

An aerial view of a city with a network of white lines and nodes overlaid on it, suggesting a global or interconnected theme. The text is centered over this background.

# **Regulatory Update: Joint Ventures & the CFPB**

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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



# 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



# 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.



**HUD.GOV**

# The Disclosure

- HUD/CFPB actually provides an accepted example available at the CFPB's 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.



# 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.



# “HUD 10 Part Sham Test”

1. Does the new entity have sufficient capital, typical in the industry, to conduct the business for which it was created?
2. Does it have its own employees?
3. Does it manage its own affairs?

# The Criteria (cont.)

4. Does it have its own space and pay fair market value rent?
5. 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?



# Criteria (cont.)

6. Does the entity perform all of the essential services itself or contract them out?
7. If the entity contracts essential services out does it use an independent third party?

# Criteria (cont.)

8. Does a party performing contracted services receive a fee reasonably related to the services received?
9. Does it actively compete for outside business?
10. Does the entity send business to a variety of entities?

# Few Joint Venture Hot Water Issues

- Inadequate Capitalization. (100k plus)
- Fluctuating Units to Members who send in referrals.
- Must have at least one full-time employee per Joint Venture.
- Better have a dedicated website & social media presence.
- Kicking out Members who don't send the Joint Venture business.
- Address, phone number, & emails better be distinct
- AfBA Disclosure Form
- Required Use

# 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



# The CFPB's Regulatory Agenda

- ▶ Strong focus on racial equity
- ▶ Using UDAAP to achieve their focus
- ▶ Remember the name Townstone Financial
- ▶ “Townstone Effect” impacts the Title Insurance Industry

# CFPB v. Townstone Financial Inc.

(US ND Illinois 1:20-cv-04176)

- ▶ First ECOA enforcement action against a non-bank mortgage lender/mortgage broker.
- ▶ Based solely on CFPB Assumptions (**ZERO** consumer complaints)
- ▶ CFPB says **5 comments** on their AM Radio Show were racially offensive.
- ▶ CFPB Manipulated HMDA Data

# CFPB's New Equity Agenda

- ▶ Alleges a failure to advertise to a specific racial group. (Theory called “*Equal Time Advertising Rule*” or “*EqTar*”)
- ▶ Alleges Townstone failed to utilize hiring practices which were based on the MSA demographics where the company operated. Job specific demographic hiring practices. (Theory called “**Demographic Equality Employment Quota Rule**” or “**DEEQR**”)

# So what is redlining?

- ▶ Unequal access to credit, or unequal terms of credit, because of the race, color, national origin, or other prohibited characteristic of the residents of the area in which the credit seeker resides or will reside, or in which the residential property to be mortgage is located.



## Ohh and there's more

- ▶ Reverse redlining is the practice of targeting certain borrowers or areas with less advantageous products or service based on prohibited characteristics.
- ▶ It can exist if applicants are treated differently on a prohibited basis characteristic on where they live. If lending patterns shift so may the level of redlining risk.

# Reasonably Expected Market Area

- ▶ A Lender's **REMA** *“is where it actually markets or provides credit or where it could be reasonably expected to have marketed and provided credit.”*
- ▶ Examiners determine the REMA based on the lender's methodology of attracting business, including the channels by which loan applications are taken **including the use of realtor referrals or real estate office locations.**

## CFPB celebrated Dental Drill Appreciation Day

- ▶ On 1/26 the Bureau sent out an RFI as to “junk fees”. Includes a wide range of fees from bank charges to hotel resort fees.
- ▶ But *title insurance* got thrown in as to a consumer's ability to reasonably be able to shop for title insurance.

# What Happened in 2022 on Erik Estrada's Birthday?

- ▶ On 3/16 the CFPB announces broad expansion of their supervisory procedures to include **discriminatory conduct “that the agency alleges”** could constitute unfair practices under Dodd-Frank.
- ▶ Every UDAAP exam will now include an assessment of a company's anti-discrimination programs as to **all consumer financial products or services even if not subject to ECOA.**

# Here is the CFPB's Title Insurance Agenda

- ▶ CFPB will hold Lenders liable for redlining violations using ECOA.
- ▶ Lenders will also be held liable for lax 3<sup>rd</sup> party vendor management practices using UDAAP.
- ▶ Lenders will be liable for the settlement agents and/or title agents who charged higher title insurance premiums to consumers in minority areas.
- ▶ CFPB does an end around the State Department of Insurance.
- ▶ Forces Lenders to start regulating consumer pricing.
- ▶ Lenders will start auditing for title insurance & settlement agent pricing.

# Why is the CFPB troubled with Title Insurance?

- ▶ CFPB has long abhorred the Title Insurance Industry.
- ▶ File and Use states are on the hot seat.
- ▶ Title Agent/Title Underwriter splits in those File & Use states.
- ▶ Enhanced Policy versus Standard Policies
- ▶ Use of Endorsements
- ▶ Inconsistent application of fees by settlement agents with multiple office locations.
- ▶ Reissue Rate Credit applications
- ▶ Simultaneous Issue applications.

# Practical considerations

- ▶ What is your REMA?
- ▶ Do you market/advertise to all of it?
- ▶ Where are your offices located?
- ▶ What does your website look like?
- ▶ Did you utilize job specific racial hiring practices to reflect the MSA in which you are operating?

# Sell a little bait, sell a little tackle

- ▶ When you disclose title and settlement fees do you provide clear and transparent information about the fees and the alternative products that may be available to consumers?
- ▶ Do you have a designated person to monitor all of these items and provide regular reports? And not as their second job.





# QUESTIONS



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