

MSAs: Marketing, Referral, or Kickback Essentials



**Sentry
Advisors**
Financial Services Risk Management

*Compliance
Communication
Collaboration
Critical Thinking
Client Service*

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What you will learn



- RESPA Section 8
 - Overview
 - Breaking it down
 - Unearned fees
- Supervisory guidance
- Marketing Service Agreements (MSAs)
- Key enforcement actions

Why is it referred to
as **Section 8**?





Introduction

Overview

- Purpose

- To eliminate

- “kickbacks or referral fees that tend to increase unnecessarily the costs of certain settlement services”

- 12 CFR 1024.14



- Coverage

- Transaction

- Is a settlement service and
 - Involves a federally related mortgage

- Generally, applies to any person, including

- Individual
 - Corporations
 - Associations
 - Partnerships
 - Trusts

- **Does not apply to** extensions of credit to

- Government or governmental agencies or instrumentalities
 - Primarily for business, commercial, or agricultural purposes

No Referral Fees, No Kickbacks

- No referral fees
 - No person shall give and no person shall accept
 - any fee, kickback or other thing of value
 - pursuant to any agreement or understanding, oral or otherwise,
 - that business incident to or part of a settlement service
 - involving a federally related mortgage loan
 - shall be referred to any person
 - A company may not pay any other company or the employees of any other company (including affiliates) for the referral of settlement service business
 - Any referral of a settlement service that is not a compensable service, unless otherwise excepted

Exceptions

- **Payments provided or received and arrangements not prohibited**
 - Fees paid to attorneys for services actually rendered
 - Fees paid by a title company to its duly appointed agent for services actually performed in the issuance of a title insurance policy
 - Fees paid by a lender to its duly appointed agent for services actually performed in the making of the loan
 - Bona fide salary or compensation or other payment for goods or facilities actually furnished or for services actually performed
 - Payments under “cooperative brokerage and referral arrangements or agreements between real estate agents and brokers”
 - Affiliated business arrangements, subject to specified conditions
 - Other payments and classes of payments adopted by regulation after consultation with other specified federal agencies and officials

- Also excluded
 - Normal promotional and educational activities, subject to certain conditions
 - May give own employees a referral fee, but not to employees of affiliates



Breaking it down

3 Elements Required to be Considered a Violation

- All 3 elements must be present
 1. Payment or transfer of a thing of value
 2. Pursuant to an agreement or understanding to refer settlement service business
 3. Resulting in an actual referral

- Origination is NOT required

Thing of value

1. **Payment or transfer of a thing of value**
2. Pursuant to an agreement or understanding to refer settlement service business
3. Resulting in an actual referral

- Broadly defined
 - The term “payment” is used throughout is synonymous with the giving or receiving of any “thing of value” and does not require transfer of money
- Includes, without limitation,
 - Monies
 - things
 - discounts
 - salaries
 - commissions
 - fees
 - duplicate payments of a charge
 - Stock

More “Things of Value”

- Dividends
- Distributions of partnership profits
- Franchise royalties
- Opportunity to participate in a money-making program
- Retained or increased earnings
- **Increased equity** in a parent or subsidiary entity
- Reduction in credit against an existing obligation
- **Special 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
- **Credits representing monies that may be paid at a future date**

What are some of the
“things of value” you
have seen?



Agreement or Understanding

1. Payment or transfer of a thing of value
 2. Pursuant to an agreement or understanding to refer settlement service business
 3. Resulting in an actual referral
- The agreement or understanding resulted in an actual referral
 - An agreement or understanding for
 - the referral of business
 - incident to or part of a settlement service
 - need not be written or verbalized but
 - **may be established by a practice, pattern or course of conduct**
 - Thing of value received repeatedly and connected in any way with volume or value of business referred
 - Receipt is evidence that it is made pursuant to an agreement or understanding for the referral of business
 - No requirement that referral is originated

Anyone find a pattern or practice
agreement?
If so, how did you discover it?

