Consumer Financial Protection Bureau

Real Estate Settlement Procedures Act FAQs

The questions and answers below pertain to compliance with the Real Estate Settlement Procedures Act (RESPA) and certain provisions of Regulation X.

RESPA Section 8 General

QUESTION 1:

What are the provisions of RESPA Section 8?

ANSWER (UPDATED 10/7/2020)**:**

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).

RESPA Section 8(c) identifies certain payments that are not prohibited by Section 8. 12 USC § 2607(c); 12 CFR § 1024.14(g).

This is a Compliance Aid issued by the Consumer Financial Protection Bureau. The Bureau published a Policy Statement on Compliance Aids, available at https://www.consumerfinance.gov/policy-compliance/rulemaking/final-rules/policy-statement-compliance-aids/, that explains the Bureau's approach to Compliance Aids.

Appendix B to Regulation X provides examples to illustrate the application of RESPA to particular fact patterns, including fact patterns under Section 8(a), 8(b), and 8(c) indicating whether or not a violation occurred. Appendix B 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).

RESPA Sections 8(a), 8(b), and 8(c) are discussed in more detail in RESPA Section 8 General FAQs 2 through FAQ 4 and RESPA Section 8(a) FAQ 1 below.

QUESTION 2:

What is RESPA Section 8(a)?

ANSWER (UPDATED 10/7/2020)**:**

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).

For more information on RESPA Section 8(a), see RESPA Section 8(a) FAQ 1 below.

QUESTION 3:

What is RESPA Section 8(b)?

ANSWER (UPDATED 10/7/2020)**:**

RESPA Section 8(b) prohibits unearned fee arrangements in connection with federally related mortgage loans. RESPA Section 8(b) prohibits the giving and accepting of any portion, split, or percentage of charges made or received for real estate settlement service business, unless for services actually performed. 12 USC § 2607(b).

QUESTION 4:

What payments are not prohibited under RESPA Section 8(c)?

ANSWER (UPDATED 10/7/2020)**:**

RESPA Section 8(c) provides a list of payments (provided or received) and arrangements that are not prohibited under RESPA Section 8. These include:

1. Fees paid to attorneys for services actually rendered. 12 USC § 2607(c)(1)(A).
2. Fees paid by a title company to its duly appointed agent for services actually performed in the issuance of a title insurance policy. 12 USC § 2607(c)(1)(B).
3. Fees paid by a lender to its duly appointed agent for services actually performed in the making of the loan. 12 USC § 2607(c)(1)(C).
4. Bona fide salary or compensation or other payment for goods or facilities actually furnished or for services actually performed. 12 USC § 2607(c)(2).
5. Payments under "cooperative brokerage and referral arrangements or agreements between real estate agents and brokers." 12 USC § 2607(c)(3).
6. Affiliated business arrangements, subject to specified conditions. 12 USC § 2607(c)(4).
7. Other payments and classes of payments adopted by regulation after consultation with other specified federal agencies and officials. 12 USC § 2607(c)(5).

Regulation X, 12 CFR §§ 1024.14(g)(1) and 1024.15 implement these RESPA Section 8 provisions and provide details on the payments that are not prohibited by RESPA Section 8, identified above. These provisions also specify additional payments and activities that are not prohibited by Section 8, such as: (1) normal promotional and educational activities, subject to certain conditions, and (2) an employer's payments to its own employees for any referral activities. 12 CFR §§ 1024.14(g)(1)(vi) and 14(g)(1)(vii). Appendix B to Regulation X provides further guidance on these payments and activities.

QUESTION 5:

Which individuals, entities, and transactions are covered by RESPA Section 8?

ANSWER (UPDATED 10/7/2020)**:**

RESPA Section 8 prohibitions generally apply to any person, which RESPA defines to include individuals, corporations, associations, partnerships, and trusts. 12 USC § 2602(5).

RESPA does not apply to extensions of credit to government or governmental agencies or instrumentalities. It also does not apply to extensions of credit primarily for business, commercial, or agricultural purposes. 12 USC § 2606.

Regulation X, 12 CFR § 1024.5 provides additional limits on the coverage of RESPA.

QUESTION 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?

ANSWER (UPDATED 10/7/2020)**:**

Generally, yes.

RESPA Section 8 does not prohibit a lender or other settlement service provider from giving a consumer a gift or an incentive (e.g., a discount, refund of fees, chance to win a prize, etc.) for doing business with that entity. However, RESPA Section 8 prohibits, for example, giving an incentive to a consumer in exchange for the consumer referring other business to that lender or other settlement service provider.

Other federal and state laws may also have restrictions that apply and should be consulted.

RESPA Section 8(a)

QUESTION 1:

What activities are prohibited under RESPA Section 8(a)?

