ARTICLE

CORRUPT JOINT VENTURES IN THE MARKET FOR RESIDENTIAL REAL-ESTATE-SETTLEMENT SERVICES

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Closing costs in residential-real-estate sales have long acted as a significant barrier to American home ownership. In the Real Estate Settlement Procedures Act of 1974 (RESPA), Congress attempted to limit these costs by prohibiting referral fees, or "kickbacks," between the various settlement-services providers. In 1983, Congress adopted an exception to its kickback prohibition for affiliated-business arrangements, where residential-real-estate service providers jointly own a business and the only thing of value received by a referring party from the arrangement is a proportional return on its ownership interest in the affiliated business. For over 40 years, courts have struggled to determine the circumstances under which these arrangements are permissible. In the last few years, the real-estate-settlement-services market has experienced a proliferation of joint ventures attempting to facilitate referral payments through the affiliated-business-arrangement exception. In these joint ventures, typically between real-estate agents, on the one hand, and mortgage brokers or title-insurance companies, on the other, the real-estate agent takes a sizable ownership share in the joint venture without contributing significant capital. Mortgage brokers and title companies arrange these

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joint ventures as a means of rewarding real-estate agents for referrals. Real-estate agents enter these joint ventures to earn ancillary profits from the mortgage and title closing costs that are paid by homebuyers and sellers. But these joint ventures are a bad deal for consumers because they stifle competition and increase homebuying costs, including "junk fees." We argue that (1) the common practice of forming joint ventures by offering discounted investment opportunities violates RESPA's kickback prohibition, and (2) many joint ventures violate the prohibition on abusive conduct in the Consumer Financial Protection Act of 2010 (CFPA) when real-estate agents take advantage of consumers by steering them into co-owned settlement-services providers. We conclude with proposed compliance principles and policy recommendations.

I. INTRODUCTION

Homeownership is deeply woven into the fabric of the American dream, symbolizing not only a place of shelter but also the promise of stability, security, and financial prosperity. The notion that every individual should have the opportunity to own a piece of land and a dwelling to call their own has been a driving force in shaping societal aspirations and economic growth.[1] Homeownership can increase employment opportunities, affect where children attend school, and raise household wealth.[2] Homeownership is now less expensive than renting for comparable properties and provides a cushion for temporary disruptions to household

[1] *See* Kenneth Worles, *MLK's Dream of Housing Equality*, INEQUALITY.ORG (Jan. 13, 2017), https://inequality.org/article/mlks-dream-housing-equality/ [https://perma.cc/Z3T4-WVLU] (quoting Martin Luther King, Jr., Speech at the Chicago Freedom Movement Rally (July 10, 1966)) ("'Now is the time to make real the promises of democracy. Now is the time to open the doors of opportunity to all of God's children.' That door to opportunity is home ownership—which, for most Americans, is their single most valuable asset."). *See also* MARTIN LUTHER KING, JR., THE AUTOBIOGRAPHY OF MARTIN LUTHER KING, JR. 297–313 (Clayborn Carson ed., 2001) (providing a historical account of King's fair housing campaign in Chicago).

[2] Whitney L. Rostad, Katie A. Ports & Shichao Tang, *Mothers' Homeownership and Children's Economic Success 20 Years Later Among a Sample of US Citizens*, 99 CHILD & YOUTH SERV. REV. 355, 355 (2019) (discussing a twenty year longitudinal study finding "adults whose mothers owned homes . . . were over 1.5 times more likely to own homes, attain[] higher education, and were moderately less likely to receive public assistance . . . compared to adults whose mothers did not own homes.").

income.[3] Stable homeownership produces social, economic, and environmental well-being and contributes to vibrant communities.[4] While the benefits of homeownership should not obscure the need to support a variety of housing options, the overall public-policy advantages of reducing barriers to owning well-designed, affordable homes are "undeniable."[5]

Consumers need simple, affordable pathways into home ownership. Yet to purchase a home today, consumers must navigate a "confusing obstacle course" of local practices, complicated lending programs, inexplicable fees, and sometimes archaic land-title laws.[6] While local real-estate-

[3] ADAM J. LEVITIN & SUSAN M. WACHTER, THE GREAT AMERICAN HOUSING BUBBLE: WHAT WENT WRONG AND HOW WE CAN PROTECT OURSELVES IN THE FUTURE 4 (2020).

[4] *Id.* at 10–11, 14–15. *See also* Jerry Anthony, *Housing Affordability and Economic Growth*, 33 HOUS. POL'Y DEBATE 1187, 1187 (2023) (studying changes in the proportion of cost-burdened showing decreases in housing affordability had a statistically significant negative effect on economic growth.)

[5] William M. Rohe & Harry L. Watson, *Homeownership in American Culture and at Public Policy*, *in* CHASING THE AMERICAN DREAM: NEW PERSPECTIVES ON AFFORDABLE HOMEOWNERSHIP 1, 11 (William M. Rohe & Harry L. Watson eds., 2007). *See also* Carolyn B. Swope & Diana Hernández, *Housing as a Determinant of Health Equity: A Conceptual Model*, 243 SOC. SCI. & MED. 112571 (2019) (presenting evidence that homeownership is a prominent determinant of health); Mark R. Lindblad & Roberto G. Quercia, *Why is Homeownership Associated with Nonfinancial Benefits? A Path Analysis of Competing Mechanisms*, 25 HOUS. POL'Y DEBATE 263, 263 (2015) ("A large body of research links homeownership to private and social benefits; for example, empirical studies associate home ownership with residential satisfaction, children's educational attainment, mental and physical health, civic engagement, and social involvement"). *Cf.* Rowan Arundel & Richard Ronald, *The False Promise of Homeownership: Homeowner Societies in an Era of Declining Access and Rising Inequality*, 58 URB. STUD. 1120, 1137 (2021) (arguing "purported societal potential . . . homeownership . . . may be increasingly recognised as a 'false promise': one that has enabled the ongoing commodification of housing, labour market deregulation and retrenchment of state welfare support.").

[6] Chris Wheat & Makada Henry-Nickie, *Hidden Costs of Homeownership: Race, Income, and Lender Differences in Loan Closing Costs*, JPMORGAN CHASE INST. (Apr. 22, 2024), https://www.jpmorganchase.com/institute/all-topics/financial-health-

closing procedures vary, in the American housing market, between "five to 18 different vendors are involved in the typical real estate transaction."[7] This labyrinth forces about 90% of consumers to rely on real-estate-industry insiders to help them select the right businesses and produce the necessary documents to close.[8] And once they reach closing, consumers face a litany of fees, charges, and premiums. The oft-used label "junk fees" is perhaps understandable in the context of the 220 different types of real-estate-settlement fees that are tracked in federal real-estate-data standards, of which 71 are associated with loans and 35 with title insurance.[9] Although some consumers are satisfied with the services that they receive in the real-estate market, for most,

wealth-creation/hidden-costs-of-homeownership-race-income-and-lender-differences-in-loan-closing-costs [https://perma.cc/3ZE5-SDBF].

[7] Lew Sichelman, *Vendor Glut Drives Up Fees*, 35 NAT'L MORTG. NEWS 14 (2011).

[8] NAT'L ASS'N OF REALTORS, 2022 PROFILE OF HOME BUYERS AND SELLERS 5, 8 (2022), https://www.gmar.com/data/resources_files/2022%20HBS%20FINAL%20REPORT.pdf [https://perma.cc/4HT6-4LE4] ("Ten percent of recent home sales [in 2022] were FSBO [for sale by owner]").

[9] NUNO MOTA & MARK PALIM, FANNIE MAE, BARRIERS TO ENTRY: CLOSING COSTS FOR FIRST–TIME AND LOW–INCOME HOMEBUYERS 15 (2021), https://www.fanniemae.com/media/42286/display [https://perma.cc/6NUJ-8YQL]. Among the hundreds of real estate settlement fees tracked by federal data standards, thirty of the most common fees identified in Mota and Palim's survey include: credit monitoring fees, recording service fees, HOA working capital lender fees, e-recording fees, condo questionnaire fees, verification fees, technology platform service fees, compliance or administrative fees, undisclosed debt report fees, chain of title fees, builder fees, verification services fees, guaranty fees, transaction coordinator fees, borrower identity validation fees, loan tie-in fees, invoice fees, flood life of loan coverage fees, estoppel fees, HOA proration of dues, natural hazard disclosure fees, municipal lien search fees, property disclosure report fees, MERS fees, overnight mail fees, VOE fees, messenger/carrier fees, and move-in fees. *Id. See also* Press Release, The White House, Biden-Harris Administration Announces Broad New Actions to Protect Consumers from Billions in Junk Fees (Oct. 11, 2023), https://www.presidency.ucsb.edu/documents/white-house-press-release-biden-harris-administration-announces-broad-new-actions-protect [https://perma.cc/W6L2-QP68].

buying a home is "a complex and disappointing experience."[10] A national survey found that households with a below-median income cite "affording the down payment or closing costs" as the single biggest obstacle to purchasing a home.[11] Nearly 15% of lower-income homebuyers had closing costs that exceeded the amount of their down payment.[12] For millions of Americans, the barriers and costs of homeownership are virtually insurmountable.[13]

Congress has long been aware of the risk that real-estate-settlement businesses may exploit the opacity of buying a home to drive up costs. For example, the findings of a 1972 interagency report to the Senate banking committee remain relevant today:

> Competitive forces in the conveyancing industry manifest themselves in an elaborate system of referral fees, kickbacks, rebates, commissions and the like as inducements to those firms and individuals who direct the placement of business. These practices are widely employed, rarely inure to the benefit of the home buyer, and generally increase the total settlement costs.[14]

If closing costs are an obstacle to affordable housing, and if Congress has long been aware of the problem, does current law provide solutions for decreasing barriers to affordable housing? If not, what can be done to make settlement costs more affordable for struggling homebuyers?