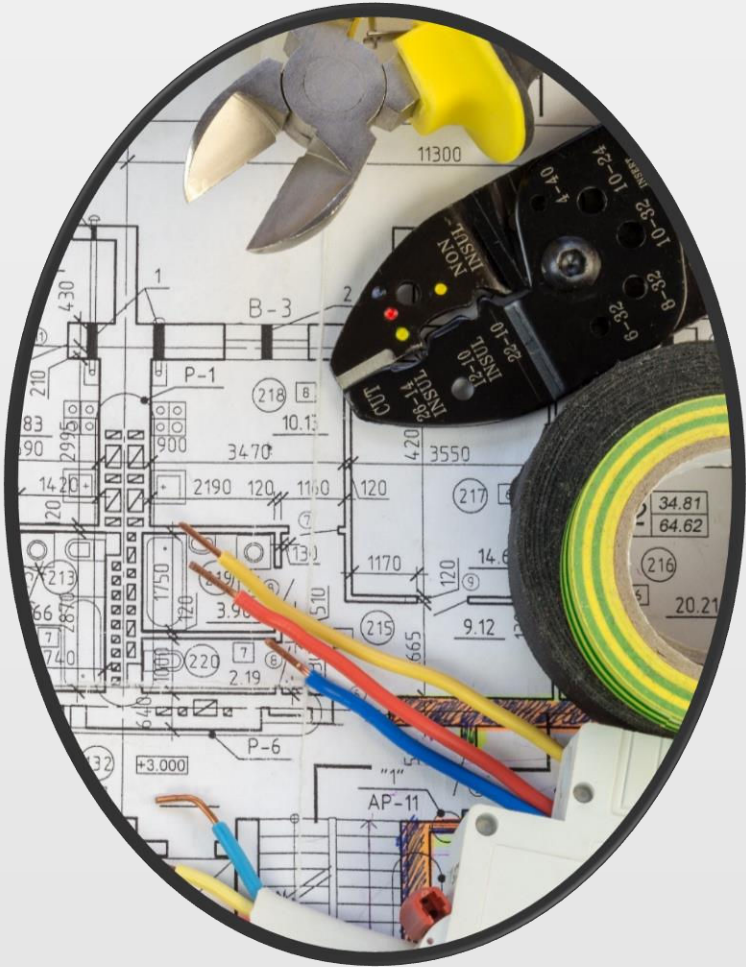


Referral

1. Payment or transfer of a thing of value
2. Pursuant to an agreement or understanding to refer settlement service business
3. **Resulting in an actual referral**

- A referral includes
 - any **oral or written** action
 - directed to a person
 - which **has the effect of affirmatively influencing**
 - the selection by any person
 - of a provider of a **settlement service or business**
 - incident to or part of a settlement service
 - when **such person will pay**
 - for such settlement service or business incident thereto or pay a charge attributable in whole or in part to such settlement service or business
- **Required use**
 - Also occurs whenever a person paying for a settlement service or business incident thereto is required to use a particular provider of a settlement service or business incident thereto
 - *“If you want to use my company for the mortgage, you must use ABC Title”*

Required Use




- But what about those builder deals?
 - Providing discounts for the use of certain settlement providers is not considered required use if
 - any package or discount is optional to the purchaser,
 - and
 - discount is a true discount below prices that are otherwise generally available,
 - and
 - is not made up by higher costs elsewhere in the settlement process

Not a Referral

1. Payment or transfer of a thing of value
2. Pursuant to an agreement or understanding to refer settlement service business
3. Resulting in an actual referral

- *“The payment to any person of a bona fide salary or compensation for goods or facilities actually furnished or for services actually performed”*
 - **Payments are reasonably related to the value** of the goods, facilities, or services (i.e., fair market value)
- and**
 - Goods/facilities were actually furnished or services were **actually performed**



RESPA Section 8 and Unearned Fees

Unearned Fees

- No splitting of charges except for actual services performed
 - No person shall give and no person shall accept
 - any portion, split, or percentage of any charge made or received
 - for the rendering of a settlement service in connection with a transaction
 - involving a federally related mortgage loan
 - other than for services actually performed
- The source of the payment does not determine whether or not a service is compensable
- A charge by a person for which no or nominal services are performed or for which duplicative fees are charged
- Prohibitions may not be avoided by creating an arrangement wherein the purchaser of services splits the fee

Compensable Services

- Payments Must Be for Goods, Facilities or Services
 - In making the determination of whether compensable services are performed, HUD's letter to the Independent Bankers Association of America, dated February 14, 1995 (IBAA letter) was incorporated into HUD's *Real Estate Settlement Procedures Act (RESPA) Statement of Policy 1999-1 Regarding Lender Payments to Mortgage Brokers*
 - <http://www.fdic.gov/news/news/financial/1999/FIL9921b.pdf>

Unearned fees

In IBAA Letter, HUD identified the following services normally performed in the origination of a loan:

