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CONVENTION

A man in a dark suit, white shirt, and red tie stands on a large, light-colored rock. He has his arms raised in a celebratory gesture, looking upwards. The background is a bright blue sky with white clouds. The large blue text 'SCALING TO SUCCESS' is overlaid on the image, with the man standing in front of the word 'TO'.

Devil In The Details: MSAs

Consumer Financial Protection Bureau (CFPB)

- Creation
- Power
 - Scope
 - Budget



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Marketing Services Agreement (MSA)

An agreement by which a settlement service provider, such as a real estate broker, agrees to market and promote the business of another provider such as a title company, in exchange for payment.



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MSAs

- MSAs are common amongst real estate settlement service providers in Arizona.
- With the CFPB's investigations into MSAs, agents and brokerages should review any existing MSAs to ensure they comply with the Real Estate Settlement Procedures Act (RESPA).



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RESPA

Consumer protection statute designed to:

1. Help consumers become better shoppers for settlement services; and
2. Eliminate kickbacks and referral fees that unnecessarily increase the costs of certain settlement services.



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Penalties for RESPA Violations

- Audit
- Sanctions
 - Rescission
 - Disgorgement (refund of money)
 - Payment of damages
 - Public notice regarding violation
 - Criminal and civil penalties (with treble damages)
 - Possible revocation of FHA approval



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RESPA: Section 8(a)

- Business referrals

Prohibits a person from giving or accepting any thing of value pursuant to an agreement or understanding for referrals of settlement service involving a federally related mortgage.



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Thing of Value

Includes any payment, advance, funds, loan, service, or other consideration



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An Agreement or Understanding

Can be written, oral or a mutual understanding



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Settlement Services

Essentially, any fee documented on the HUD-1:

- Real Estate Brokers and Agents
- Mortgage Bankers and Mortgage Brokers
- Title Companies and Title Agents
- Home Warranty Companies
- Hazard Insurance Agents
- Appraisers
- Flood and Tax Service Providers
- Home and Pest Inspectors



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Federally Related Mortgage Loan

Any loan secured by a first or subsequent lien on a 1-4 family residential property



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RESPA: Section 8(b)

– Splitting of Unearned Fees

Prohibits a person from giving or accepting any part of a charge for services that are not performed.



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RESPA: Section 8(c) – Exception

Payment in return for goods provided or services performed.



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Exception: 2 Part Test

1. Goods or services must be actual, necessary and distinct; and
2. Payment must be commensurate with the value of goods or services.



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Lighthouse Title

Last Fall, the CFPB found that Lighthouse Title's MSAs with various real estate brokers violated RESPA.

The CFPB and Lighthouse Title entered into a Consent Order.



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Lighthouse Title

Consent Order :

- Civil money penalty in the amount of \$200,000;
- Prohibition from entering into any MSAs in the future;
- Terminate all existing MSAs;
- Require documentation for all exchanges of things of value worth \$5.00 or more with persons in a position to refer business for five years.



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Lighthouse Title

What caused the CFPB's findings?

- MSAs were entered into and renewed with the agreement or understanding that business would be referred
- No documentation for how FMV was determined
- Fees were based on how many referrals were received
- Parties were not monitored to ensure contracted services were received



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Quiz

1. Is an MSA required to be disclosed to a client?
 - a. Yes
 - b. No
 - c. It depends



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Quiz

2. How do you determine a fair market value fee?
- a. By what other brokers are paying
 - b. By the amount of transactions referred
 - c. It depends



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Quiz

3. How do you determine if a fee is fair and reasonable?
 - a. The parties to the agreement consent to the amount
 - b. Payments bear a reasonable relationship to the market value of the services actually rendered and/or the facilities actually furnished
 - c. It depends



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Quiz

4. What is pro rata share?
- a. Proportionate amount
 - b. Half of the cost
 - c. It depends



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Quiz

5. Should an MSA be tied to the success of the marketing arrangement?
- a. Yes
 - b. No
 - c. It depends



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Best Practices

- Agreements should be transparent and well documented
- Keep records
- Periodically review services and amount paid
- Employ a flat fee per time period



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Best Practices

- Rely on independent valuation services to reduce conflicts of interest
- Set fees below FMV to be conservative
- Adjust fees only periodically based upon material changes in services
- Disclose agreement to client



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Word Search



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Questions?



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Thank You!



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