Because housing affordability is a complex problem with no single solution, a complete discussion of the topic is beyond the scope of this article. In this piece, we focus on one

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[10] Sichelman, *supra* note 7, at 14.

[11] FANNIE MAE, CONSUMERS CONTINUE TO SEE HOMES AS A SAFE, HIGH POTENTIAL INVESTMENT: NATIONAL HOUSING SURVEY Q4 2020, at 46 (2021), https://www.fanniemae.com/media/38891/display [https://perma.cc/P3TE-6GWL].

[12] MOTA & PALIM, *supra* note 9, at 2.

[13] Alyssa Fowers, *Millennials Shut Out of the Housing Market, Again*, WASH. POST (Nov. 30, 2022) (on file with Columbia Business Law Review).

[14] DEP'T OF HOUS. & URB. DEV. & VETERAN'S ADMIN., 92D CONG., 2D SESS., MORTGAGE SETTLEMENT COSTS 3 (Comm. Print 1972).

contributor to the problem: real-estate-settlement vendors who form jointly owned businesses to avoid competition and extract higher closing costs from consumers. While these joint ventures arise in a variety of ways, most typically they involve real-estate brokers or sales agents, on the one hand, and mortgage brokers or title-insurance companies, on the other. Recent years have seen a proliferation of real-estate agents who take sizable ownership shares in joint ventures without contributing meaningful capital of their own. Mortgage brokers and title companies have strong incentives to arrange joint ventures as a means of rewarding real-estate agents for referrals. Real-estate brokers and sales agents enter joint ventures as a way to share in the profits generated from the mortgage and title services provided to the brokers' and agents' clients—homebuyers and home sellers. These joint ventures may severely mute vendors' incentive to compete through offering consumers lower prices, because the partnering real-estate agents can earn significant profits beyond their real-estate commissions by steering homebuyers into a co-owned joint venture.[15]

Congress has passed several laws that attempt to curb settlement costs and avoid abusive practices in residential-real-estate transactions.[16] This article focuses on two such

[15] NELSON R. LIPSHUTZ, THE REGULATORY ECONOMICS OF TITLE INSURANCE 67 (1994). Industry participants who own affiliated-business arrangements have, at times, contested whether these businesses increase closing costs. For example, in 2006 RESPRO, a real-estate-industry trade association, commissioned a report that concludes some title insurance related real-estate closing costs are not higher to a statistically significant level when conducted by affiliated-business arrangements. *See* Donald L. Martin & Richard E. Ludwick, Jr., Affiliated Business Arrangements and their Effects on Residential Real Estate Settlement Costs: An Economic Analysis, October 10, 2006 (unpublished manuscript on file with the Columbia Business Law Review). But this study was not published, was not subjected to peer review, predates the 2008 financial crisis and the TILA/RESPA integrated-disclosure reforms, and only studied settlement documents supplied by the trade association's members. The report also did not attempt to control for whether the studied affiliated-business arrangements were created through a discounted price on equity shares.

[16] Key federal laws and regulations affecting residential real-estate transactions include the Home Ownership and Equity Protection Act, Pub.

statues. First, in 1974, Congress adopted the Real Estate Settlement Procedures Act.[17] Among other provisions, RESPA prohibited referral payments, or "kickbacks," between businesses offering services in buying or selling most residential properties.[18] Second, in 2010, Congress adopted the Dodd-Frank Wall Street Reform and Consumer Protection Act.[19] Among many other provisions, the Dodd-Frank Act prohibits abusive acts or practices by companies that offer consumer-financial products and services.[20] The ban on abusive conduct includes taking unreasonable advantage of a consumer's reasonable reliance on a "covered person" to act in the consumer's interest.

This article proceeds as follows. In Part II, we explore the details of increasingly common real-estate-settlement joint ventures, focusing on how they increase closing costs for consumers and create barriers to affordable housing. In Part III, we argue that many common real-estate-settlement joint ventures do not comply with RESPA's requirements for affiliated-business arrangements and therefore violate the statute's prohibition of referral payments. Part IV explores whether real-estate agents who steer consumers toward vendors partially owned by the real-estate agent violate the Dodd-Frank Act's prohibition of abusive conduct. Part V proposes an affirmative interpretation of RESPA and the

L. No. 103-325, 108 Stat. 2190 (codified to various parts of Truth in Lending Act, particularly 15 U.S.C. §§ 1601–02, 1639–41); the Homeowners Protection Act, Pub. L. No. 105-216, § 2, 112 Stat. 897 (codified at 12 U.S.C. § 4901–10); the Mortgage Reform and Anti-Predatory Lending Act, Pub. L. No. 111-203, 124 Stat. 1376 (codified in relevant part at 12 U.S.C. § 5481 note, 15 U.S.C. §§ 1601 note, 1602, 1631); the Secure and Fair Enforcement for Mortgage Licensing Act, Pub. L. No. 110-289, § 1502, 122 Stat. 2810 (codified at 12 U.S.C. § 5101); and the Truth in Lending Act, Pub. L. No. 90-321, § 102, 82 Stat. 146 (codified at 15 U.S.C. § 1601).

[17] Real Estate Settlement Procedures Act, Pub. L. No. 93-533, 88 Stat. 1724 (1974) (codified as amended at 12 U.S.C. §§ 2601–17).

[18] *See* 12 U.S.C. § 2607(a).

[19] Mortgage Reform and Anti-Predatory Lending Act, Pub. L. No. 111-203, 124 Stat. 1376 (codified in relevant part at 12 U.S.C. §§ 5301, 5481–603, and in laws amended (Title X)).

[20] *See* 12 U.S.C. § 5536(a)(1)(B).

Dodd-Frank Act that permits compliant structuring of real-estate-settlement joint ventures. In Part VI, we make several policy recommendations. And in Part VII, we briefly summarize and conclude.

II. BACKGROUND

Buying a home forces consumers to confront a dizzying maze of businesses, documents, rules, and deadlines. Often, residential buyers and sellers rely heavily on real-estate agents to guide them through the process. While it is possible to sell or buy a home without an agent, the fact that 90% of consumers hire a real-estate agent is a testament to the complexity of modern real-estate transactions.[21] Real-estate agents are licensed at the state level to assist people seeking to buy or sell real property, and they usually work as an independent contractor or employee of a real-estate-brokerage business.[22]

Because real-estate rules and norms vary from state to state, terminology in residential real-estate transactions can be challenging for consumers.[23] Typically, real-estate agents work directly with consumers, while brokers supervise agents.[24] Homeowners seeking to sell their land often engage a real-estate agent, usually known as the "listing agent," by

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[21] Anne Marie Chaker, *The Upending of One of America's Most Popular Professions*, WALL ST. J. (Nov. 13, 2023) (on file with Columbia Business Law Review).

[22] FED. TRADE COMM'N & U.S. DEP'T OF JUST., COMPETITION IN THE REAL ESTATE BROKERAGE INDUSTRY 4–5 (2007), https://www.ftc.gov/sites/default/files/documents/reports/competition-real-estate-brokerage-industry-report-federal-trade-commission-and-u.s.department-justice/v050015.pdf [https://perma.cc/FSY2-QKDS] [hereinafter JOINT FTC-DOJ REPORT].

[23] J. Clark Pendergrass, *The Real Estate Consumer's Agency and Disclosure Act: The Case Against Dual Agency*, 48 ALA. L. REV. 277, 277 (1996) ("Confusion among home buyers and sellers as to the real estate broker's role in residential real estate transactions is a problem common to . . . the nation.") (citations omitted).

[24] JOINT FTC-DOJ REPORT, *supra* note 22, at 4–5.

signing an exclusive listing agreement.[25] Prospective buyers also often engage a real-estate agent to help them find suitable properties, negotiate offers, and facilitate communication between parties.[26] Real-estate agents assisting buyers are often referred to as a "buyer's agent," but they are also (confusingly) called a "selling agent" or sometimes a "cooperating agent."[27] The term "realtor" can refer to either the seller's or the buyer's agent.[28]

Most homebuyers also seek the assistance of a mortgage broker or loan officer at a bank or other finance company to discuss financing options, gather necessary documents, and submit a loan application. Within three days after receiving a

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[25] Michelle L. Evans, *Real Estate Brokers as Agents*, 45 AM. JURIS. PROOF OF FACTS 3d 453, § 5 (1998 & Supp. Nov. 2024).

[26] Lori S. Herman, *Resolving Real Estate Broker's Disputes*, 88 Am. Juris. Trials 321 (2003 & Supp. Nov. 2024).

