

Staying out of CFPB Jail (Part I)

Most of us have heard of the **Consumer Financial Protection Bureau (CFPB)** and that it is not only coming to town... it is already here. In turn, now is the time for all professionals in the real estate field to learn how to stay out of CFPB jail! This is the first of a three part series on the CFPB and its enforcement powers.

The CFPB is an independent agency of the United States government responsible for consumer protection in the financial sector. In 2010, the Dodd–Frank Wall Street Reform and Consumer Protection Act created the CFPB as a response to the financial crisis of 2007–08 and the subsequent Great Recession.

Included within its jurisdiction is enforcement of the Real Estate Settlement Procedures Act (RESPA). Specifically, Section 8 of RESPA and its prohibition against "kickbacks" among **settlement service providers**.

Real Estate Agents are **settlement service providers**, as are lenders, title and escrow companies, appraisers, inspectors and home warranty companies. Significantly, RESPA has been in place since 1974 and, hence, RESPA violations have been actionable for over four decades. Yet, because the U.S. Department of Housing and Urban Development was charged with RESPA compliance and had limited resources, enforcement has been sparse. That will and has changed with the CFPB.

The CFPB, with offices in Washington D.C. and Phoenix, Arizona, is well staffed and incredibly well funded. It also generates revenue by and through assessing fines and penalties for non-compliance with the laws under its jurisdiction. Those fines can range from **\$5,000** per violation up to **\$1,000,000**. This is serious business.

So, what should real estate licensees be mindful of?

- **Co-Marketing among settlement service providers (Flyers and other promotional materials).** In the past, it was not uncommon for industry partners, such as lenders or title companies, to provide a licensee with marketing materials (say a flyer, or customized pens or calendars or the like) that included an agent's logo, information and/or picture on it. They did so without charging the licensee the cost of producing the marketing pieces and to bridge a relationship. That is not permitted. Indeed, if another service provider offers to do a specialized marketing piece for a licensee, the licensee must pay the fair market value for the piece (pro rata). For example, if 75% of a flyer is dedicated to the licensee's business and 25% to a title company, the agent/licensee must pay for 75% of the cost of producing it.

- **Co-Marketing on Lead Sites and other Real Estate Sites (Zillow or Trulia).** It is likewise not uncommon for settlement service providers to market together on these types of lead-generating websites. And, often times one of the providers pays the entire

cost for both. That should not occur. Again, the providers should pay their proportionate cost of the marketing.

- **Providing Food and Refreshments at Events.** A settlement service provider (e.g. a title company) sometimes offers to furnish food and refreshments for an event hosted by another provider (e.g. a real estate brokerage). This often occurs at team meetings, office meetings, and home tours. By providing something of value, the CFPB could consider this a kickback. One way to mitigate this, and possibly avoid a RESPA infraction, is to make certain that the settlement service provider who is furnishing the food and drink is present at the event and afforded an opportunity to actually market their services. So, in essence, in exchange for paying for the food and beverages, the title company is able to meet with agents, a team, consumers or others and advertise its services.

- **Template Pieces.** There seems to be a split in the industry as to whether “template-type marketing pieces” are RESPA compliant. For instance, title companies often create listing books or buyer brochures that they provide to real estate licensees to give to buyers and sellers the licensees are working with. The books/packets are consumer driven and are largely informational as to the real estate market, listing information, etc. and basically a promotional piece for the title company. However, the title companies will often personalize the template to include a licensee’s name, brokerage, phone number and email on the cover. Some in the industry believe that because these books/packets/brochures are not created specifically for an individual licensee and/or to actually market the licensee, providing them for free is not a kickback. Others take the position it is still something of value and the cost of production should be pro-rated.

- **Event Tickets, Meals and Entertainment.** Marketing 101: get to know your referral partners. An effective means of marketing has always been taking a potential referral source to lunch, to a game or event. Can those tickets be considered something of value to trigger a RESPA violation? Well, it is almost certainly a RESPA violation if a real estate licensee accepts tickets from another provider (lender for instance) and that provider does not join the licensee at the event. If they go together, then, again, it could be argued that there is value being exchanged – e.g. an opportunity to market and grow the relationship.

Be mindful of two things in reviewing the foregoing. First, this a general overview of RESPA based solely on current trends. The CFPB is just now ramping up and we will receive more guidance going forward as to what it considers a RESPA violation. Second, a licensee’s own state law may address, limit and/or govern some of these issues as well.

In our part II of this series, we will explore Marketing Service Agreements and CFPB compliance.