2. Entering a contract is a "thing of value" even if fees paid under contract are at FM
- 3. Entering into a contract with an understanding that brokers will refer title busienss violates Section 8(a) of RESPA

CFPB Weighs In: Lighthouse Title Consent Order

C. What Happened to Lighthouse?

- Lighthouse and its officers, agents, servants and employees enjoined from violating RESPA
- 2. \$200,000 civil money penalty
- 3. All expenditures worth more than \$5 must be documented for 5 years
- 4. Forced to terminate all existing MSAs

CFPB Weighs In: Lighthouse Title Consent Order

D. Lessons from Lighthouse Consent Order

- 1. CFPB makes clear that "quid pro quo agreements" violate RESPA
- 2. Contract considered a thing of value (one of the elements of a Section 8(a) violation)
- 3. Independent third party valuation a must
- 4. Audit to confirm services performed a must

Important MSA Considerations

A. Best Practices

- 1. Flat Fee Agreements
 - Per-transaction Agreements more difficult to defend
- 2. Services should be geared toward advertising
 - Banner on webpage
 - Signage in offices
 - Racks of brochures
 - Co-advertising
- 3. Perform audit to verify all services set forth in MSA
- 4. Do not pay for direct customer solicitations
 - MSA should not include payment for directly soliciting consumers
- 5. Avoid exclusive arrangements

MSAs Not Without Risk (cont'd)

- A. Best Practices (cont'd)
 - 5. Avoid preferential designations
 - "preferred lender," "outstanding," "exceptional," etc.
 - 6. Payment for "access" to sales staff frowned upon
 - access to sales meetings in particular
 - difficult to value
 - 7. Disclosure to consumers encouraged
 - Similar to affiliated business disclosure
 - Or included in affiliated business disclosure

MSAs Not Without Risk (cont'd)

A. Best Practices (cont'd)

- 8. Monthly fee <u>must</u> be commensurate with value of services
 - fair market value
 - lots of factors go into determining value
 - number of offices
 - number of agents
 - number of listings
 - hits on webpage
 - circulation of advertisements
 - etc.
 - independent third party valuation <u>strongly</u> recommended

MSAs Not Without Risk (cont'd)

A. Best Practices (cont'd)

- Changing monthly marketing fee must be for objective reasons
 - Never based upon production/volume
 - Changes in business model
 - Additional offices
 - Additional agents, etc.

MSAs Not Without Risk (cont'd)

A. Best Practices (cont'd)

- 10. Provide services for no compensation
 - access to sales meetings
 - conducting customer satisfaction surveys
 - Providing company with monthly reports of
 - services
 - activity levels
 - other data

Compliance

- 1. New sheriff in town
 - HUD no longer calling shots
 - CFPB in charge
 - yet to formally announce its policy
- 2. Make sure Agreements reflect arrangement
 - actual services, actually performed
 - for fair market value
- 3. CFPB enforcement action matter of time