[27] A. J. Jarmel, *Listing Agent vs. Selling Agent: What's the Difference?*, BANKRATE (May 12, 2023), https://www.bankrate.com/real-estate/listing-agent-selling-agent-whats-the-difference/ [https://perma.cc/V4MK-6JRB]; Mary Szto, *Dual Real Estate Agents and the Double Duty of Loyalty*, 41 REAL EST. L.J. 22, 33 (2012). The variation in naming conventions for agents assisting home buyers is due, in part, to legal complexities in the relationship of a buyer's agent to the buyer. *See* JOINT FTC-DOJ REPORT, *supra* note 22, at 8. In some states it is common for the agent assisting the buyer to owe a legal duty to the seller as a subagent of the listing agent– rendering the more intuitive label "buyer's agent" legally inaccurate. Matthew M. Collette, *Sub-Agency in Residential Real Estate Brokerage: A Proposal to End the Struggle with Reality*, 61 S. CAL. L. REV. 399, 401 (1988) ("Brokers do not know who they represent. Consumers do not know who represents them. The cause of much of this confusion is the doctrine of 'sub-agency,' by which two brokers in a real estate transaction both represent the seller."). *See also* James A. Bryant & Donald R. Epley, *The Conditions and Perils of Agency, Dual Agency, and Undisclosed Agency*, 21 REAL EST. L.J. 117, 120 (1992); Joseph M. Grohman, *A Reassessment of the Selling Real Estate Broker's Agency Relationship with the Purchaser*, 61 ST. JOHN'S L. REV. 560, 562–63 (1987).

[28] While real-estate agents are often colloquially known as "realtors," that term is trademarked by the National Association of Realtors and refers only to real-estate agents who are active, dues-paying members of the industry's largest trade association. *Real Estate Topics: Being a Real Estate Professional*, NAT'L ASS'N OF REALTORS, https://www.nar.realtor/being-a-real-estate-professional [https://perma.cc/2GBL-FPS8] (last visited Feb. 9, 2025).

completed loan application, federal law requires the mortgage lender to provide the consumer with a "Loan Estimate."[29] This disclosure is designed to allow borrowers the time to ask their lender any additional questions and consider shopping for an alternative loan or lender. Consumers also typically require services from a property and pest inspector, a home-value appraiser, and one or more credit-reporting agencies—all of which are generally needed to qualify for financing or satisfy contract contingencies.

Meanwhile, in most states, a title-insurance company conducts a title search to determine whether the seller can deliver an insurable title to the buyer and generally convey the property free and clear of any liens or other legal issues.[30] Mortgage lenders require a title policy to protect their investment in the mortgage loan and to facilitate assigning the mortgage loan to subsequent assignees.[31] Although title-insurance norms and rules vary considerably from state to state, most title companies rely on a handful of large title-reinsurance firms to assume the liability for the title-insurance policy.[32] In many states, the title company also acts as a settlement-services provider, holding funds in escrow, coordinating the closing, hosting software to compile documents, and ultimately dispersing funds to the various parties.[33] Unlike most forms of insurance, a significant portion of title-insurance premiums cover the cost of settlement services rather than paying claims.[34] Federal law requires

[29] *See* 12 C.F.R. § 1024.7.

[30] ALAN S. GUTTERMAN, BUSINESS TRANSACTIONS SOLUTIONS § 113:37, at ¶ 4.1 (2024).

[31] MARGARET C. JASPER, HOME MORTGAGE LAW PRIMER § 4:3 (2011).

[32] U.S. GOV'T ACCOUNTABILITY OFF., GAO-07-401, TITLE INSURANCE: ACTIONS NEEDED TO IMPROVE OVERSIGHT OF THE TITLE INDUSTRY AND BETTER PROTECT CONSUMERS 11 (Apr. 2007) [hereinafter GAO REPORT]. Where allowed by state law, many larger title reinsurance companies also operate a network of affiliated title insurance agents that sell insurance directly without a smaller, independent title insurance business. *Id.* at 11–12. The structure of the title industry in each state varies based on historical norms, local regulation, and tax policy. *Id.*

[33] ANDREW G. PFIZOR ET AL., MORTGAGE LENDING § 1.5.9 (4th ed. 2024).

[34] GAO REPORT, *supra* note 32, at 17–21.

mortgage lenders to provide a "Closing Disclosure" no later than three business days before consummation.[35] Finally, on the closing day, the parties involved, including the buyer, seller, attorneys, real-estate agents, mortgage lender, and title-insurance representatives, come together (increasingly virtually) to finalize the transaction.

Coordinating all these stakeholders can be time-consuming and costly. A delay in any part of the process can ripple through the entire transaction, leading to prolonged wait times for consumers and changes in the costs to be disclosed. The Consumer Financial Protection Bureau's Truth-in-Lending and Real Estate Settlement Procedures Act integrated disclosures (known in the industry as "TRID") aim to make the mortgage and closing process more transparent for consumers by requiring lenders to provide detailed loan estimates and closing disclosures.[36] But these regulations also come with extensive documentation and compliance requirements that reflect the complexity of the modern real-estate industry. Mortgage lenders and settlement-services providers must navigate complex rules, forms, and timelines, which can slow the process and create opportunities for errors or misunderstanding. Real-estate transactions are also subject to state regulations, which can vary significantly.[37] Real-estate transactions often involve negotiations between buyers and sellers regarding repairs, contingencies, and contract terms. These negotiations can be protracted, cause compliance challenges with federal or state rules, and further extend the time that it takes to reach a closing. When closing is imminent, consumers face real pressure to ignore the costs

[35] 12 C.F.R. § 1026.19(f)(1)(ii)(A).

[36] CONSUMER FIN. PROT. BUREAU, TILA-RESPA INTEGRATED DISCLOSURE: GUIDE TO THE LOAN ESTIMATE AND CLOSING DISCLOSURE FORMS 7–8 (Dec. 2017), https://files.consumerfinance.gov/f/documents/cfpb_kbyo_guide-to-loan-estimate-and-closing-disclosure-forms_v2.0.pdf [https://perma.cc/8CQR-83KK].

[37] *See* ANDREW G. PFIZOR ET AL., MORTGAGE LENDING § 5.1 (4th ed. 2024) (providing an introductory overview to state mortgage lending regulation).

of various settlement services to avoid jeopardizing a deal that may have been months in the making.

At the same time, most consumers do not understand settlement services. For many people, these products are a one-time purchase that represents a relatively modest cost in comparison to the purchase price of the land and the finance charges on the buyer's mortgage loan.[38] Title charges, including the cost of title insurance, is particularly opaque for most prospective home buyers.[39] Unlike most insurance, title-insurance premiums are non-recurring—giving consumers only a single up-front opportunity to compare prices. Variation in state and local market practices, technical legal terminology, and imperfect price-disclosure regimes all make it difficult for consumers to engage in effective comparison shopping.[40] Many consumers may not realize that unless they pay for an "owner's title insurance policy," a "lender's title insurance policy" only protects the lender—even though it is the consumer who pays the premium.[41] Moreover, because mortgage lenders do not pay for the title-insurance policies that protect their investments, lenders do not have an incentive to bargain for a competitive premium.[42]

[38] JOSEPH W. EATON & DAVID J. EATON, THE AMERICAN TITLE INSURANCE INDUSTRY 28–30 (2007).

[39] *Id.* at 78–80; Lauren E. Willis, *Decisionmaking and the Limits of Disclosure: The Problem of Predatory Lending: Price*, 65 MD. L. REV. 707, 750 (2006)

[40] Wheat & Henry-Nickie, *supra* note 6; Oren Bar-Gill, *The Law, Economics and Psychology of Subprime Mortgage Contracts*, 94 CORNELL L. REV. 1073, 1144 (2009); Christopher L. Peterson, *Truth, Understanding, and High-Cost Consumer Credit: The Historical Context of the Truth in Lending Act*, 55 FLA. L. REV. 807, 897–98 (2003).

[41] *What Is Homeowner's Title Insurance?*, CONSUMER FIN. PROT. BUREAU (Oct. 19, 2023), https://www.consumerfinance.gov/ask-cfpb/what-is-owners-title-insurance-en-164/ [https://perma.cc/4FHB-BGHT].

[42] Stewart E. Sterk, *Title Insurance: Protecting Property at What Price?*, 99 WASH. UNIV. L. REV. 519, 523 (2021) (arguing federal law should require lenders to bundle title insurance with interest rates because lenders "would have a financial incentive to control title insurance costs"); Alan B. Morrison, *Closing Costs: Soaring Costs and Consumer Confusion*, 92 BANKING L.J. 30, 33 (1975) ("[I]t is the lender who should in the first instance be required to absorb all of these settlement costs since he is in the

One consequence of this complexity is that most prospective buyers and sellers are highly dependent on real-estate agents to help identify settlement-services providers and generally navigate the system. Because real-estate agents are the entry point into this web of relationships, they have significant leverage over title insurers, appraisers, property inspectors, and mortgage lenders—all of whom are necessary for a sale to take place but who are far less likely to have formed a trusting relationship with homebuyers.[43] A steady stream of referrals from real-estate agents can mean the difference between success or failure for other settlement-services businesses. Real-estate agents often function as gatekeepers for other settlement-services providers, creating the potential for anticompetitive closing markets where real-estate agents auction off referrals, leading to higher overall closing costs. Pest inspections, appraisers, repairmen, title insurers, mortgage lenders, and other settlement-service providers have a strong incentive to compete for business from real-estate agents, rather than directly from consumers.