- (a) Taking information from the borrower and filling out the application;
- (b) Analyzing the prospective borrower's income and debt and prequalifying the prospective borrower to determine the maximum mortgage that the prospective borrower can afford;
- (c) Educating the prospective borrower in the home buying and financing process, advising the borrower about the different types of loan products available, and demonstrating how closing costs and monthly payments could vary under each product;
- (d) Collecting financial information (tax returns, bank statements) and other related documents that are part of the application process;
- (e) Initiating/ordering VOEs (verifications of employment) and VODs (verifications of deposit);
- (f) Initiating/ordering requests for mortgage and other loan verifications;
- (g) Initiating/ordering appraisals;
- (h) Initiating/ordering inspections or engineering reports;
- (i) Providing disclosures (truth in lending, good faith estimate, others) to the borrower;
- (j) Assisting the borrower in understanding and clearing credit problems;
- (k) Maintaining regular contact with the borrower, realtors, lender, between application and closing to appraise them of the status of the application and gather any additional information as needed;
- (l) Ordering legal documents;
- (m) Determining whether the property was located in a flood zone or ordering such service; and
- (n) Participating in the loan closing

Unearned fees

- If only provide counseling services
 - (b), (c), (d), (j), and (k)
- Then, must also take the application
and
- No steering
 - Counseling gave borrower opportunity to consider products from at least three different lenders;
 - Entity performing counseling would receive the same compensation regardless of which lender's products were ultimately selected; and
 - Any payment made for “counseling-type” services is reasonably related to services performed and not based on the amount of loan business referred to a particular lender

The question of purchased leads goes to the heart of the debate over RESPA Section 8, the anti-kickback/referral regulation

- The **process of purchasing leads** does not appear to have been accepted by HUD or clearly been ruled as not being in violation of RESPA Section 8 (antikickback/referral)
 - Arguments have been made that paying a referral fee for lead generation is permitted and not a violation of RESPA
 - **Section 8(a)** of the Regulation prohibits any person from giving and any person from accepting any fee, kickback, or other thing of value pursuant to any agreement or understanding that business shall be referred to any person
 - **Section 8(b)** also prohibits anyone from giving or accepting any portion, split, or percentage of any charge made or received for the rendering of a settlement service other than for services actually performed
 - **Section 8(c)** of RESPA provides, however, that nothing in Section 8 shall be construed as prohibiting the payment to any person of a bona fide salary or compensation or other payment for goods or facilities actually furnished or services actually performed

The question of purchased leads goes to the heart of the debate over RESPA Section 8, the anti-kickback/referral regulation

- *Is there value in the services performed to generate leads?*
 - If the payment of a thing of value bears no reasonable relationship to the market value of the goods or services provided, then the excess is not for services or goods actually performed or provided. The fact that goods or facilities have been actually furnished or that services have been actually performed does not by itself make a payments by a lender legal.
 - The next inquiry is whether the payment is reasonably related to the value of the goods or facilities that were actually furnished or services that were actually performed.
 - Although RESPA is not a rate-making statute, the CFPB is authorized to ensure that payments from lenders are reasonably related to the value of the goods or facilities actually furnished or services actually performed, and are not compensation for the referrals of business, splits of fees or unearned fees.

HUD Advisory Letter from Grant E. Mitchell, dated March 24, 1994

May a person in the real estate settlement service business pay for or be paid for a prospects list (potential customer list)?

- HUD's position
 - It's an improper referral if payment is conditioned on
 - the number of closed transactions resulting from the lead
 - any other considerations, such as endorsement of the settlement service
 - Example: the lead generator tells the lead, "XYZ Bank will give you the best mortgage"
- **1994 vs. technology today**

Referral or Earned Fee?

- *Is payment of a subscription fee to use a database of leads (and there is no separate fee based on whether the loan is closed or not or whether or not they pursue a particular lead) a violation of RESPA's no referral fees or are its services actually performed?*
 - Under the CFPB's Consent Order with New Day Financial, you do get the takeaway that no more paying for lead generation referrals
 - <http://www.consumerfinance.gov/administrativeadjudication/>
 - However, point #43(b) - the requirement to submit all lists of consumers or for access to such lists - indicates maybe it is a compensable service
 - Fine if we are talking about a prescreened list from a consumer reporting agency, but what isn't clear is whether it is also suggesting that there may be some way of doing leveraging a lead generation database and not be a RESPA Section 8 issue
 - With no further explanation, CFPB just may have said lead generation is a no-no

