
The Rules (and their Enforcement) of the Mortgage Game Have Changed

The Rules (and Their Enforcement) of the Game Have Changed:
Cooperative Relationships Among Mortgage Brokers, Title Agents, and Others
May Result in Potentially Stiff Penalties

By Brian A. Nettleingham and Martin S. Frenkel

The mortgage business relies on mutually beneficial relationships among various players throughout the residential real estate market in order to function. Title agents, mortgage brokers, real estate agents, home builders, and others have long understood this fact.

However, traditionally, little attention has been given to the interrelationship between various non-bank entities that are active in this segment of the real estate market and how the relationships between title agents, mortgage brokers, real estate agents, and others were structured.

These cooperative relationships were previously required to comply with laws restricting payment of referral fees in conjunction with settlement services by fitting within the Real Estate Settlement Procedures Act's (RESPA) legal safe harbor for "affiliated business arrangements" ("ABAs"). However, certain business realities, lack of enforcement, and general lack of awareness created the potential that many of these relationships were not legally compliant. And, there were few consequences if the relationships were not, in fact, in compliance with RESPA. That is, until now.

Recent enforcement actions and court decisions have resulted in significant fines and penalties for violations of RESPA's anti-kickback provisions.

For example, in 2013, the CFPB investigated a business arrangement under which a home construction contractor formed a new company with a mortgage bank. The contractor referred home buyers to the new company for purposes of obtaining a mortgage and received a payment commensurate with his interest in the entity. The CFPB construed these payments as a violation of RESPA's

prohibition of payment or acceptance of any fee or kickback.

More recently, the CFPB ordered a title company in New Jersey to pay \$30,000 for payments that the agency characterized as “illegal kickbacks for referrals.”¹

In addition, a federal judge in California recently ruled that Marketing Service Agreements (“MSAs”), common in the industry, also violated RESPA’s anti-kickback provision, because the services provided under the agreement were not “settlement services.” The decision arguably calls into question may similar agreements in the residential real estate industry which were previously thought to comply with RESPA.

In short, these enforcement actions and court decisions highlight the growing effort to look beyond the structure of a business relationship to determine whether it constitutes a violation of RESPA. And these will undoubtedly generate renewed interest in class action litigation under RESPA.

Because violations can carry steep fines and even possible criminal charges, title agencies, real estate brokers, loan originators and any other company that participates in the mortgage origination and title service industries should immediately begin reviewing their relationships, written agreements, and disclosure practices for compliance.

If you have questions or would like advice regarding any affiliated business relationships and the current regulatory requirements, please contact Brian Nettleingham or Martin Frenkel at 248-354-4030. If you would like to participate in our upcoming series of industry round table discussions on finding new solutions to the problem of maintaining profitability in light of recent regulatory developments, please let us know, and we will send you information on how to register to participate.

1Consumer Financial Protection Bureau article: CFPB Takes Action Against Illegal Mortgage Referrals