Consumers can benefit from real-estate agents' expertise if agents, on behalf of their clients, use their position to bargain for quality services at competitive prices. In other contexts, economists and finance scholars have noted that principal-agent relationships create complex monitoring and self-dealing incentives, often referred to in academic literature as "agency costs."[44] But real-estate agents have a strong financial

best position to determine which ones are necessary and which can be reduced."); PROVIDING FOR GREATER DISCLOSURE OF THE NATURE AND COSTS OF REAL ESTATE SETTLEMENT SERVICES, S. Rep. No. 93-866 (1974) (noting that Senator Proxmire accepted RESPA as a compromise following his efforts to require lenders to bear settlement costs because "lenders have the sophistication and bargaining power to keep the costs down.").

[43] William N. Eskridge, Jr., *One Hundred Years of Ineptitude: The Need for Mortgage Rules Consonant with the Economic and Psychological Dynamics of the Home Sale and Loan Transaction*, 70 VA. L. REV. 1083, 1118–23 (1984).

[44] For influential introductions to the application of agency-cost theory to law, see generally Kenneth J. Arrow, *The Economics of Agency*, *in* PRINCIPALS AND AGENTS: THE STRUCTURE OF BUSINESS 37 (John W. Pratt & Richard J. Zeckhauser eds., 1985); Kathleen M. Eisenhardt, *Agency Theory:*

incentive to dole out their clients' closing business in exchange for referral fees from other settlement-services providers. Because consumers are typically unable to effectively compare prices of these specialized local services, settlement-services providers can recoup the expense of paying for the real-estate agents' referrals by raising the costs and fees paid by consumers at closing. Most consumers cannot tell the difference and, even if they could, are under structural pressure to ignore inflated costs and junk fees. As in other contexts, then, the agency costs associated with real-estate closings can create sub-markets that are not subject to efficient market competition.[45]

Historically, the risk of this market inefficiency shaped modern settlement-services law. In the 1970s, Congress found that the settlement-services industry was corrupted by a web of hidden kickback payments that raised transaction costs and prevented consumers from shopping for fair prices.[46] While a variety of federal and state laws currently apply to settlement services (several of which are discussed later in this article), the Real Estate Settlement Procedures Act of 1974 (RESPA) set out the foundational structure of federal oversight. Discussed in more detail in Part III, § 8 of RESPA prohibited giving or accepting things of value for business referrals.[47] Congress prohibited these "kickbacks" to facilitate

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An Assessment and Review, 14 ACAD. MGMT. REV. 57 (1989); Sanford J. Grossman & Oliver D. Hart, *An Analysis of the Principal-Agent Problem*, 51 ECONOMETRICA 7 (1983); Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs, and Ownership Structure*, 3 J. FIN. ECON. 305, 308 (1976); JEAN-JAQUES LAFFONT & DAVID MARTIMORT, THE THEORY OF INCENTIVES: THE PRINCIPAL-AGENT MODEL (2002); Eric Posner, *Agency Models in Law and Economics*, *in* CHICAGO LECTURES IN LAW AND ECONOMICS 225 (Eric A. Posner ed., 2000); and Stephen A. Ross, *The Economic Theory of Agency: The Principals Problem*, 63 AM. ECON. REV. 134 (1973).

[45] Bar-Gill, *supra* note 40, at 1150–51; Mark S. Nadel, *Obstacles to Price Competition in the Residential Real Estate Brokerage Market*, 18 BERKELEY BUS. L.J. 90, 114–19 (2021); Lawrence J. White, *The Residential Real Estate Brokerage Industry: What Would More Vigorous Competition Look Like?*, 35 REAL EST. L.J. 11, 30 (2006).

[46] *See* 12 U.S.C. § 2601(b)(1)–(2).

[47] 12 U.S.C. § 2607(a).

a competitive, free market in real-estate transactions.[48] Congress took the view that consumers need protection from the hidden closing costs facilitated by officious steering incentivized by secret payments in what, for many, may be the most important contract of their life.

In the deregulatory wave of the early 1980s, and under intense industry pressure, Congress revisited RESPA. Resisting the industry lobbying for outright repeal, Congress left its kickback prohibition in place but enacted an exception for payments made in connection with jointly owned businesses. This exception allowed payments from one settlement-services provider to another if, among other requirements not at issue here, the only thing of value paid is a return on the ownership interest in a jointly owned business.[49] Currently, RESPA characterizes these jointly owned ventures as "affiliated business arrangements."[50] In subsequent decades, some settlement-services businesses have thrived as independent companies by offering quality services and competitive prices. But the potential to compete with referral payments, albeit processed through jointly owned affiliated-business arrangements, has remained strong.

Affiliated-business arrangements have taken many different forms. But in recent years, the real-estate settlement-services market has seen a proliferation of joint ventures between established settlement-services providers and real-estate agents.[51] Figure 1 provides a schematic of a modern joint venture that real-estate-industry insiders report has become increasingly common—and indeed has come to

[48] Pub. L. No. 93-533, § 2, 88 Stat. 1724 (codified at 12. U.S.C. § 2601); PROVIDING FOR GREATER DISCLOSURE OF THE NATURE AND COSTS OF REAL ESTATE SETTLEMENT SERVICES, S. Rep. No. 93-866, at 2 (1974).

[49] *See* 12 U.S.C. § 2607(c)(4)(C).

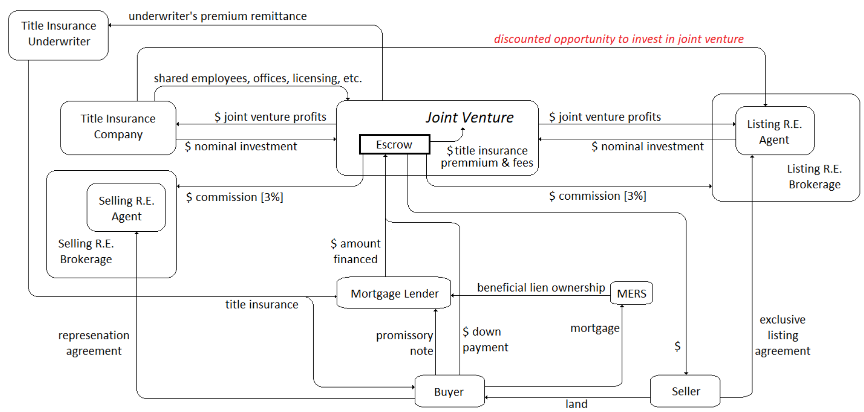
[50] *See* 12 U.S.C. § 2602(7).

[51] Mathew Blake, *RESPA for Dummies*, HOUSINGWIRE (Oct. 27, 2021), https://www.housingwire.com/podcast/respa-for-dummies/ [https://perma.cc/FV84-4VBB] ("[J]oint ventures are the business plan of choice for an increasing number of brokerages and lenders.").

dominate many local real-estate markets.[52] In a typical arrangement, a real-estate settlement-services provider—in this example a local title company—begins by approaching a leading real-estate agent with a significant book of business. The title company offers to establish a joint venture with the real-estate agent in the form of a limited-liability company (LLC). In the proposed joint venture, both the title company and the real-estate agent would co-own the LLC, which provides the same title-insurance and settlement services as the established title company. The established title company often shares employees, offices, licenses, software, and management with the new joint-venture title company. More importantly, the joint venture is led with industry know-how and management experience of the established title company's management. Often, the joint venture has only a single employee who may have other responsibilities at the established title company or its other joint ventures.

[52] *See Why Title Companies Aren't Really Title Companies . . . Anymore*, DC TITLE GUY (May 22, 2023), https://dctitleguy.com/why-title-companies-arent-really-title-companies-anymore/ [https://perma.cc/DT3E-WF9R] ("Title Companies are becoming revenue streams for [real estate] agents."); Joe Gentile, *When a Listing Forces the Contract to Their Title Company*, FED. TITLE & ESCROW CO. (Apr. 25, 2023), https://www.federaltitle.com/when-a-listing-forces-the-contract-to-their-title-company/ [https://perma.cc/H2DN-UMJW] ("Unfortunately, this scenario is dominating the local market. We get calls from agents daily complaining that they are being forced into using the Listing Agent's Joint Venture title company.").

Figure 1: Discounted Joint Venture Real Estate Closings



These joint ventures tend to be severely undercapitalized relative to the volume of business flowing through the LLC. Real-estate agents typically invest only a nominal amount up front in exchange for a long-term flow of kickback payments in the form of joint-venture profits.[53] The joint venture characterized in Figure 1 is likely to operate at a profit because the established title-insurance company absorbs most of the expenses of doing business. In economic effect, the established title company uses the joint venture to mask referral payments to the real-estate agent in the form of profits from the LLC. The real-estate agent has a strong financial incentive to refer closings to the joint venture, even if there are lower-cost alternatives available for their clients, because an equity share of the profits derived from the referral are eventually remitted back to the agent.[54]

[53] *See, e.g.*, *What Is a Title Company Joint Venture?*, CLOSED (Feb. 8, 2022), https://www.closedtitle.com/post/what-is-a-title-company-joint-venture [https://perma.cc/669S-3LUN] ("For the real estate broker, the 'goal' of the joint venture is to 'realiz[e] profit from their existing title referrals.' For high volume real estate professionals, entering into a title company joint venture can assist them in realizing a significant source of additional revenue.").