X Recordkeeping

IT IS FURTHER ORDERED that:

43. Except as provided in subsection 43(f) below, within 60 days of the Effective Date, Respondent must create, for at least 5 years from the Effective Date, the following business records:
 - a. All documents and records necessary to demonstrate full compliance with each provision of this Consent Order, including all submissions to the Bureau.
 - b. Copies of all sales scripts; training materials; advertisements; websites; marketing or endorsement agreements with third parties; **agreements for the purchase of lists of consumers or for the access to such lists from third parties; and other marketing materials; and including any such materials used by a third party on behalf of Respondent.**
 - c. All consumer complaints and refund requests (whether received directly or indirectly, such as through a third party), and any responses to those complaints or requests.
 - d. Records showing, for each employee providing services related to mortgage advertising, marketing, or sales, that person's: name; telephone number; email,



Guidance

CFPB Guidance

- On October 7, 2020, CFPB rescinded Bulletin, *"RESPA Compliance and Marketing Services Agreements,"* which had provided guidance about RESPA
 - “Bureau determined that Compliance Bulletin 2015-05, RESPA Compliance and Marketing Services Agreements, does not provide the regulatory clarity needed on how to comply with RESPA and Regulation X and therefore is rescinding it”
 - Consistent with the rescission, the Bulletin has no force or effect
 - RESPA is unchanged and remains in force and effect
- In its place, the CFPB issued RESPA FAQs



CFPB FAQs

RESPA Section 8 General

1. What are the provisions of RESPA Section 8? [Show +](#)
2. What is RESPA Section 8(a)? [Show +](#)
3. What is RESPA Section 8(b)? [Show +](#)
4. What payments are not prohibited under RESPA Section 8(c)? [Show +](#)
5. Which individuals, entities, and transactions are covered by RESPA Section 8? [Show +](#)
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? [Show +](#)

RESPA Section 8(a)

1. What activities are prohibited under RESPA Section 8(a)? [Show +](#)

RESPA Section 8: Gifts and Promotional Activity

1. Are gifts and promotions allowed under RESPA Section 8? [Show +](#)
2. What conditions does Regulation X establish for gifts and promotions to be "normal promotional and educational activities" allowed under RESPA? [Show +](#)
3. What are examples of "normal promotional and educational activities" meeting the conditions in Regulation X? [Show +](#)

RESPA Section 8: Marketing Services Agreements (MSAs)

1. What are marketing services agreements? [Show +](#)
2. What is the distinction between referrals and marketing services for purposes of analyzing MSAs under RESPA Section 8? [Show +](#)
3. How do the provisions of RESPA Section 8 apply when analyzing whether an MSA is lawful? [Show +](#)
4. What are some examples of MSAs prohibited by RESPA Section 8? [Show +](#)

Gifts and Promotional Activity

- ❑ *Is the item or activity targeted to referral sources?*
- ❑ *How often is the item or activity given to the referral source?*
- ❑ *Does the item or activity involve a good or service that the referral source would otherwise have to pay for themselves?*

Are gifts permitted?

- It depends
- Not based on a value of gift or promotion
- **Why is the gift being provided?**

What is considered normal promotional and educational activities?

- “Normal promotional and educational activities” directed to a referral source if the activities meet two conditions:
 - **Activities are not conditioned on referral** of business; and
 - **Activities do not involve defraying expenses** that otherwise would be incurred by the referral source

Key questions

- ❑ *Is it a bona fide rental?*
- ❑ *Is the renter paying fair market value?*
 - ❑ Is the rent the same (\$\$, space, services) that a non-settlement service provider would pay in the same or a comparable building?

- HUD issued policy statement *in response to numerous complaints* that it received, *alleging that certain settlement service providers, particularly lenders, are leasing desks or office space in real estate brokerage offices* at **higher than market rate in exchange for referral of mortgage business**
- HUD noted that “an example of a “thing of value” is a rental payment that is higher than that ordinarily paid for the facilities



MSAs

Marketing Service Agreements

- Usually framed as payments for advertising or promotional services
 - Oral or written
 - Disguised as compensation for referrals
 - Quid pro quo for the referral of business
- Review facts and circumstances
 - Each case may be unique
- 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

“MSAs appear to create opportunities for parties to pay or accept illegal compensation for making referrals of settlement service business.”

