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What Entities Are Subject to RESPA?

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cfpb Consumer Financial Protection Bureau

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What are the provisions of RESPA Section 8?

- RESPA Section 8 prohibits certain actions related to federally related mortgage loans.
- RESPA Section 8(a) prohibits kickbacks for business referrals related to or part of settlement services involving federally related mortgage loans. 12 USC § 2607(a); 12 CFR § 1024.14(b).
- RESPA Section 8(b) prohibits unearned fee arrangements, i.e., splitting charges made or received for settlement services, except for services actually performed, in connection with federally related mortgage loan transactions. 12 USC § 2607(b); 12 CFR § 1024.14(c).

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What are the provisions of RESPA Section 8, cont.?

- RESPA Section 8(c) identifies certain payments that are not prohibited by Section 8. 12 USC § 2607(c); 12 CFR § 1024.14(b).
- Appendix B to Regulation Z provides examples to illustrate the application of RESPA prohibitions to fact patterns, including fact patterns under sections 8(a) and 8(b), indicating whether or not a violation occurred.
- Appendix L to 12 CFR part 1024. RESPA Section 8(d) details specific penalties for violations of Section 8, including for Sections 8(a) and 8(b). 12 USC § 2607(d)

8

Break it down!

9

What is RESPA, Section 8(a)

- RESPA Section 8(a) prohibits kickbacks for business referrals involving a federally related mortgage loan.
- RESPA Section 8(a) prohibits the giving and accepting of kickbacks (e.g., cash or other “things of value” as defined in RESPA and Regulation X) pursuant to any agreement or understanding to refer settlement service business or business incident to a real estate settlement service in connection with those loans. 12 USC § 2607(a).

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What activities are prohibited under RESPA Section 8 (a)

- RESPA Section 8(a) and Regulation X, 12 CFR § 1024.14(b), **prohibit giving or accepting a fee, kickback, or thing of value** pursuant to an agreement or understanding (oral or otherwise), for referrals of business incident to or part of a settlement service involving a federally related mortgage loan.

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What is a fee, kickback or “thing of value”?

- Thing of value is broadly defined in RESPA and Regulation X. 12 USC § 2602(2); 12 CFR § 1024.14(d).
- Regulation X defines the term to include, without limitation: monies, things, discounts, salaries, commissions, fees, duplicate payments of a charge, stock, dividends, distributions of partnership profits, franchise royalties, credits representing monies that may be paid at a future date, the opportunity to participate in a money-making program, retained or increased earnings, increased equity in a parent or subsidiary entity, special bank 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...

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What is a fee, kickback or "thing of value", cont.?

- based in whole or in part on the amount of business referred, trips and payment of another person's expenses, or reduction in credit against an existing obligation. "Payment" is used synonymously with the giving or receiving of a "thing of value" in Regulation X, 12 CFR §§ 1024.14 and 1024.15, and does not require the transfer of money. 12 CFR § 1024.14(d).

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- For example, it is illegal for a mortgage brokerage firm to pay \$200 per loan (or any amount) to real estate agents who steer homebuyers in its direction.
- Other forms of kickbacks illegal under RESPA include gifts, prizes and entries into raffles designed to reward agents for referring business, for example, to a title insurance company, surveyor or attorney.



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Interesting.....

- Pursuant to an agreement or understanding, oral or otherwise.
- **An agreement or understanding need not be written or verbalized. It may be established by practice, pattern, or course of conduct.**
- For example, when a thing of value is received repeatedly, and connected in any way with the volume or value of business referred, receipt of the thing of value is evidence that it is made pursuant to an agreement **or understanding**. 12 CFR § 1024.14(e).

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Referrals...

- Referrals include **oral or written action directed to a person that has the effect of affirmatively influencing a person's selection of a provider of a settlement service or business incident to or part of a settlement service.**
- That effect can be on any person in connection with the settlement service or business incident thereto who will pay for the service or a charge attributable, in whole or in part, to that service or service provider.



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More on referrals...