[54] Some real-estate agents may further complicate the paper trail by creating an additional limited liability company that owns the equity stake in the joint venture. But this one further step removed does not blunt the

Title companies are willing to create joint ventures, not because they provide greater economic efficiency, but because, in the words of one title-insurance insider, the real-estate agent's profit incentive makes this structure "the easiest path to business" for title companies.[55] Listing agents who associate with a title-insurance joint venture have a particularly strong incentive to turn a cold shoulder to purchase offers that do not propose to use their joint venture for title and closing services.[56] In this example, the seller's listing agent does not even have to self-deal against their own client, because most of the closing costs are paid by the buyer, either in cash at closing or capitalized into a mortgage loan's principal. The seller's listing agent can simply force the buyer's agent to pass on higher closing costs or risk blowing up the deal.

While Figure 1 presupposes a joint venture between a *listing* agent and a title company, *buyers'* agents (who in many states are called "selling agents") also have a strong incentive to submit purchase offers with their own joint ventures as the proposed title-insurance provider. Because most real-estate purchasers are not able to efficiently shop for title insurance,[57] the joint venture can raise closing costs in the form of higher settlement fees, upsell homebuyers with added "Cadillac" title-insurance coverage at a higher-cost premium, neglect to offer less expensive reissue policies, and impose other ancillary junk fees. These enhanced closing costs, in turn,

agent's incentive to self-deal against the consumer's interest in attempting to sell or purchase the real estate.

[55] Wade Vander Molen, *Should My Real Estate Team Sign a Title Company Joint Venture?*, YOUTUBE (June 2, 2022), https://youtu.be/6sheCsQ1qmE [https://perma.cc/725V-5D8V] ("That's why this is happening. . . . It's the easiest path to business.").

[56] Joe Gentile, *When a Listing Forces the Contract to Their Title Company*, FED. TITLE & ESCROW CO. (Apr. 25, 2023), https://www.federaltitle.com/when-a-listing-forces-the-contract-to-their-title-company/ [https://perma.cc/H2DN-UMJW].

[57] *See* Sterk, *supra* note 42, at 533–34, 549; JOSEPH W. EATON & DAVID J. EATON, THE AMERICAN TITLE INSURANCE INDUSTRY 6–7 (2007).

fund the profits remitted to the real-estate agent through the joint venture's profit distributions.[58]

The critical, innovative feature of this and similar joint-venture structures is the established settlement-services provider's offer to sell an equity stake in the new business *at a steep discount*. On the one hand, if the joint venture is merely a shell company with no employees or assets, real-estate agents could not be expected to pay substantial sums for an equity stake in what is essentially an illusory business. As discussed in more detail in Part III, courts have largely struck down "sham" joint ventures as concealed kickback mechanisms that violate REPSA.[59] On the other hand, if the joint venture is a real business with meaningful assets and capital requirements—meaning one with employees, software licenses, office space, workers-compensation coverage, marketing plans, a website, policies and procedures, and independent management—then one would expect every investor to pay a meaningful price for an equity share of the joint venture. What if the joint venture is an authentic, sufficiently capitalized, and valuable settlement-services business, but the price that real-estate agents pay to own it is not reflective of that?

In modern real-estate transactions, this seemingly esoteric development has profound consequences for millions of Americans. Real-estate professionals report that this type of closing structure, which we will call a *discounted joint venture*,

[58] *See, e.g.*, Wade Vander Molen, *Should My Real Estate Team Sign a Title Company Joint Venture?*, YOUTUBE (June 2, 2022), https://youtu.be/6sheCsQ1qmE [https://perma.cc/725V-5D8V] ("Is it a profitable business model? For some title companies it probably is based on if they have low overhead or whatever else they have going on or who they assign to the JV. But in many instances, it is marginally profitable for the title company, and it is profitable for the real estate team. Ok. And the real estate teams that I've talked to are like, 'Oh I love my JV, they pay for some much!' Yeah, they pay for so much. Keep in mind the money comes from somewhere and it is being taken from somewhere. Well, the money is being taken from the title company, but the money comes from your clients. Your buyers. Your sellers. Whoever it is. They are funding the JV. Do they know that?").

[59] *See infra* Part III.

is now "the business plan of choice for an increasing number of brokerages and lenders."[60] In many areas of the country, the market for real-estate-settlement services is quickly reorienting around joint ventures that induce real-estate agents to join with little or no meaningful up-front investment. Moreover, if real-estate agents are permitted to refer their clients to discounted joint ventures, mortgage-loan officers, real-estate developers, and others are likely to follow suit. The structure of discounted joint ventures has the potential to blow a hole in RESPA's kickback prohibition and re-form the corrupt web of hidden referral fees that led Congress to adopt RESPA in the first place. If courts permit the new structure and it predictably raises settlement costs overall, millions of families could be excluded from owning a home in the coming years because at the outset of long-term loans, even modest cost barriers can have a substantial effect on affordability.[61] Many consumers may end up paying interest on added fees for much of their adult lives. Despite the implications of this trend, there is surprisingly little legal analysis of whether this business strategy is actually legal. The remainder of this article focuses on that question.

III. REAL ESTATE SETTLEMENT JOINT VENTURES UNDER RESPA'S AFFILIATED BUSINESS ARRANGEMENT EXEMPTION

RESPA is a cornerstone of the federal government's efforts to make homebuying affordable for most Americans. Unlike grant programs, tax credits, or mortgage-loan subsidies, RESPA—without a direct cost to taxpayers—attempts to lay ground rules that facilitate efficiency and transparency in

[60] Blake, *supra* note 51.

[61] *Cf.* Andrei Paduraru, *What's Ahead? U.S. Housing Market Predictions for 2024*, JVM LENDING (Oct. 16, 2023), https://www.jvmlending.com/blog/whats-ahead-u-s-housing-market-predictions-for-2024/ [https://perma.cc/LHR3-9UNS] ("[A]s many as 5 million potential buyers leave the market with every 1% increase in interest rates.").

purchasing a home. Congress enacted RESPA in 1974 after finding that:

> reforms in the real estate settlement process are needed to insure that consumers throughout the Nation are provided with greater and more timely information on the nature and costs of the settlement process and are protected from unnecessarily high settlement charges caused by certain abusive practices that have developed in some areas of the country.[62]

Directing the Department of Housing and Urban Development (HUD) to implement and enforce the law, RESPA's basic approach was twofold. First, it required price disclosures to empower consumers to shop for affordable closing services. Second, it prohibited referral payments. We focus on the latter.

A. *Section 8's Kickback Prohibition and the Affiliated Business Arrangements Exception*

At the core of RESPA's efforts to prevent costly barriers to purchasing a home is § 8's prohibition of referral payments—commonly known as kickbacks—between settlement-services providers. RESPA's kickback prohibition is rooted in the public-policy objective of safeguarding consumers, promoting fair competition, and maintaining the integrity of real-estate transactions.[63] Congress was concerned that paying compensation for steering business introduced hidden incentives and conflicts of interest into real-estate transactions that would raise costs for homebuyers.[64] For half a century, RESPA's kickback prohibition has been America's

[62] Pub. L. No. 93-533, § 2, 88 Stat. 1724 (codified at 12 U.S.C. § 2601(a)).

[63] PROVIDING FOR GREATER DISCLOSURE OF THE NATURE AND COSTS OF REAL ESTATE SETTLEMENT SERVICES, S. Rep. No. 93-866, at 3 (1974) (explaining that Congress adopted RESPA's prohibition of referral fees to "ensure that the costs to the American home buying public will not be unreasonably or unnecessarily inflated by abusive practices.").

[64] *Id.* at 6.

most important anti-corruption rule in the residential-housing market.

This single-sentence rule states: "No person shall give and no person shall accept any fee, kickback, or thing of value pursuant to any agreement or understanding, oral or otherwise, that business incident to or a part of a real estate settlement service involving a federally related mortgage loan shall be referred to any person."[65] Real-estate-settlement joint ventures between real-estate agents and title companies or mortgage brokers easily run afoul of this simple standard. The real-estate agent receives payments from the joint venture. The joint venture is formed specifically for the purpose of incentivizing referrals from the real-estate agent. And the payments to the real-estate agent are forthcoming from the joint venture only if referrals are actually made; without referrals, there are no profits to distribute. Thus, in general, title companies, mortgage brokers, and other settlement-services providers are prohibited from giving, and real-estate agents are prohibited from receiving, "*any . . . thing of value*" in exchange for a referral.[66]

Nevertheless, during the deregulatory reforms of the Reagan Administration, Congress adopted an exception to RESPA's prohibition of referral payments, allowing settlement-services providers to co-own settlement-services businesses under certain circumstances.[67] Originally, Congress called these permissible co-owned businesses "controlled business arrangements."[68] Later, in its 1996 RESPA amendments, Congress recharacterized them as "affiliated business arrangements."[69] This exception to

[65] 12 U.S.C. § 2607(a). *See also* 12 C.F.R. § 1024.14(a) ("A company may not pay any other company or the employees of any other company for the referral of settlement service business.").

[66] 12 U.S.C. § 2607(a) (emphasis added).

[67] Housing and Urban-Rural Recovery Act of 1983. Pub. L. No. 98-181, (HR 3959), § 461, 97 Stat. 1153, 1230 (Nov. 30, 1983).

[68] *Id.* Section 461 of the created a new exemption for "controlled business arrangements" from the ban on referral fees.

[69] Pub. L. No. 104-208, § 2103(c)–(d), 110 Stat. 3009 (Sept. 30, 1996) (changing the word "controlled" to "affiliated").