ANSWER (UPDATED 10/7/2020)**:**

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.

- *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 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).

- *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).

- *For referrals of business.* 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. 12 CFR § 1024.14(f)(1). 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).

- *Incident to or part of a real estate settlement service involving a federally related mortgage loan.* To be a violation, the referral(s) must be directly or indirectly incident to or part of a real estate settlement service involving a federally related mortgage loan. 12 USC § 2602(1); 12 CFR § 1024.2(b). Settlement service is defined broadly as any service provided in connection with a real estate settlement, which includes (but is not limited to) origination of a loan, closing services, title services, title insurance, document preparation, property surveys, inspections and appraisals, the rendering of credit reports and appraisals, and services of attorneys, real estate agents, and mortgage brokers. 12 USC § 2602(3); 12 CFR § 1024.2(b).

RESPA Section 8: Gifts and Promotional Activity

QUESTION 1:

Are gifts and promotions allowed under RESPA Section 8?

ANSWER (UPDATED 10/7/2020)**:**

It depends.

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.

For example, 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).

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.

However, in certain circumstances, gifts or promotions directed to a referral source are not prohibited if they are a "normal promotional or educational activity" meeting the conditions in Regulation X. 12 CFR § 1024.14(g)(1)(vi).

For more information about the analysis under RESPA Section 8(a), see RESPA Section 8(a) FAQ 1, above. For more information about "normal promotional and educational activities" under RESPA and Regulation X, see RESPA Section 8: Gifts and Promotional Activities FAQ 2 and FAQ 3, below.

QUESTION 2:

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

ANSWER (UPDATED 10/7/2020)**:**

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).

Whether a particular item or activity meets each of these two conditions is a factual question.

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*. If an item or activity is targeted narrowly towards prior, ongoing, or future referral sources, this could indicate the item or activity is conditioned on referrals of business. For example, if a promotional item is provided only to a limited set of settlement service providers who also happen to be current referral sources or an intentionally targeted group of future referral sources, this may suggest that the recipient is receiving the promotional item because of past or future referrals and, thus, the promotional item may be conditioned on referrals. If, instead, a promotional item is provided to a broader set of recipients, such as the general public or all settlement service providers offering similar services in a given locality, then that may indicate that the promotional item is not conditioned on referral of business.
- *How often the item or activity is given to the referral source.* If a referral source is routinely and frequently provided with an item or included in an activity, and particularly if that referral source is provided with the item or included in the activity more often than other persons, this could indicate the item or activity is conditioned on referrals.

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.* If, for example, a promotional activity involves paying for mandatory continuing education expenses, certifications, licenses, or other items that the referral source would otherwise need to pay for on their own, the promotional item or activity is more likely to defray expenses. Similarly, if the activity involves paying for the referral source's office supplies branded with the referral source's name, contact information, or logo, this is more likely to defray expenses of the referral source. But if the activity involves providing the referral source with office supplies featuring the name, contact information, or logo of the entity providing the supplies, this is less likely to defray expenses, since it is unlikely that the referral source would otherwise use its own funds to purchase office supplies featuring the name and information of another entity.

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). See RESPA Section 8: Gifts and Promotional Activities FAQ 3 below for discussion of "normal promotional or educational activities" as applied to examples.

QUESTION 3:

What are examples of "normal promotional and educational activities" meeting the conditions in Regulation X?

ANSWER (UPDATED 10/7/2020)**:**

Regulation X allows "normal promotional and educational activities" that are not conditioned on the referral of business and do not involve "defraying" expenses otherwise incurred by that recipient who is in a position to make a referral. 12 CFR § 1024.14(g)(1)(vi).

Whether a particular item or activity meets the conditions in Regulation X for "normal promotional and educational activities" depends on the facts and circumstances. For example:

- 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. The drawing is more likely to meet the conditions for a "normal promotional and educational activity" under Regulation X because 1) the drawing entry is not conditioned on referrals and 2) the prize would not defray expenses as the basketball set is not an expense that persons in a position to refer business to the settlement agent would otherwise incur.

- 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. Under these facts, the activity is more likely to meet the conditions for a "normal promotional and educational activity" under Regulation X because 1) the course admission is not provided conditioned on referrals and 2) the course admission fee is the fair market value, meaning the title company is not defraying the real estate agent's expenses for the course.
- 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. The seminars are more likely to meet the conditions of a "normal promotional and educational activity" under Regulation X, because 1) admission to the courses are not conditioned on referrals and 2) the courses are not defraying expenses that otherwise would be incurred by persons in a position to make referrals, as they are routinely provided free of charge for everyone, not just referral sources.

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. For example:

- 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. 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, as discussed in RESPA Section 8: Gifts and Promotional Activity FAQ 1, above.