- ~ CFPB, Bulletin 2015-05
 - Although rescinded in 2020, still a key message today

Impact of MSAs

- Compliance risks
 - Individual, creditor
 - Financial fines, penalties
 - Injunctive relief
 - Could be subject to imprisonment

Steering of business

- Consumers pay higher prices
- Indirectly undermines consumer's ability to shop
- Disguise or hide affiliate relationships
- Creates tangible legal and regulatory risks for the monitoring and administration of MSAs





Failure to provide services

- Consumer pays for services not actually performed
- Reasonable inference can be drawn that MSA is referral arrangement in exchange for kickbacks

Marketing expenses in exchange for referrals

CFPB FAQs on MSAs

RESPA Section 8: Marketing Services Agreements (MSAs)

1. What are marketing services agreements? 
 2. What is the distinction between referrals and marketing services for purposes of analyzing MSAs under RESPA Section 8? 
 3. How do the provisions of RESPA Section 8 apply when analyzing whether an MSA is lawful? 
 4. What are some examples of MSAs prohibited by RESPA Section 8? 
-

What is an MSA

An agreement for the performance of marketing services where the **payments** under the MSA **are reasonably related to the value of services actually performed**

- 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, marketing services are compensable services

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**

- Such marketing services **cannot be nominal**
- Payments cannot be for a duplicative charge or referrals

Distinguish: Referral vs. Marketing Service

- Whether a particular activity is a referral or a marketing service is a **fact-specific question**
 - 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
 - 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
 - A marketing service is not directed to a person; rather, it is generally targeted at a wide audience
 - 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
- Analysis
 - 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 8(b), or is permitted under 8(c)
 - 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

Analysis: RESPA Section 8(a)



- Agreement or understanding is to refer business incident to or part of a settlement service in exchange for a fee, kickback, or thing of value
 - The MSA or conduct under the MSA **is prohibited**
- Example
 - May include (but is not limited to) agreements structured or implemented to provide payments based on the number of referrals received

Analysis: RESPA Section 8(b)



- 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 that 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 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

Analysis: RESPA Section 8(c)



- 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** under 8(c)(2)
- 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

Prohibited MSAs

Example

- Assume a lender enters into an MSA with a real estate agent that also makes referrals to the lender
 - MSA requires the real estate agent to perform marketing services, including deciding on and coordinating direct mail campaigns and media advertising for the lender
 - 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, 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
- 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)



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



Enforcement Actions

Penalties

- Criminal case
 - May be fined up to \$10,000 and
 - Imprisoned up to one year
- Civil/private lawsuit
 - May be liable to the person charged for the settlement service an amount equal to 3X the amount of the charge paid for the service
- Regulatory potential violation penalties
 - \$\$
 - Consent Order likely
 - Compliance Ratings lowered
 - Could also trigger UDAAP

Deceptive Mortgage Advertising and Kickbacks

“Respondent, and its officers, agents, servants, employees, and attorneys who have actual notice of this Consent Order, whether acting directly or indirectly, may not violate Section 8 of RESPA, including by providing a thing of value to a third party pursuant to an agreement or understanding to refer real estate settlement service business, including, but not limited to, providing a thing of value in exchange for an endorsement of Respondent that is directed to a person.”

The screenshot shows a web browser window displaying the CFPB website. The page title is "CFPB Takes Action Against NewDay Financial for Deceptive Mortgage Advertising and Kickbacks". The main content includes a sub-headline "Lender to Pay \$2 Million Civil Penalty for Illegal Conduct" and a paragraph starting with "WASHINGTON, D.C. — Today, the Consumer Financial Protection Bureau (CFPB) took action against NewDay Financial, LLC for deceptive mortgage advertising and kickbacks." The page also features a "Receive press releases by email" sign-up form, social media icons, and a "Photos and bios" section with portraits of Director Rich Cordray and Acting Deputy.



- MSA
 - CFPB – Lighthouse Title, Inc. Consent Order (2014)
 - Lighthouse entered into MSAs with a number of other settlement services providers
 - Issues
 - Neither Lighthouse nor other counterparties determined or documented what a fair market value for the services was
 - Fees were established by considering how many referrals Lighthouse had received from the counterparties
 - Lighthouse did not monitor counterparties to ensure it actually received the services under the MSAs
 - Result
 - CFPB determined that Lighthouse’s payments under the MSAs were actually payments for referrals



- Desk Rental and Marketing Service Agreement
Example CFPB – Prospect Mortgage LLC Consent Order (2017)
 - Prospect maintained agreements with numerous real estate brokers
 - Issues
 - Tracked referrals and adjusted compensation accordingly
 - Required use of Prospect for prequalification
 - Conditioned desk rental payments on referrals rather than general market value
 - Result
 - CFPB determined that Prospect’s payments under these various agreements were illegal kickbacks for mortgage referrals