- Additionally, referrals include requiring the use by the person paying for the service of a particular provider of settlement service-related business. 12 CFR §§ 1024.14(f)(2) and 1024.2(b) ("required use").
- Finally, note that prohibited referrals are not limited to those directed to consumers. They might be directed to a number of sources, such as appraisers, real estate agents, title companies and agents, lenders, mortgage brokers, or companies that provide information in connection with settlements, such as credit reports and flood determinations. 12 CFR § 1024.14(b) and (f).

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VENDOR LIST

1	2 VENDORS:		3 NAME	4 PHONE
5	1.			
6	2.			
7	3.			
8	4.			
9	5.			
10	6.			
11	7.			
12	8.			
13	9.			
14	10.			

13 Furnishing of any names of Vendors provided by the Broker or Broker's Affiliated Licensee(s) is done as a ministerial act and
14 only as a courtesy to the undersigned and does not in any way constitute any warranty or representation as to the quality of the
15 Vendors, their services or subsequent reports. The undersigned acknowledges that it/they had the option to select any Vendor
16 of its/their choice, including any not listed above and that Broker or Broker's Affiliated Licensee(s) is not responsible for any
17 representation, guarantees or warranties of the selected Vendors or their services. For good and valuable consideration, the
18 receipt and sufficiency of which are hereby acknowledged, the undersigned herewith releases the Broker, the Broker's
19 Affiliated Licensee(s) and/or Broker's employees from any liability or claim arising out of or in connection with the services
20 of the Vendor.

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Are Gifts & Promotions Allowed?



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- Under RESPA Section 8(a), gifts and promotions generally are “things of value” and therefore could, depending on the circumstances, violate RESPA Section 8(a).
- If the gifts or promotion are given or accepted, as part of an agreement or understanding, for referral of business incident to or part of a real estate settlement service involving a federally related mortgage loan, **they are prohibited**.


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- ...if a settlement service provider gives current or potential referral sources tickets to attend professional sporting events, trips, restaurant meals, or sponsorship of events (or the opportunity to win any of these items in a drawing or contest) in exchange for referrals as part of an agreement or understanding, such conduct violates RESPA Section 8(a). 12 CFR § 1024.14(b).
- Such an agreement or understanding need not be written or oral and can be established by a practice, pattern, or course of conduct. 12 CFR § 1024.14(e).

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NO




- **There is no exception to RESPA Section 8 solely based on the value of the gift or promotion.** Accordingly, settlement service providers should carefully analyze whether providing gifts or opportunities to win prizes to referral sources could violate the prohibitions under RESPA Section 8.

22

What conditions does Regulation X establish for gifts and promotions to be “normal promotional and educational activities” allowed under RESPA?



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- Regulation X allows “normal promotional and educational activities” directed to a referral source if the activities meet two conditions:
 - The activities are not conditioned on referral of business; and
 - The activities do not involve **defraying expenses** that otherwise would be incurred by the referral source. 12 CFR § 1024.14(g)(1)(vi).

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1st Condition


- The first condition is that normal promotional and educational activities must not be conditioned on referral of business.
- Factors that are relevant to whether the first condition is met may include the following:
 - Whether the item or activity is targeted to referral sources.
 - How often the item or activity is given to the referral source.




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2nd Condition

- The second condition is that normal promotional and educational activities must not involve the defraying of expenses that otherwise would be incurred by persons in a position to refer settlement services or business incident thereto. Factors that may be relevant to whether the second condition is met may include the following:
 - Whether the item or activity involves a good or service that the referral source would otherwise have to pay for themselves.



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- If the particular item or activity does not meet either of these conditions, it is not a "normal promotional or educational activity" meeting the conditions in Regulation X, 12 CFR § 1024.14(g)(1)(vi)

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Examples of "normal promotional and educational activities" meeting the conditions in Regulation X

- A settlement agent hosts a one-time-only drawing for a mini basketball set (backboard, rim, net, and ball).
- The settlement agent includes an announcement of the drawing in an email to all previous customers and all loan originators in the city summarizing the settlement agent's services and providing the agent's contact information.
- The entries to the drawing are automatically made for every previous customer and loan originator in the city, regardless of whether the prior customer or loan originator has made or will make a referral to the settlement agent.
- The agent also includes a drawing entry submission form on their website.

