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RESPA enforcement is back — are you ready?

The CFPB takes action against supposed mortgage kickbacks, adding more confusion to RESPA boundaries

October 10, 2023, 1:30 pm *By Flávia Furlan Nunes and Brooklee Han*



What do beach trips, baseball tickets and fancy dinners have in common? All are violations of the 1974 Real Estate Settlement Procedures Act (RESPA) ... or maybe they aren't — it depends on the circumstances and who you ask.

Although RESPA prohibits quid pro quo payments, known as kickbacks, it allows for so much else, leaving room for interpretation.

“Regulators would like to think that their rules are very black and white, the problem is that black and white creates gray space,” Jerra Ryan, the vice president of **Firstline Compliance, LLC**, said in early June. “The only way you can navigate that gray space is to define what your black is in that space.”

And the market has gotten much darker over the last few years.

After six years of no enforcement actions and a rapidly declining housing market, RESPA attorneys believe some in the industry may be more willing to test the boundaries.

“I think folks tend to get creative and take a bit more risk than they might be willing to take in a market where rates are lower,” Holly Bunting, a partner at **Mayer Brown** in the areas of residential mortgage banking and consumer finance, said in an interview.

Colgate Selden, founding member of the **Consumer Financial Protection Bureau** (CFPB) and an attorney at **SeldenLindeke LLP**, agrees: “People are getting more desperate in the mortgage industry in general. And they’re starting

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to ignore compliance or entering into agreements without fully documenting and monitoring them like they should, hoping they'll make it through this downturn."

But this might all be coming to an end after the CFPB's [latest enforcement action](#) on RESPA and mortgage kickbacks. The Bureau issued orders against [Freedom Mortgage Corporation](#) and [Realty Connect USA Long Island](#) in mid-August, its first such enforcement action since 2017.

More than a dozen industry pros and attorneys told HousingWire that RESPA rules are unclear, leaving violations to flourish in a shrinking market. However, the Freedom case represented a "wakeup call."

Kickbacks in a shrinking market

A shrinking market, defined by high [mortgage rates](#) and low [inventory levels](#), appears to have exacerbated the existing mortgage kickbacks problem, industry pros told HousingWire. That's because real estate agents and loan officers are in survival mode and desperate to close new business.

For lenders and brokerages, the risks of LOs or agents overstepping are high. A CFPB enforcement action could "force already financially weakened lenders into bankruptcy," Selden said.

"This should be part of the cost of your doing business – compliance and risk monitoring for these types of things. If you can't do that, then maybe you should look at strategic options or shutting your doors anyway," Selden added.

More vexing for lenders and brokerages is that RESPA rules remain unclear, despite recent guidance from regulators and the existing consent orders.

For example, paying for lead lists or desk rentals is typically *not* a RESPA violation. But that comes

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with some caveats. One can't spend more than the reasonable market value, must also use these services and actually receive them. Regulators may also demand that you prove all of this. Otherwise, it could be seen as a payment for a referral, attorneys said.

The same happens with concert or sports tickets as a marketing opportunity. Can the LO back up the narrative?

"If you just give the real estate agent the tickets, you don't go to the game, and you don't sit and try to schmooze, that seems more like a thank-you thing for being of value in return for referrals, as opposed to a marketing opportunity and relationship," Brian Levy, counsel at **Katten and Temple**, said.

The lack of clarity and myriad interpretations from regulators is a major frustration for industry firms.

"The line of what is legal and illegal depends on who is running the CFPB," Steve Murray, partner at **RealTrends Consulting**, said.

Murray adds: "Under the Obama administration, they basically just did away with marketing agreements even though many were written and performed within the laws that came out of the Bush administration. Then the Trump administration went back to more of where the Bush administration was, but now with Rohit Chopra [*under the Biden administration*], things are going back to where the Obama administration was."

The consent orders themselves are not always helpful in explaining the actual activities involved or rules as they only show one side of the story—the CFPB side. The orders can give insight into what the agency thinks the rule is or wants the rule to be. But the other party entering the consent order usually denies the allegations and is not permitted to say anything about the law.

Companies typically agree with these orders because they want to avoid spending the resources fighting regulators in protracted

litigation, whether in court or elsewhere. This makes the accusations a poor source of information to better understand the rules.

“It often seems cheaper and less risky for mortgage lenders just to pay the penalty and move on in life,” Troy Garris, co-managing partner at **Garris Horn LLP**, said.

In the spotlight: MSAs

The consent order against Freedom and Realty Connect focuses on marketing services agreements, an example of how the RESPA’s interpretations have evolved over time. Under MSAs, a lender or title insurer markets the services of a real estate agent or brokerage, and vice versa, in exchange for a set fee.

In 2015, the CFPB released guidance to MSAs since its investigation showed that lenders, appraisal management and title insurance companies used it to disguise kickbacks and referral fees. Basically, the CFPB found that MSA participants failed to provide the services under the agreements.

Following the 2015’s guidance, many industry participants concluded that the CFPB considered MSAs to be a RESPA violation.

Mike Golden, co-founder and co-CEO at **@properties**, said that the company had a mortgage MSA years ago for a while, which was a “nice income stream.”