RESPA's kickback prohibition has led to considerable controversy and litigation.[70] Because affiliated-business arrangements provide an exclusion to RESPA's kickback prohibition, the exception—what it allows, how it is enforced, and who can use it—has become a defining feature in the way real-estate agents, title companies, and other settlement-services providers serve consumers seeking to sell or purchase a home.[71] As one real-estate attorney explained, § 8's kickback prohibition, and the affiliated-business-arrangement exception, is the "[m]ost important and most controversial statute affecting the settlement service industry."[72]

The combination of a kickback prohibition and an exception for affiliated-business arrangements has led to years of technical and nuanced regulatory guidance and litigation about what practices are permissible.[73] Two examples of potentially illegal settlement practices provide a useful preface to our discussion of discounted joint ventures.

First, settlement-services providers have tried to circumvent RESPA with "sham" businesses. In these cases,

[70] *See, e.g.*, Glenn J. Kalinoski, *Affiliated Business Arrangements Cause for Concern*, ORIGINATION NEWS, June 1, 1997, at 20 (listing unsettled questions considered when applying the business arrangement exception).

[71] Nicholas McGuire, *RESPA Update: How Homebuilders Blocked HUD's Recent Effort to Reform RESPA and Regulate Affiliated Business Arrangements*, 61 ADMIN. L. REV. 893, 896–97 (2009) (explaining the "longstanding and widespread usage" of affiliated business arrangements since 1980s).

[72] Holly S. Bunting, *How to Set Up a Compliant Joint Venture or MSA*, Am. Land Title Ass'n (May 12, 2021), https://www.alta.org/file.cfm?name=How-to-Set-Up-a-Compliant-Joint-Venture-or-MSA [https://perma.cc/3KXM-5EGX].

[73] For example, HUD issued several policy statements to assist public and the courts in resolving Section 8 compliance issues. *See, e.g.*, Real Estate Settlement Procedures Act Statement of Policy 2001-1: Clarification of Statement of Policy 1999-1 Regarding Lender Payments to Mortgage Brokers, and Guidance Concerning Unearned Fees Under Section 8(b), 66 Fed. Reg. 53052 (Oct. 18, 2001); Statement of Policy 1996-1, Regarding Computer Loan Origination Systems (CLOs), 61 Fed. Reg. 29255 (June 7, 1996) (guidance on compliance issues in transition to digital mortgage loan origination systems); Statement of Policy 1996-2, Regarding Sham Controlled Business Arrangements, 61 Fed. Reg. 29258 (June 7, 1996).

consumer advocates have argued that the settlement businesses created an empty shell company that purports to be an affiliated-business arrangement but, in fact, does not provide any settlement services.[74] In a sham affiliated-business arrangement, the pre-existing, established settlement business continues to perform its normal role. Referral payments are disguised as dividends from an affiliated-business arrangement that doesn't actually do anything except store profits and distribute them to its members. In the 1990s, sham affiliated-business arrangements became so common that HUD issued a policy statement identifying ten factors to help clarify whether an affiliated-business arrangement is the *actual provider* of a settlement service.[75] Phrased as questions, HUD's queries included whether the purported business actually has capital, whether it uses its own employees, whether it has its own management, and whether the affiliated entity is located at its own place of business.[76]

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[74] *See, e.g.*, Benway v. Res. Real Est. Servs., LLC, 239 F.R.D. 419, 423 (D. Md. 2006) (granting a motion to certify RESPA Section 8 class action against an alleged sham affiliated business arrangement).

[75] Statement of Policy 1996-2, Regarding Sham Controlled Business Arrangements, 61 Fed. Reg. 29258, 29262 (June 7, 1996).

[76] *Id.* In the policy statement, HUD explained that it would "consider the following factors" and "weigh them in light of the specific facts in determining whether an entity is a bona fide provider":

> (1) Does the new entity have sufficient initial capital and net worth, typical in the industry, to conduct the settlement service business for which it was created? Or is it undercapitalized to do the work it purports to provide?
> (2) Is the new entity staffed with its own employees to perform the services it provides? Or does the new entity have "loaned" employees of one of the parent providers?
> (3) Does the new entity manage its own business affairs? Or is an entity that helped create the new entity running the new entity for the parent provider making the referrals?
> (4) Does the new entity have an office for business which is separate from one of the parent providers? If the new entity is located at the same business address as one of the parent providers, does the new entity pay a general market value rent for the facilities actually furnished?

Second, some real-estate-settlement businesses attempt to circumvent the kickback prohibition by making up illusory or over-valued services to conceal referral payments. For example, settlement vendors looking for referrals have claimed to also be renting the use of office space or equipment from the company that refers business to them.[77] Here, the

> (5) Is the new entity providing substantial services, i.e., the essential functions of the real estate settlement service, for which the entity receives a fee? Does it incur the risks and receive the rewards of any comparable enterprise operating in the marketplace?
> (6) Does the new entity perform all of the substantial services itself? Or does it contract out part of the work? If so, how much of the work is contracted out?
> (7) If the new entity contracts out some of its essential functions, does it contract services from an independent third party? Or are the services contracted from a parent, affiliated provider or an entity that helped create the controlled entity? If the new entity contracts out work to a parent, affiliated provider or an entity that helped create it, does the new entity provide any functions that are of value to the settlement process?
> (8) If the new entity contracts out work to another party, is the party performing any contracted services receiving a payment for services or facilities provided that bears a reasonable relationship to the value of the services or goods received? Or is the contractor providing services or goods at a charge such that the new entity is receiving a "thing of value" for referring settlement service business to the party performing the service?
> (9) Is the new entity actively competing in the marketplace for business? Does the new entity receive or attempt to obtain business from settlement service providers other than one of the settlement service providers that created the new entity?
> (10) Is the new entity sending business exclusively to one of the settlement service providers that created it (such as the title application for a title policy to a title insurance underwriter or a loan package to a lender)? Or does the new entity send business to a number of entities, which may include one of the providers that created it?

[77] Statement of Policy 1996-3, Rental of Office Space, Lock-Outs, and Retaliation, 61 Fed. Reg. 29264, 29266 (June 7, 1996).

kickback is disguised as a rent payment to the referring party.[78] Alternatively, some businesses form marketing-services agreements to conceal referral payments. Ostensibly, these are contracts for one settlement-services provider to pay another for advertising or promotional services.[79] These arrangements can be legal, but only if the performance of marketing services under the agreement is "reasonably related to the value of the services actually performed."[80] The CFPB has found that these agreements often include "payments [that] are actually disguised compensation for referrals" and has set out several examples and factors courts can use to identify illegal kickbacks.[81]

For purposes of this article, the history of past strategies used to evade REPSA's kickback prohibition is informative. Courts and regulators have held that an *illusory business* cannot be a compliant affiliated-business arrangement. And courts and regulators have held that an *illusory service* cannot provide a basis for compliant referral compensation. What

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[78] *Id*. In 1996, HUD described an example of this evasion strategy:

> One case involved a title insurance company that paid a "rental fee" to a real estate broker for the "per use rental" of a conference room for closings. The title insurance company paid a $100 fee for each transaction. This "rental fee" was greater than the general market value for the use of the space. In addition, the facts revealed that the room was rarely actually used for closings. In this case, HUD examined whether a "facility" was actually furnished at a general market rate. HUD concluded that this was a sham rental arrangement; the "rent" was really a disguised referral fee in violation of Section 8(a).

[79] ANDREW G. PFIZOR ET AL., MORTGAGE LENDING § 7.4.2 (4th ed. 2024).

[80] *Real Estate Settlement Procedures Act FAQs*, CONSUMER FIN. PROT. BUREAU (Oct. 7, 2020), https://www.consumerfinance.gov/compliance/compliance-resources/mortgage-resources/real-estate-settlement-procedures-act/real-estate-settlement-procedures-act-faqs/ [https://perma.cc/L7ZP-WX9R].

[81] CFPB Compliance Bulletin 2015-05, RESPA Compliance and Marketing Services Agreements 2 (Oct. 8, 2015). *See also* Bryan A. Schneider, *CFPB Provides Clearer Rules of the Road for RESPA Marketing Service Agreements*, CONSUMER FIN. PROT. BUREAU (Oct. 7, 2020), https://www.consumerfinance.gov/about-us/blog/cfpb-provides-clearer-rules-road-respa-marketing-service-agreements/ [https://perma.cc/7SLW-BKK3].

about an *illusory capital investment* in a settlement-services business?

B. Discounts as Kickbacks: Illusory Capital Investment in Real Estate Settlement Joint Ventures

With these examples in mind, we turn to whether discounted joint ventures are permissible under RESPA's exception for affiliated-business arrangements. Congress defined affiliated-business arrangements as an arrangement in which "(A) a person who is in a position to refer business incident to or a part of a real estate settlement service . . . [has] a direct or beneficial ownership interest . . . in *a provider of settlement services*" and "(B) either of such persons directly or indirectly refers such business to that provider."[82] Under the safe harbor, the referring business is exempt from RESPA's kickback ban if three conditions are met.[83] First, consumers must receive a disclosure regarding the affiliated-business relationship at or before the time of the referral.[84] Second, consumers must not be required to use any particular settlement-services provider.[85] And third, "[t]he *only thing of value* that is received from the arrangement . . . is a return on an ownership interest or franchise relationship."[86]

It is this third condition that is most relevant to discounted joint ventures. RESPA defines "thing of value" to include any "payment," "funds," and "other consideration."[87] RESPA's implementing regulation, Regulation X, clarifies that "thing of value" is "broadly defined" and includes, "[w]ithout limitation," "discounts," "the opportunity to participate in a

[82] 12 U.S.C. § 2602(7) (emphasis added).