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Examples, cont.

- A title company hosts a continuing education course for real estate agents who must meet mandatory continuing education requirements to maintain their license.
- The title company charges a course admission fee equivalent to the fair market value of the course and invites all of the local real estate agents, regardless of their status as referral sources.
- The real estate agents pay for their own admission to the course.

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Examples, cont.

- A title company routinely hosts free seminars on recent real estate market developments.
- The seminars are open to the public, and they are advertised to all of the area's real estate agents, regardless of their status as referral sources.

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Failure to meet "normal" activities

- However, with slight changes to these fact patterns, the activities can fail to meet the conditions for "normal promotional and educational activity" under Regulation X.
- A settlement agent's drawing for a mini basketball set where the agent's announcement and promotion email is sent only to select mortgage loan originators, who are given drawing entries for each referral the loan originator makes directing others to the settlement agent is likely not a "normal promotional or educational activity" meeting the conditions established in Regulation X. T

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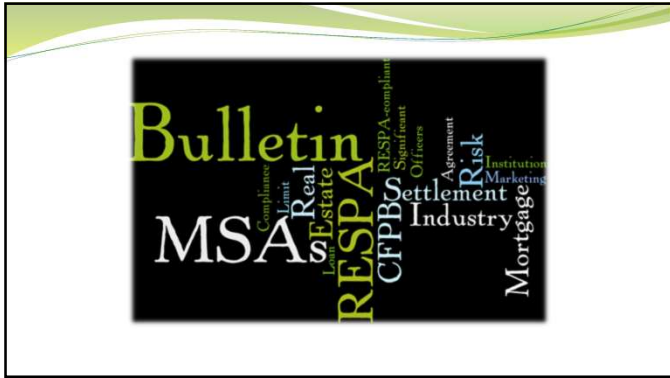


- This is because the facts and circumstances indicate the opportunity to win the mini basketball set, or the mini basketball set itself, is conditioned on the referral of business, given that the persons in the drawing pool are only those persons who made referrals and also that the number of entries (which affect the odds of winning the mini basketball set) are based on the number of referrals.
- In fact, as a reminder, this may implicate a RESPA Section 8(a) violation.

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- A title company's continuing education course that real estate agents use to meet their license requirements, for which the admission fee is waived if the real estate agent makes a specified number of referrals, is likely not a "normal promotional or educational activity" meeting the conditions established in Regulation X.
- This is because the course admission fee waiver is conditioned on referrals to the title company (which could also implicate a RESPA Section 8(a) violation), and the fee waiver is defraying the real estate agent's expenses.
- Similarly, if the title company opens the same continuing education course to the public and charges an admission fee, but waives the fee for all real estate agents (regardless of referrals), the activity is still likely not a "normal promotional or educational activity" meeting the conditions established in Regulation X.
- This is because the course fee waiver is defraying expenses that the real estate agents otherwise would incur, as the course is meeting their license requirements and the fee waiver reduces their license-related expenses.

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Marketing Service Agreements

- Marketing services agreements, or “MSAs,” are agreements that commonly involve an arrangement where one person (or entity) agrees to market or promote the services of another and receives compensation in return.
- Example: an MSA exists when a mortgage loan originator agrees to market or promote the services of a real estate agent in return for compensation. (insert any SSP)
- A lawful MSA is an agreement for the performance of marketing services where the payments under the MSA are reasonably related to the **value of services actually performed**. 12 USC § 2607(c)(2); 12 CFR § 1024.14(g)(1)(iv). T

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RESPA Section 9

- Section 9 of RESPA prohibits a seller from requiring the home buyer to use a particular title insurance company, either directly or indirectly, as a condition of sale. Caveat, the seller purchases and pays for the entire cost of title insurance (owner’s and lender’s policies)
- Buyers may sue a seller who violates this provision for an amount equal to three times all charges made for the title insurance
- This prohibition applies to any seller, whether a private individual, a home builder, or a lender with REO properties.