“But when the CFPB cracked down on that around eight years ago, we stopped it outright,” Golden said. “It was a bummer to lose the income stream, but it wasn’t worth the risk based on the potential penalties and some of the ways the government looked at it.”

In October 2020, the CFPB published new guidance in the form of frequently asked questions on the RESPA Section 8 topics to provide more precise rules, considering that the bulletin

from 2015 did not provide regulatory clarity, the CFPB stated.

The guidance included, among other things, that the MSAs ought not to be directed to a specific individual but to a broader audience of potential customers, the services must be actually performed and the compensation must be at market value.

Based on this guidance, the CFPB alleged that Freedom provided real estate agents and brokers with incentives, including cash payments, paid subscription services and catered parties in exchange for agent and broker referrals for mortgage loan offerings.

Freedom, the company's attorneys, Realty Connect and the CFPB declined to comment on this story.

In its consent order, the CFPB said that more than 2,000 real estate agents and brokers accepted free access to subscription services, such as property reports and sales comparables. In turn, most of them made mortgage referrals to Freedom's traditional retail loan officers.

"There were some classic, fundamental RESPA violations here that are pretty clear: the subscriptions for the real estate agents to look at property valuations and other defrayals of expenses for stuff that they would use in their business — that's the classic, old school 'things of value,'" Selden said.

However, some of the allegations could be clearer, attorneys said.

Levy, of Katten and Temple, said the CFPB failed to connect the dots on a RESPA violation when it mentions Freedom sometimes documented the number of referrals to track performance under the MSA agreement.

"In any marketing spending, you need to track your return on investment," Levy said. "However, if you vary the payment under the MSA based on the amount of referrals generated, it could be a

problem, because the reason you are tracking it is that you want to pay for the referrals and not for the services.”

Selden said a way to solve this problem is to track overall application volume, which is not necessarily resulting in closed loans.

“But the more applications you get, the more chances they might get closed on eventually. That’s traffic coming to the company, not necessarily referrals. And that’s the point of advertising,” Selden said.

Levy also raises questions when the CFPB mentions that Freedom encouraged its MSA partners to use a third-party smartphone app, which its loan officers would share with the brokerage’s agents, who would later share with clients. The app featured the Freedom LO’s headshot and Freedom logo at the top and included buttons where the client could contact the Freedom loan officer directly for assistance.

“What I think CFPB needs to say is that Freedom tied the MSA payments to making sure that these smartphone apps were distributed. That would have been problematic because that’s essentially paying for what amounts to a referral if that app is a way to communicate only for Freedom,” Levy added.

(Editorial note: Levy and Selden are not involved in the case and provided their opinions based on the consent order.)

New enforcement actions on the horizon?

Industry experts believe that the Freedom case opens doors to more RESPA-related enforcement actions, and not just from the CFPB. State attorneys general may also pursue cases.

When the CFPB was created, it mainly targeted small actors, which is not the case now. But lenders always seem to get in trouble because “that’s where the money is,” attorneys said.

Francis Riley, a RESPA attorney, said the Freedom case may seem like a pivot for the CFPB, “but one has to remember that this resulted from an investigation that most believe started over three years ago.”

“So it cannot be viewed as something new or a new focus by the Bureau. This could be closing the book on an investigation that did not materialize as strongly as the initial investigators might have thought. This may be why the fine is relatively small, notwithstanding the length of time the alleged conduct was carried on and the number of participants (those who received the benefit who are also liable under RESPA).”

Now that a company allegedly receiving the kickback has been slapped with a fine, “it should be a wakeup call,” Riley said.

According to Gretchen Pearson, the broker-owner of **Berkshire Hathaway HomeServices Drysdale Properties**, many smaller top-performing agents and teams think they can fly under the radar and are using “sham MSAs to do mortgage kickbacks.”

“The agents don’t think they will get caught because they are smaller, and the CFPB wants to go after big fish,” she said. “But the LO will take up a corner of the ad space and pay for the whole advertisement, and it is getting sketchier with digital marketing.”

Based on an advisory opinion released by the CFPB earlier this year, anything directed to the consumer online, such as a mortgage lender’s logo on a real estate brokerage’s website, could be considered co-marketing and needs to be evaluated to see if it fits within the scope of an accepted referral.

According to sources, when mortgage kickbacks flourish, there’s no fair game for real estate agents and loan officers. Moreover, homebuyers don’t have access to all the options available in the market.

Jack Granger, a New Jersey-based community mortgage loan officer at **TD Bank**, believes mortgage kickbacks affect mainly underserved communities.

That’s because “people are desperate to buy and not as financially astute.”

He estimates that “three out of 10 potential borrowers don’t even get to” a loan officer offering the best options. It means these homebuyers are not referred to competitive programs, which would provide lower down payments, no mortgage insurance and grants for closing costs, saving the homebuyer thousands of dollars a year.

Ken Trepeta, the president of **RESPRO**, said it’s important that “everyone plays by the same rules and we definitely don’t want to end up in a situation like 50 years ago when RESPA was enacted and just have an environment that is rampant with kickbacks.”

“We do not want to see a situation again that inspires Congress to act again and feel like they need to do something draconian because the current law is not being followed — you want the enforcement so that doesn’t happen.”

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Theodore Sprink

October 11, 2023 at 1:06 am [Edit](#)

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