[83] 12 U.S.C. § 2607(c)(4); 12 C.F.R. § 1024.15(b).

[84] 12 C.F.R. § 1024.15(b)(1). There is considerable debate over whether consumers read or understand these opaque disclosures. The efficacy of these disclosures is discussed further in Part IV *infra*.

[85] 12 C.F.R. § 1024.15(b)(2).

[86] *Id.* § 1024.15(b)(3) (emphasis added).

[87] 12 U.S.C. § 2602(2).

money-making program," and "increased equity in a parent or subsidiary entity."[88]

If the sponsoring business offers an ownership share of a joint venture at a discounted price, then this discount is *itself* a thing of value provided to the referring party in violation of the plain language of rule, because this "thing of value" is different from a permitted "return on an ownership interest." The *only* thing of value that compliant affiliated-business arrangements may provide to their participants is a return on an ownership interest. In discounted joint ventures, the referring party receives an equity return *plus a discount* if the equity share is purchased at a cost that is below fair-market value.[89]

Take the example of a joint venture between an established title company and a real-estate agent, as illustrated in Figure 1.[90] In forming this joint venture, the sponsoring title company is offering the real-estate agent an opportunity to purchase equity in the proposed joint venture. To set up a compliant affiliated-business arrangement, the real-estate agent must pay a full, fair-market price for their ownership stake in the affiliated business. In Figure 1, if the real-estate agent receives an opportunity to buy an equity share of the joint venture at a below-market price, then the referring party receives a "discount[]," which qualifies as a "thing of value" by law.[91] A compliant affiliated-business arrangement cannot arise unless "the *only* thing of value" received by the real-estate agent is a return on an equity share. In Figure 1, the

[88] 12 C.F.R. § 1024.14(d).

[89] The mere fact that the established business offering a discounted opportunity to invest does not pay money to the real-estate agent during formation of the joint venture is immaterial because, in Regulation X, "payment" is used synonymously with the giving or receiving of a "thing of value." *See* 12 C.F.R. §§ 1024.14, 1024.15. It does not require the transfer of money. *See* 12 C.F.R. § 1024.14(d); *see also Real Estate Settlement Procedures Act FAQs*, CONSUMER FIN. PROT. BUREAU (Oct. 7, 2020), https://www.consumerfinance.gov/compliance/compliance-resources/mortgage-resources/real-estate-settlement-procedures-act/real-estate-settlement-procedures-act-faqs/ [https://perma.cc/L7ZP-WX9R].

[90] *See supra* Figure 1.

[91] 12 C.F.R. § 1024.14(d). *See also* 12 U.S.C. § 2602(2).

real-estate agent receives *both* a return on an equity share *and* a discount on the purchase price of that share. Since the safe harbor is facially unavailable, the underlying elements of a RESPA kickback violation are easily met. The real-estate agent receives things of value—the discounted investment opportunity and dividends from the joint venture. Both things of value are provided "pursuant to" an agreement to refer settlement business. And the real-estate agent refers business to the joint venture. If, as Regulation X demands, a "discount" is a "thing of value," then the real-estate agent must pay a fair-market price for their equity share in the joint venture, or the new business cannot qualify for the affiliated-business-arrangement exception.

Figure 1 is not merely hypothetical; the diagram is based on an actual business document reproduced in Appendix A following this article. Appendix A is a screen shot of a "pro forma" used by a title company to market a joint-venture arrangement to real-estate agents.[92] The document sets out terms of a proposed joint venture between the title company and up to ten real-estate agents. The columns under the heading "deals per month" reflect prospective costs and revenue based on the number of homes each month that participating real-estate agents sell in combination with title-insurance and escrow services provided by the joint venture. Based on these sales estimates, the pro forma's bottom rows set out total net profits of the joint venture. And, critically, the third column from the right, in the bottom rows, sets out how much each real-estate agent must pay to purchase equity shares of the proposed joint venture.

For example, the title company in Appendix A is offering a 2% equity share in the joint venture for only $1,200. In exchange, assuming the joint venture processes 35 closings a month (the title company's own mid-level projection), the real-estate agent would earn an estimated $29,424 a year, making back their initial investment in about *two months*. Over a single year, the agent with a 2% equity stake would make an astonishing 2,452% return on equity from their passive

[92] We omitted the name of the sponsoring title-insurance company.

investment in the joint venture. Of course, the reason the title company can offer these returns is because the $1,200 payment is a smokescreen for the real-estate agents' actual contribution: *their future referrals*.

Tellingly, the opportunity to invest in the joint venture is not offered to investors other than real-estate agents—after all, the point of offering these equity shares is not to raise capital, but to drum up business. Thus, only people expected to refer business to the new company are offered the opportunity to invest. At the core of this joint venture is a fiction. Where prior RESPA evasions relied on dividends from fake companies or compensation for fake services, discounted joint ventures rely on a fake investment. The title company captures future referrals, locking out other title businesses, by offering real-estate agents a discounted opportunity to invest in the joint venture. A company set up this way is unlawful because the discounted opportunity to invest is *itself* a thing of value other than a return on ownership and, accordingly, does not qualify for the affiliated-business-arrangement exception, turning dividends paid to the referring real-estate agent into illegal kickbacks that run afoul of RESPA § 8.

IV. STEERING CONSUMERS TO DISCOUNTED REAL ESTATE SETTLEMENT JOINT VENTURES UNDER THE DODD-FRANK ACT'S PROHIBITION OF ABUSIVE PRACTICES

Even if courts mistakenly hold that discounted-joint-venture referral payments comply with RESPA, it is also worth considering whether these referral webs comply with other laws. In this part we focus on the legality of these joint ventures through the lens of the federal Consumer Financial Protection Act's prohibition of abusive conduct. Congress adopted the CFPA as Title X of the Dodd-Frank Act.[93] The

[93] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376, 1955 (2010) (codified as amended in scattered sections of 7, 12, 15, 22, 31, and 42 U.S.C. (2012)).

Dodd-Frank Act attempted to reform practices in the financial system that led to the subprime-mortgage-foreclosure crisis and the ensuing Great Recession.[94] The Act included a wide variety of reforms, including new laws designed to promote financial stability,[95] affordable mortgage lending,[96] and consumer protection.[97] Among these far-reaching reforms, the Dodd-Frank Act also created the Consumer Financial Protection Bureau.[98] Congress tasked the CFPB with implementing and enforcing a large body of financial consumer-protection laws to "ensur[e] that all consumers have access to markets for consumer financial products and services and that markets for consumer financial products and services are fair, transparent, and competitive."[99] Along with other preexisting federal consumer-financial laws, the

[94] S. Rep. No. 111-176, at 9 n.19 (Apr. 30, 2010) ("The need could not be clearer. Today's consumer protection regime just experienced massive failure. It could not stem a plague of abusive and unaffordable mortgages and exploitative credit cards despite clear warning signs. It cost millions of responsible consumers their homes, their savings, and their dignity. And it contributed to the near-collapse of our financial system.") (quoting Michael Barr, Assistant Secretary of the Treasury for Financial Institutions).

[95] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376, 1392 (2010); Act of Sept. 27, 2017, Pub. L. No. 115-61, 12 U.S.C. § 5321 (2017). *See* Patricia A. McCoy, *Systemic Risk Oversight and the Shifting Balance of State and Federal Authority over Insurance*, 5 U.C. IRVINE L. REV. 1389, 1411–12 (2015) (describing the Dodd-Frank Act's "new framework for the federal oversight of systemic risk").

[96] Title XIV of Dodd-Frank was subtitled the "Mortgage Reform and Anti-predatory Lending Act," Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376, 2136 (2010). *See* John Pottow, *Ability to Pay*, 8 BERKELEY BUS. L.J. 175, 176 (2011) (describing the Dodd Frank Act's "profoundly transformative" home mortgage affordability rules).

[97] *See* Christopher L. Peterson, *Consumer Financial Protection Bureau Law Enforcement: An Empirical Review*, 90 TUL. L. REV. 1057, 1076–104 (2016) (describing the CFPB's early consumer-protection law-enforcement work).

[98] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376, 1955–2113 (2010); 12 U.S.C. § 5491(a).

[99] Seila L. LLC v. Consumer Fin. Prot. Bureau, 591 U.S. 197, 206 (2020) (citing 12 U.S.C. § 5511(a)).

Dodd-Frank Act transferred the authority to implement and enforce RESPA from HUD to the CFPB.[100]

Among these and other reforms, the Dodd-Frank Act also adopted a new prohibition on "abusive acts or practices."[101] Congress has used the word "abusive" to describe certain financial practices in the past. For example, the Fair Debt Collection Practices Act characterized some harassing debt-collection practices as "abusive."[102] And, interestingly, Congress's legislative findings in enacting RESPA characterized as "abusive" kickback payments that unnecessarily increase settlement costs.[103] But the Dodd-Frank Act set out new, independent, and potentially far-reaching standards creating a public cause of action for abusive financial practices.[104] The Dodd-Frank Act's general prohibition on abusive conduct restricts actions that interfere with the ability of a consumer to understand a consumer-financial product or take unreasonable advantage of certain vulnerable consumers.[105]

Real-estate agents who participate in joint ventures with mortgage lenders or title companies potentially violate the Dodd-Frank Act's abusive-conduct prohibition. In this Part we

[100] 12 U.S.C. §§ 5581(b)(7), 5512(a), 5481(14), 5481(12)(M). *See also* Removal of Regulations Transferred to the Consumer Financial Protection Bureau, 79 Fed. Reg. 34224-01, 34225 (June 16, 2014).