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• Section 9 prohibits a seller from both “directly or indirectly” conditioning the sale on buyer’s purchase of title insurance from a specific company.

• Sellers have tried to play the system by forcing the use of a particular title insurance company by claiming to pay for the insurance but then charging the buyer later in the transaction. “Directly or Indirectly” means transactions which result in the seller recovering the cost for the title insurance through some otherwise seemingly unrelated fee or charge risk violating Section 9.

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Scenario

- Real estate agent has a great working relationship with Company A and decides, with the seller, to condition the sale on the use of Company A (i.e., if buyer does not use Company A, then no deal).
- Violation of Section 9?
- It depends on who pays for the insurance. If seller pays for the insurance at no cost to the buyer – no violation.
- However, where the seller purports to pay for the insurance but then, for example, charges the buyer a fee for closing costs that includes the title insurance expense, seller risks violating Section 9.

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Scenario

- Real estate agent likes to use Company A and decides, with the seller, to condition the sale on the use of Company A and make buyer pay for the title insurance (i.e. If buyer does not use Company A and also pay for their insurance, then no deal).
- Violation of Section 9?
- Yes.

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Criminal Penalties for Violation of RESPA

- Fines up \$10,000, per occurrence
- Minimum one year in prison




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NAR and RESPA



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Article 6



- REALTORS® shall not accept any commission, rebate, or profit on expenditures made for their client, without the client's knowledge and consent.
- When recommending real estate products or services (e.g., homeowner's insurance, warranty programs, mortgage financing, title insurance, etc.), REALTORS® shall disclose to the client or customer to whom the recommendation is made any financial benefits or fees, other than real estate referral fees, the REALTOR® or REALTOR®'s firm may receive as a direct result of such recommendation. *(Amended 1/99)*
 - Standard of Practice 6-1
 - REALTORS® shall not recommend or suggest to a client or a customer the use of services of another organization or business entity in which they have a direct interest without disclosing such interest at the time of the recommendation or suggestion. *(Amended 5/88)*

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NAR and RESPA



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Can a mortgage banker and a real estate broker advertise their services together, for example, on the same brochure or newspaper advertisement?


- Nothing in RESPA prevents joint advertising. However, if one party is paying less than a pro-rata share for the brochure or advertisement, there could be a RESPA violation.



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Can a lender give a real estate agent note pads with the lender's name on it?

- Yes. Such note pads with the lender's name on it would be allowable as normal promotional items.
- However, if the lender gives the real estate agent note pads with the real estate agent's name on it for the agent to use to market clients for its real estate business, then the note pads could be a thing of value given for referral of loan business, because it defrays a marketing expense that the real estate agent would otherwise incur.



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- Can a lender set up a contest for real estate agents under which the agent who provides the lender with the most business will win a trip or other prize?
 - No. Under RESPA, the trip/prize itself, and even the opportunity to win the trip/prize, would be a thing of value given in exchange for the referral of business.

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- Can a settlement service provider (i.e. title or mortgage company, home warranty company, pest or home inspection company) host/sponsor a free education event for Realtors®?
 - Sponsorship of continuing education is more likely to be a RESPA violation because members normally have to pay a fee to attend such programs. If the cost of the course is underwritten by the affiliate so that the agents need not pay fees that they otherwise would have to pay, such sponsorship could be interpreted as a thing of value received by the agent for RESPA purposes.

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Affiliated Business Arrangement



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• An "affiliated business arrangement" (AfBA) that meets the statutory criteria does not violate RESPA's anti-kickback rule.

• An AfBA exists when:

- Person in position to refer settlement service business, or associate of that person has affiliate relationship with, or direct or beneficial ownership interest of more than 1% in, settlement service provider and
- Person or associate refers settlement service business to the provider or influences a borrower's selection of the provider.