- 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.

For more information about the conditions for meeting the "normal promotional and educational activities" under Regulation X, see RESPA Section 8: Gifts and Promotional Activities FAQ 2. For more information about the application of RESPA Section 8(a) to promotional or educational activities, see RESPA Section 8: Gifts and Promotional Activities FAQ 1.

RESPA Section 8: Marketing Services Agreements (MSAs)

QUESTION 1:

What are marketing services agreements?

ANSWER (UPDATED 10/7/2020)**:**

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. MSAs may involve only settlement service providers or may also involve third parties who are not settlement service providers. For 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.

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). This is 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, as described in RESPA Section 8: Marketing Services Agreement FAQ 2, below, marketing services are compensable services under RESPA. 12 CFR § 1024.14(b) and (g)(2).

Moreover, 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. These marketing services cannot be nominal, and the payments cannot be for a duplicative charge or referrals. 12 CFR § 1024.14(b), (c), and (g)(3).

QUESTION 2:

What is the distinction between referrals and marketing services for purposes of analyzing MSAs under RESPA Section 8?

ANSWER (UPDATED 10/7/2020)**:**

Whether a particular activity is a referral or a marketing service is a fact-specific question for purposes of the analysis under RESPA Section 8(a).

As discussed in RESPA Section 8(a) FAQ 1, 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. 12 CFR § 1024.14(f)(1). For 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.

In contrast, a marketing service is not directed to a person; rather, it is generally targeted at a wide audience. For 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.

MSAs that involve payments for referrals are prohibited under RESPA Section 8(a), whereas MSAs that involve payments for marketing services may be permitted under RESPA Section 8(c)(2), based on the facts and circumstances of the structure and implementation. More

information on this analysis is discussed in RESPA Section 8: Marketing Services Agreement FAQ 3 and FAQ 4, below.

QUESTION 3:

How do the provisions of RESPA Section 8 apply when analyzing whether an MSA is lawful?

ANSWER (UPDATED 10/7/2020)**:**

Entering into, performing services under, and making payments under MSAs are not, by themselves, prohibited acts under RESPA or Regulation X. In fact, MSAs are not referenced in RESPA or Regulation X. Ultimately, the 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 RESPA Section 8(b), or is permitted under RESPA Section 8(c). The 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. The following describes how specific provisions of RESPA frame that analysis.

Under RESPA Section 8(a), if an MSA involves an agreement or understanding to refer business incident to or part of a settlement service in exchange for a fee, kickback, or thing of value, then the MSA or conduct under the MSA is **prohibited**. For example, this can include (but is not limited to) agreements structured or implemented to provide payments based on the number of referrals received. For more information about the analysis under RESPA Section 8(a), see RESPA Section 8(a) FAQ 1, above.

Under RESPA Section 8(b), if the 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 violate RESPA Section 8(b) if they 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 of RESPA Section 8(b) 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. For more information about the analysis under RESPA Section 8(b), see RESPA Section 8 General FAQ 3, above.

However, under RESPA Section 8(c)(2), if the 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. 12 USC § 2607(c)(2); 12 CFR § 1024.14(g)(1)(iv). RESPA Section 8(c)(2) does not apply to MSAs that involve payments for referrals because they are not agreements for marketing services actually performed. However, 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. 12 CFR § 1024.14(g)(2). *See also* 12 CFR § 1024.14(b).

QUESTION 4:

What are some examples of MSAs prohibited by RESPA Section 8?

ANSWER (UPDATED 10/7/2020)**:**

As stated previously, an MSA can be lawful under RESPA if it is structured and implemented consistently as an agreement for the performance of actual marketing services and where the payments under the MSA are reasonably related to the value of the services performed. 12 USC § 2607(c)(2); 12 CFR § 1024.14(g)(1)(iv) and (g)(2).

However, as discussed in the FAQs above, MSAs can be unlawful when entered into based on their structure or can become unlawful based on how they are implemented. The Bureau's Office of Enforcement has identified violations of RESPA Section 8 in investigations that involved the use of oral or written MSAs. An MSA is or can become unlawful if the facts and circumstances show that the MSA as structured, or the parties' implementation of the MSA—in form or substance, and including as a matter of course of conduct—involves, for example:

- 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.

For example, assume a lender enters into an MSA with a real estate agent that also makes referrals to the lender. The MSA requires the real estate agent to perform marketing services, including deciding on and coordinating direct mail campaigns and media advertising for the lender. However, the 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, the 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. 12 CFR § 1024.14(g)(1)(iv). Further, 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).

More information about analyzing MSAs under RESPA Section 8 is available in RESPA Section 8: Marketing Services Agreement FAQ 3, above.