
RESPA: Is Kindness Prohibited?

Baseball Tickets, Seminar Giveaways, and Fruit Baskets: Routine Promotion or RESPA Violation?

By **Martin S. Frenkel** and Sheila Strong

They seem like common everyday occurrences in business. You're invited to attend a baseball game with a group sponsored by someone with whom you do business. Perhaps, you attend an educational seminar put on by a company that would like your business and you leave with your free pen and cube of sticky notes with the presenter's logo. Or, you receive a fruit basket from a vendor at holiday time.

In nearly any industry, these routine acts of promotion (and even expressions of kindness or thanks) would be seen as mundane and go unnoticed as being anything particularly unique. However, the mortgage industry has become so scrutinized that we, as participants in that industry, may be finding it challenging to recognize "normal" human interaction (note, this is a joke!). While this may be an extreme statement made to prove a point, it goes without saying that the level of regulation on the industry has made us second guess our own "smell test" on life – being able to instinctively distinguish between activity that is lawful and unlawful.

Recently, a friend employed by a company doing business with the mortgage industry suggested (we think also jokingly) to the authors of this article that, despite passing the smell test, activities such as those noted above might constitute a violation of the Real Estate Settlement Procedures Act ("RESPA"). So, we decided to put this thought through a more rigorous analysis. This is what we found.

The fact of the matter is that nuances of RESPA can be confusing. A simple networking opportunity can either be viewed as an act of human kindness and generosity or be viewed as an illegal event subject to criminal and civil penalties under RESPA.

So with all this confusion, where does normal human interaction and the

opportunity to enjoy some comradery become a RESPA violation? The crossover from kindness to illegal activity occurs when a special event or gift is given as a quid pro quo for referrals. 12 U.S.C. 2607(a); 12 C.F.R. 1024.14(b). For example, let's say a local mortgage company threw a holiday party last month. If they only invited real estate agents that sent them business, then that holiday party served as something of value in exchange for referrals – a quid pro quo in violation of RESPA. If the entire local real estate association was invited to the holiday party without regard to referrals, then it's ok. Just the mere presence of a “thing of value” doesn't make the event a violation; it must be tied to referrals.

The authors of this article have learned through regulatory examinations that there is still widespread confusion of what constitutes a RESPA violation. A normal promotional event is expressly allowed under RESPA and happens all the time. 12 C.F.R. 1024.14(g)(iv). In fact, at the most recent annual Mortgage Bankers Association convention, a mortgage company sponsored a concert that was attended by mortgage professionals, some of whom referred business to the sponsoring lender. So, now we have something of value and we have referrals that occurred. Does that make the event a RESPA violation? No, and here's why. Even though something of value and referrals may equal a RESPA violation, the thing of value has to be *in exchange* for referrals. 12 U.S.C. 2607(a); 12 C.F.R. 1024.14(b). If the concert would have been limited only to those who referred business, the special event would have morphed from “normal” human interaction to an illegal kick-back.

So, what are the takeaways from this RESPA “exercise”? To avoid a regulator's finding that a promotional activity has crossed the line to become an illegal kick-back, remember that: (1) All promotional activities and events should include an invitation philosophy that does not take referrals into consideration; (2) If you want to say “Thank you” to a real estate agent for sending business your way, go ahead — kindness isn't statutorily defined as a thing of value in exchange for referrals (note, this is *not* a joke!); (3) If you do send a thank you note for a referral, however, don't include a special gift — even a \$1 lotto ticket is out since there is no de minimis exception for kick-backs under RESPA; and (4) Documentation, documentation, documentation — make sure to keep records of events and promotional items including invitation lists, dates and content of business meetings, sponsorships, and all other marketing materials to serve as proof that there was no RESPA violation.

Now, go out there this summer and enjoy that baseball game!

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