Think: Preferred Vendor Lists

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• AfBA does not violate RESPA if:

- Person making referral provides an AfBA Disclosure to each person whose business is referred
- Person making referral does not require use of any particular provider of services, *except* that lender may require borrower to pay for attorney, credit reporting agency, or real estate appraiser chosen by lender and
- Only thing of value received from arrangement by person making referral, other than payments otherwise permitted by RESPA, is legitimate return on person's ownership interest in the affiliated service provider.

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• **AfBA Disclosure must be made:**

- At signature or within 3 business days
- Must be a separate paper
- Must be signed by borrower

• Person making referral cannot require use of any particular provider of services.

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62-13-403

- (7)
 - (A) Not engage in self-dealing nor act on behalf of licensee's immediate family or on behalf of any other individual, organization or business entity in which the licensee has a personal interest without prior disclosure of the interest and the timely written consent of all parties to the transaction; and
 - (B) Not recommend to any party to the transaction the use of services of another individual, organization or business entity in which the licensee has an interest or from whom the licensee may receive a referral fee or other compensation for the referral, other than referrals to other licensees to provide real estate services under this chapter, **without timely disclosing to the party who receives the referral the licensee's interest in the referral or the fact that a referral fee may be received.**

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CFPB Shuts Down Mortgage Loan Business of RMK Financial for Repeat Offenses Against Military Families

Mortgage lender violated 2015 CFPB order by continuing to advertise with unauthorized VA seals and FHA logos
FEB 27, 2023

WASHINGTON, D.C. – Today, the Consumer Financial Protection Bureau (CFPB) permanently banned RMK Financial Corporation, which does business as Majestic Home Loans, from the mortgage lending industry by prohibiting RMK from engaging in any mortgage lending activities or receiving remuneration from mortgage lending. In 2015, the CFPB issued an agency order against RMK for, among other things, sending advertisements to military families that led the recipients to believe the company was affiliated with the United States government. Despite the 2015 order's prohibition on these and other actions, the company engaged in a series of repeat offenses, including disseminating millions of mortgage advertisements to military families that deceptively used fake U.S. Department of Veterans Affairs (VA) seals, the Federal Housing Administration (FHA) logo, and other language or design elements to falsely imply that RMK was affiliated with the government. In addition to the ban, RMK will also pay a \$1 million penalty that will be deposited into the CFPB's victims relief fund.

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CFPB Orders Wells Fargo to Pay \$3.7 Billion for Widespread Mismanagement of Auto Loans, Mortgages, and Deposit Accounts

English | [Español](#)

Company repeatedly misapplied loan payments, wrongfully foreclosed on homes and illegally repossessed vehicles, incorrectly assessed fees and interest, charged surprise overdraft fees, along with other illegal activity affecting over 16 million consumer accounts

DEC 20, 2022

54

CFPB Takes Action Against Carrington Mortgage for Cheating Homeowners out of CARES Act Rights

English | [Español](#)

Company wrongly charged fees and inaccurately reported homeowner credit information despite pandemic-era housing protections

NOV 17, 2022

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Builder Example

- **ARVIDA:** HUD negotiated a settlement with ARVIDA/JMB Partners, a large builder and realty services company in Florida. The settlement resolved allegations of violations of RESPA Sections 8(b) and 9, in the Weston Community in Broward County, Florida. The Section 8(b) allegation addressed ARVIDA's practice of charging a percentage of the house sales price for closing costs, a portion of which was paid for certain closing costs and a portion of which was retained by ARVIDA and not specifically accounted for. The Section 9 allegation involved [an added \\$300 fee to buyers who opted to use their own title agent rather than ARVIDA's affiliate](#). The Settlement Agreement provides for the cessation of these practices and for the refund of \$45,750, most of the additional fee that ARVIDA charged for buyers' using their own title agents.


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Consumer Financial Protection Bureau and Multiple States Enter into Settlement with Nationstar Mortgage, LLC for Unlawful Servicing Practices


1.5 million civil penalty
73 million in redress

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• **Fidelity National Financial** agreed to pay HUD \$4.5 million to settle kickback claims. The title company paid real estate brokers kickbacks and referral fees in violation of the Real Estate Settlement Procedures Act.



