



# RESPA, ABAs and the new enforcement regimes in DC and elsewhere

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## Section 8 of RESPA

- 8(a): No fees, kickbacks or things of value for referral of business.
- 8(b): No splitting or giving of any charge to any person referring business other than services actually performed.
- 8(c): The exceptions and AfBAs



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## Section 8(c) exceptions

- Payments to attorneys for services actually rendered.
- Title insurance premiums to agents
- Loan officer commissions
- Bona fide salary or compensation for goods or facilities actually furnished or for services actually performed.
- AfBAs



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## Section 8 (c) (4) requirements

- Disclosure of the relationship and ownership by the referrer.
- Disclosure of estimate of charges or range of charges.
- No required use by the consumer.
- Only thing of value received by the referrer is a return on ownership interest.



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## The Disclosure

- HUD actually provides an accepted example available at the HUD website.
- Use it verbatim
- Must be provided at earliest opportunity to the party being referred.
- Be sure it is signed and if the party will not sign, so note that.
- Retain a copy of it. How long? More on that later.



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## HUD 10 Point Sham Test

- HUD Statement of Policy 1996-2 provide a “sham test” of 10 criteria which would be used by HUD in evaluating if an AfBA is bona fide.
- Not rules more like guidelines. Probably.
- Have been incorporated into state law in some jurisdictions.
- Thrown out as unconstitutionally vague and beyond scope of authority in the 6<sup>th</sup> Circuit.
- Led to dismissal of Borders and Borders action by the CFPB.



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## The Criteria

- Does the new entity have sufficient capital, typical in the industry, to conduct the business for which it was created?
- Does it have its own employees?
- Does it manage its own affairs?
- Does it have its own space and pay fair market value rent?
- Does it provide substantial services, i.e. the essential functions for which it receives a fee and does it incur risks and rewards of a comparable enterprise in the market?



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## Criteria (continued)

- Does the entity perform all of the essential services itself or contract them out?
- If the entity contracts essential services out does it use an independent third party?
- Does a party performing contracted services receive a fee reasonably related to the services received?
- Does it actively compete for outside business?
- Does the entity send business to a variety of entities?



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## HUD's statement but what about the CFPB?

- The Bureau has relied on the Statement of Policy in several enforcement actions.
- Under the Cordray and Chopra directorships entities were warned that meeting the criteria may still not save them from being determined to be a sham.
- The CFPB reaffirmed the 10 point sham test with several other HUD letters in September of 2023.

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## What are the penalties under Dodd-Frank?

- Non-culpable or negligent violations: Up to \$5,000 per day
- Reckless violations: Up to \$25,000 per day
- Knowing violations: Up to \$1,000,000 per day
- Disgorgement of gross revenues or profits
- Private right of action under RESPA: Section 8= treble damages plus attorneys' fees. Section 9= treble damages



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## Settlement Agreements

- Sharing employees
- FMV of space rented
- What is a thing of value?
- Joint marketing
- Marketing Service Agreements
- Proper and adequate disclosure
- Freedom Mortgage settlement
- Can you be compliant under RESPA and violate the CFPA?



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## Whither RESPA and a retooled CFPB?

- Don't forget state law
- Attorneys General, Secretaries of State and Insurance regulators can enforce RESPA
- But not just RESPA-Final Interpretive Rule as to Authority of States to enforce CFPA (UDAAP) issued May of 2022
- Both blue and red states using the rule to enforce through their AGs

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## And this was only February

- 2/1: Director Chopra fired
- 2/3: Treasury Secretary Bessent named Acting Director; orders stand down
- 2/4: Chopra blueprint for state level enforcement released
- 2/7: DOGE gets access to CFPB data
- 2/8: OMB Director Vought named Acting Director of CFPB; orders shut down with Bureau home page temporarily shut down.

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## That was just the first week

- 2/11: Jonathan McKernan nominated as CFPB Director; confirmation hearings in March
- 2/14: DC federal district court blocks CFPB firings; AD Vought announces defunding of CFPB temporarily halted
- 2/19: Former FHFA Director Mark Calabria joins OMB and is designated by AD Vought to “streamline” the CFPB
- 2/26: Court filing by AD Vought in National Treasury Employees Union v Vought includes letter that the CFPB will not be shut down but streamlined

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## So is the ball now bounced to the states?

- The May 2022 Rule is quite clear that the state AGs have broad authority under the CFPB to bring actions under UDAP even if there is concurrent action by the CFPB
- 1/14/25 report by CFPB advocating that states strengthen their own laws prohibiting abusive practices, expanding tools and remedies and levying fines and damages necessary to enforce

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## Wolverines heard in the streets of Lansing?

- 2/11/25: Michigan AG Nessel advises that Michigan will defend and protect Michiganders as to abusive practices in absence of CFPB enforcement
- 2/20/25: Coalition of 23 states (including Michigan) bring action in US District Court in Maryland opposing defunding or dismantling of CFPB
- 2/25/25: Amicus brief filed by the 23 AGs alleges that shutdown of CFPB leaves no regulatory enforcement or examination in regard to federally-chartered institutions jeopardizing their citizens

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## Purple enforcement

- 1/17/25: PA AG settles action against Bright Financial Group LLC as to alleged ECOA and RESPA violations
- 5/24/24: TX AG settles action against Colony Ridge, Inc. for alleged UDAAP violations
- 7/13/23: Washington AG settles action against Prehire LLC for alleged TILA and Reg Z violations

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# Questions?

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