

NEWS

Independent Insurance Agents of Virginia

8600 Mayland Drive, Richmond, VA 23294

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Urgent – Increased Enforcement of the Real Estate Settlement Procedures Act (RESPA) Against Settlement Service Providers

Purpose

This technical bulletin is designed to alert IIAV members about increased RESPA enforcement action by federal regulators for the improper giving or receiving of a fee, kickback or thing of value pursuant to an agreement in exchange for settlement service referrals.

Insurance companies/agencies are key settlement service providers, and have been subject to significant enforcement actions by federal regulators. Hazard or casualty, title, flood and mortgage insurance provided in connection with a real estate settlement are all examples of insurance subject to RESPA and enforcement. IIAV strongly encourages you to read this bulletin and discuss risk management strategies with your attorney.

RESPA Overview

RESPA was enacted in 1974 to provide consumers with enhanced disclosures concerning their settlement fees and to reduce unnecessary settlement service costs by eliminating kickbacks and referral fees in connection with closings. Specifically, RESPA addresses improper referral fees and kickbacks in *12 U.S. Code § 2607(a)* as follows: “No person shall give and no person shall accept any fee, kickback, or thing of value [payments, commissions, gifts, tangible items or special privileges] 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.” As this U.S.

Code section demonstrates, RESPA is meant to prohibit a broad range of settlement service referral arrangements.

RESPA applies to all loans on residential properties secured with federally related mortgages. The law was originally enforced by the U.S Department of Housing & Urban Development (HUD), but it is now the responsibility of the Consumer Financial Protection Bureau (CFPB). The CFPB has aggressively, and frequently, pursued actions against settlement service providers that run afoul of RESPA.

What Settlement Services Are Subject to RESPA?

The law defines settlement services broadly to include any services provided in connection with a real estate settlement. These services include, but are not limited to:

- Title searches;
- Title examinations;
- Provision of title certificates;
- Title insurance;
- Services rendered by an attorney;
- Preparation of documents, such as notarization and recordation;
- Property surveys;
- Rendering of credit reports or appraisals;
- Pest and fungus inspections;
- Real estate agent or broker services;
- Mortgage broker and banker services;
- Origination of a federally related mortgage (including, but not limited to, the taking of loan applications, loan processing, and the underwriting and funding of loans);
- Handling of the processing and closing or settlement;
- Provision of services involving mortgage, flood, hazard or casualty insurance or home warranties;
- Lender required insurance to pay a mortgage loan upon the disability or death of a borrower; and
- Flood certification and tax services.

What Are Examples of RESPA Violations?

The CFPB has focused many of its enforcement actions on Marketing Service Agreements (MSAs) between providers of settlement services in mortgage loan transactions, including lenders, real estate licensees, or title companies. MSAs may also involve non-settlement service providers, such as membership organizations. The CFPB has issued guidance saying that MSAs are usually presented as payments for advertising or promotional services. However, in some cases these payments are disguised compensation for referrals.

A significant CFPB enforcement action involved a relationship between real estate brokers with ReMax Gold Coast and Keller Williams Mid-Wilamette and Prospect Mortgage. “The CFPB’s investigation found that ReMax Gold Coast and Keller Williams Mid-Wilamette accepted illegal payments for referrals. Both companies were among more than 100 brokers who had marketing services agreements, lead agreements, and desk-license agreements with Prospect, which were, in whole or in part, vehicles to obtain illegal payments for referrals.”

For more information on this enforcement action please visit:

<https://www.consumerfinance.gov/about-us/newsroom/cfpb-orders-prospect-mortgage-pay-35-million-fine-illegal-kickback-scheme/>

In one enforcement action, the CFPB discovered that a title insurance company entered into MSAs in exchange for the referral of business. Specifically, “[t]he fees paid under the agreements were based, in part, on how many referrals the title insurance company received and the revenue generated by those referrals. From its investigation of the underlying facts, the Bureau found that the number of referrals increased significantly when MSAs existed, and the differences in referrals were statistically significant and not explained by seasonal or year-to-year fluctuations.”

The CFPB is also concerned that certain MSAs attempt to disguise impermissible actions, including steering business in connection with kickbacks and referral fees, that could result in consumers paying more for mortgages. In a related CFPB enforcement action, “a settlement service provider did not disclose its affiliate relationship with an appraisal management company and did not tell consumers

that they had the option of shopping for services before directing them to the affiliate.”

Another area of enforcement action involves settlement service provider companies subject to MSAs receiving payment from other providers but failing to perform some or all services required under the agreements. The CFPB has stated that this situation creates a reasonable inference that the MSA is part of an agreement to refer settlement service business in exchange for kickbacks. Enforcement actions have involved settlement service providers receiving payments from other providers but not executing title work or not performing underwriting, processing, and closing services.

For more information on enforcement actions please visit: [Consumer Financial Protection Bureau: RESPA Compliance and Marketing Services Agreements](https://files.consumerfinance.gov/f/201510_cfpb_compliance-bulletin-2015-05-respa-compliance-and-marketing-services-agreements1.pdf)
https://files.consumerfinance.gov/f/201510_cfpb_compliance-bulletin-2015-05-respa-compliance-and-marketing-services-agreements1.pdf

RESPA’s Regulation X: Prohibition Against Kickbacks and Unearned Fees

Providers of settlement services must tread carefully based on the severe penalties for RESPA violations outlined below:

Civil and criminal liability is provided for violating the prohibition against kickbacks and unearned fees including:

- Civil liability to the parties affected, equal to three times the amount of any charge paid for such settlement service.
- The possibility that the costs associated with any court proceeding together with reasonable attorney’s fees could be recovered.
- A fine of not more than \$10,000 or imprisonment for not more than one year or both.

Please see [Federal Reserve: Regulation X – Real Estate Settlement Procedures Act](https://www.federalreserve.gov/supervisionreg/caletters/CA_15-6_Attach_Reg_X.pdf)
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Permitted RESPA Referral Fees [See 12 U.S. Code § 2607(c)]

- To attorneys for services actually rendered
- By a title company to its duly appointed agent for services actually performed in the issuance of a policy of title insurance
- By a lender to its duly appointed agent for services actually performed in making a loan
- 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 (ex. employer to employee)
- Payments pursuant to cooperative brokerage and referral arrangements or agreements between real estate licensees
- Secondary market transactions
- Properly crafted and executed Affiliated Business Arrangements

Conclusion

IIAV members, please take this bulletin seriously – the implications of a RESPA violation are no joke. Settlement service providers should be aware of the pitfalls for improper referral fees and kickbacks. It is important to work with an attorney experienced with RESPA when setting up Affiliated Business Arrangements, and other cooperative arrangements must be carefully crafted to avoid liability. Again, the CFPB is actively enforcing RESPA against settlement service providers for improper conduct and the penalties for noncompliance can be severe.

It is the intent of this technical bulletin to be just guidelines and not legal advice. Each agency should review their own particular clients exposures and applicable coverage forms. The Independent Insurance Agents of Virginia does not accept any responsibility for the information provided, but offers such as acceptable guidelines. This information is not intended as legal advice, but is provided for general agency information. Facts, circumstances, and the application of particular laws will differ in individual circumstances.

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