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• Officials at the **Dept. of Housing and Urban Development** said Friday that they had agreed to a \$35 million settlement to a federal lawsuit centering on alleged kickbacks paid to real estate brokerages by hazard reporting company **Property I.D. Corporation**. The government had accused **Realogy Corporation** and related brokerage entities **Cendant Corp.**, and **Coldwell Banker Residential Brokerage Corp.** with accepting kick-backs from **Property I.D.** in exchange for orders of hazard disclosure reports.

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CFPB Findings



Examiners found redlining

The Bureau's examiners observed discouragement of people in minority neighborhoods from applying for credit by, among other things, locating offices in almost exclusively majority-white neighborhoods, only using pictures of white people in direct mail marketing campaigns, and publishing loan officer headshots of almost exclusively white people. Examiners noted these practices lowered the number of applications from minority neighborhoods relative to other comparable lenders.

As demonstrated by our [complaint](#) against **Townstone Financial, Inc.**, the CFPB will continue to combat redlining in all its forms in the 21st century.

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Zillow has agreed to pay \$15 million to settle a class action suit by shareholders alleging that questions about the legality of a program that allows real estate agents and lenders to share marketing expenses caused the company's stock price to tumble in 2017.

Zillow settles shareholder lawsuit over co-marketing program

Zillow has maintained its agent-lender co-marketing program is RESPA compliant, and admitted no wrongdoing while agreeing to pay \$15M, which was granted preliminary approval Monday



Image by Getty Images

BY GARY CARTER

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Allowed versus Not Allowed

- A title company hosts a monthly dinner and reception for real estate agents. **NA**
- A mortgage broker pays for a lock-box without including any information identifying the mortgage broker on the lock-box. **NA**
- A title agent provides a food tray for an open house, posts a sign in a prominent location indicating that the event was sponsored by the title agent, and distributes brochures about its services. **A**
- A mortgage lender provides lunch at an open house, but does not distribute brochures or display any marketing materials. **NA**

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• A mortgage lender sponsors an educational lunch for real estate agents where employees of the lender are invited to speak. **A**

• A hazard insurance company hosts a "happy hour" and dinner outing for real estate agents. **NA**

• A home inspector pays for a real estate agent to go to dinner, but does not attend the dinner. **NA**

• A hazard insurance company provides notepads, pens, or other office materials reflecting the hazard insurance company's name. **A**

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• A title company makes a lump-sum payment toward a function hosted by the real estate agent, but does not provide advertising materials or make a presentation at the function. **NA**

• A mortgage broker buys tickets to a sporting event for a real estate agent, or pays for the real estate agent to play a round of golf. **NA**

• A title company sponsors a "get away" in a tropical location, during which only an hour or two is dedicated to education and the remainder of the event is directed toward recreation. **NA**

• A mortgage lender only pays a real estate agent for taking the loan application and collecting credit documents if the activity results in a loan. **NA**

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• A title company hosts an event that various individuals, including real estate agents, will attend and posts a sign identifying the title company's contribution to the event in a prominent location for all attending to see and distributes brochures regarding the title company's services. **A**

• A mortgage brokerage sponsors the hole-in-one contest at a golf tournament and prominently displays a sign reflecting the brokerage's name and involvement in the tournament. **A**

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• A real estate agent and mortgage broker jointly advertise their services in a real estate magazine, provided that each individual pays a share of the costs in proportion with his or her prominence in the advertisement. **A**

• A lender pays a real estate agent fair market value to rent a desk, copy machine, and phone line in the real estate agent's office for a loan officer to pre-qualify applicants. **A**

• A real estate broker tells his agents that for each buyer they send to its affiliated title company, it will include their name in a monthly drawing for a weekend hotel package. **NA**

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NATIONAL ASSOCIATION OF REALTORS®
**WINDOW
TO THE LAW**

68

REMEMBER

Do not give or receive anything of value for referrals!



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