Desk Rental and MSA (FDIC)



- Marketing Service Agreement and Desk Rental Example
 - FDIC – HomeStreet Bank Order to Pay Civil Money Penalty (2019)
 - Issue
 - HomeStreet, through its now discontinued Home Loan Center, entered into online co-marketing agreements and desk rental agreements for the payment of referral fees
 - All agreements found to be in violation have been terminated
 - Result
 - Without admitting or denying the violations of RESPA Section 8(a), the bank stipulated to payment of a \$1.35 million civil money penalty

Kickbacks and Referrals



NOTE: CFPB did not take issue with the notion of a lender buying information about prospective buyers, such as consumer name, address, email address, and phone number; however, CFPB's investigation revealed other problematic conduct that went beyond the mere transferring of consumer information

- CVPB v. Prospect Mortgage, LLC, and against two real estate brokers and a mortgage servicer that took illegal kickbacks from Prospect (2017)
 - **Paying illegal kickbacks** for mortgage business referrals
 - Paid for referrals through agreements
 - Maintained various agreements with over 100 real estate brokers
 - Tracked the number of referrals made by each broker and adjusted the amounts paid accordingly
 - Paid brokers to require consumers – even those who had already prequalified with another lender – to prequalify with MML
 - Had brokers engage in a practice of “writing in” MML into their real estate listings
- **Split fees** with a mortgage servicer to obtain consumer referrals
 - Identified and persuaded eligible consumers to refinance with MML for their HARP mortgages
 - MML compensated Servicer for the referrals by splitting the proceeds of the sale of such loans evenly with Servicer
 - MML **also sent the resulting mortgage servicing rights** back to Servicer

Kickbacks and Referrals



- CFPB v. Freedom Mortgage (2023)
 - Providing things of value in exchange for referrals of mortgage loans
 - Subscription services
 - Events
 - Monthly marketing services agreement payments

Compliance Risk Management Program (CRMP)

Board and Management Oversight

Change Management

Risk Assessments

Policies and Procedures

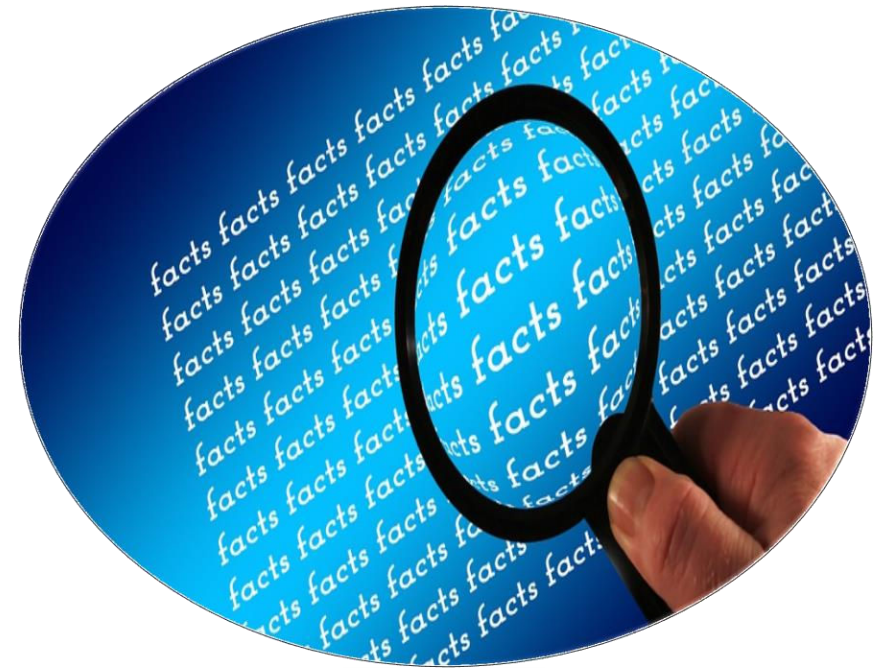
Monitoring and Audit

Complaint Response

Three Lines of Defense

Third Party Risk Management

-
- Oversight, due diligence, and on-going monitoring
 - Actual practices compared to the contract's terms and conditions, including compensation structure
 - Valuations, and rental expense history
 - Application and origination records
 - Documentation of goods/services provided or received



Questions