[101] Pub. L. No. 95-109, 91 Stat. 874 (1977); 12 U.S.C. § 5531(d) ("*Abusive* debt collection practices contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy."); 15 U.S.C. § 1692d (prohibiting "any conduct the natural consequence of which is to harass, oppress, or *abuse* any person in connection with the collection of a debt") (emphasis added).

[102] 15 U.S.C. § 1692(a).

[103] Real Estate Settlement Procedures Act, Pub. L. No. 93-533, 88 Stat. 1724 (1974) (codified at 12 U.S.C. § 2601(a)) (Congressional finding reform to the real estate settlement procedures was needed to protect consumers "from unnecessarily high settlement charges caused by certain *abusive* practices") (emphasis added).

[104] Statement of Policy Regarding Prohibition on Abusive Acts or Practices, 88 Fed. Reg. 21883, 21884 (Apr. 12, 2023), https://www.govinfo.gov/content/pkg/FR-2023-04-12/pdf/2023-07233.pdf [https://perma.cc/BTK4-NUTQ] [hereinafter CFPB Policy Statement].

[105] 12 U.S.C. § 5531(d).

begin with an explanation of why real-estate agents who participate in settlement joint ventures are subject to the Consumer Financial Protection Act (CFPA). Next, we argue that real-estate agents are subject to potential liability for violating the CFPA's abusive-practices prohibition in two ways. First, an agent may be engaging in abusive conduct when they steer their customers to a joint venture that the agent partly owns, rather than to a mortgage or title company that might act in the consumer's best interest. Second, when an agent participates in a title-company joint venture that serves as the escrow agent at closing, the agent may have an irreconcilable conflict of interest. In both cases, the agent may be taking unreasonable advantage of a consumer's reasonable reliance on the agent to act in the consumer's interests—a violation of the CFPA.

A. The CFPA applies to real-estate agents who partly own settlement joint ventures.

Ordinarily, the CFPA might be of little concern to real-estate agents because the CFPA applies only to "covered persons" and "service providers."[106] By definition, Congress excluded real-estate agents from these terms to the extent that the agents act for buyers and sellers of real property.[107] Moreover, § 1027(b) of the CFPA prohibits the Bureau from exercising "any rulemaking, supervisory, enforcement, or other authority . . . with respect to a . . . real estate agent," unless the agent is "engaged in an activity of offering or providing any consumer financial product or service."[108]

But when real-estate agents enter into joint ventures with mortgage or title companies, they expose themselves to the CFPA. A real-estate-settlement joint venture is, itself, a "covered person" under the CFPA, because it offers mortgage or title services.[109] And joint-venture partners who materially

[106] *See* 12 U.S.C. § 5536(a)(1)(B).
[107] 12 U.S.C § 5481(6), (26).
[108] *See* 12 U.S.C. § 5517(b).
[109] *See* 12 U.S.C. § 5481(6), (15)(A)(i), (iii).

participate in the affairs of their covered-person entity are "related persons,"[110] which the CFPA treats as "covered persons."[111] One way that real-estate agents "materially participate" in the affairs of their joint ventures is by referring their real-estate customers to the joint ventures for mortgage or title services.[112] This same conduct might also qualify a real-estate agent as a "service provider," which the CFPA defines to mean "any person that provides a material service to a covered person."[113]

Allowing real-estate agents to provide financial services through a jointly owned business without incurring the legal responsibilities associated with that activity would be inconsistent with the CFPA's goal of reducing regulatory arbitrage.[114] Because the CFPA's prohibition on abusive conduct applies to "covered persons" and "service providers,"[115] real-estate agents who participate in these joint ventures must abide by it.

B. Real-estate agent liability for abusive self-dealing under the CFPA

The CFPA defines abusiveness to include taking "unreasonable advantage" of "the reasonable reliance by the consumer on a covered person to act in the interests of the

[110] *See* 12 U.S.C. § 5481(25)(C)(ii).

[111] *See* 12 U.S.C. § 5481(25)(B).

[112] Consumer Fin. Prot. Bureau v. D & D Mktg., No. CV 15–9692 PSG (EX), 2016 WL 8849698 (C.D. Cal. Nov. 17, 2016) (holding that a company that provided leads to lenders could be a "service provider").

[113] *See* 12 U.S.C. § 5481(26).

[114] *See* 12 U.S.C. § 5511(a) (directing the CFPB to "implement and . . . enforce Federal consumer financial law consistently for the purpose of ensuring that all consumers have access to markets for consumer financial products and services and that markets for consumer financial products and services are fair, transparent, and competitive"); *see also* Patricia McCoy, *Inside Job: The Assault on the Structure of the Consumer Financial Protection Bureau*, 103 MINN. L. REV. 2543, 2551–58 (describing the Dodd-Frank Act's regulatory architecture as a legislative attempt to minimize future harmful regulatory arbitrage).

[115] 12 U.S.C. § 5536(a)(1)(B).

consumer."116 Real-estate agents with settlement joint ventures expose themselves to at least two potential forms of liability for abusive conduct. First, they may be engaging in abusive conduct when they steer their customers to their own settlement joint ventures. Second, when real-estate agents jointly own a closing-agent joint venture, they risk liability for breaching a duty of impartiality.

1. Abusive Steering

In its recent policy statement on abusive conduct, the Bureau explained that:

> [S]ometimes people are in a position in which they have a reasonable expectation that an entity will act in their interest to make decisions for them, or to advise them on how to make a decision. Where people reasonably expect that a covered entity will make decisions or provide advice in the person's interest, there is potential for betrayal or exploitation of the person's trust. Therefore, Congress prohibited taking unreasonable advantage of reasonable consumer reliance.[117]

The policy statement went on to identify two ways that a government enforcer might establish reasonable reliance. "First, reasonable reliance may exist where an entity communicates to a person or the public that it will act in its customers' best interest, or otherwise holds itself out as acting in the person's best interest."[118] And, "[s]econd, reasonable reliance may . . . exist where an entity assumes the role of acting on behalf of consumers or helping them to select providers in the market."[119]

Real-estate buyers often rely on their agents for help with selecting "providers in the market." Because buying a home can involve "five to 18 different vendors," consumers

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[116] *See* 12 U.S.C. § 5531(d)(2).

[117] CFPB Policy Statement, *supra* note 104, at 21889.

[118] *Id.*

[119] *Id.*

understandably may rely on their real-estate agent to help identify who to work with.[120] A buyer might ask their agent to recommend a mortgage or title company, for example. "In these situations," the Bureau noted, "the entity [here, the real-estate agent], acting as an intermediary, can function as a broker or other trusted source that the person uses in selecting, negotiating for, or otherwise facilitating the procurement of consumer financial products or services provided by third parties."[121] In the Bureau's view, "people should be able to rely on the entity to do so in a manner that is free of manipulation," and those "that engage in certain forms of steering or self-dealing may be taking unreasonable advantage of the consumers' reasonable reliance."[122]

Real-estate agents who refer their customers to the agents' own joint ventures risk violating the CFPA's prohibition on abusive conduct. For example, when an agent refers their real-estate customer to a mortgage broker, the consumer might reasonably believe that the agent is acting in the *consumer's* interest—namely, referring the consumer to someone who will help the consumer get the best mortgage for the consumer—while the agent might be acting in their *own* interest by steering the consumer to a mortgage company that the agent partly owns and from which the agent would share in profits derived from referred consumers. Because the parties to the joint venture are steering consumers into the joint venture, it is less likely that "[the] consumer can shop and compare products based on quality, price, and convenience without having to worry about getting trapped by the fine print into an abusive deal."[123] And it is highly likely

[120] Sichelman, *supra* note 7, at 14.

[121] CFPB Policy Statement, *supra* note 104, at 21889.

[122] *Id.* at 21889–90.

[123] S. Rep. No. 111-176, at 11 (2010). *See also* Consumer Financial Protection Circular 2024-01, CONSUMER FIN. PROT. BUREAU (Feb. 29, 2024), https://www.consumerfinance.gov/compliance/circulars/consumer-financial-protection-circular-2024-01-preferencing-and-steering-practices-by-digital-intermediaries-for-consumer-financial-products-or-services/ [https://perma.cc/7HMK-GKJM] ("Protecting and facilitating people's ability to effectively compare and choose among options for consumer

that the arrangement leads to unreasonable advantage-taking, because closing costs imposed by the settlement joint venture must be sufficiently high to recoup the kickback payment concealed within the dividends remitted to the real-estate agent. The Bureau or a state attorney general could, under the right circumstances, show this to be "steering or self-dealing" that is "abusive" under the CFPA.[124]

2. Abusive Breach of a Duty of Impartiality

And what about when an agent refers their customer, who is looking for title services, to the agent's own joint venture? Real-estate agents may be engaging in abusive conduct when their joint venture serves as a closing agent. In most jurisdictions, a title agent is a third-party neutral, with fiduciary obligations to both the seller and the buyer.125 For

financial products or services is among the core statutory objectives of the CFPB.").

[124] It is also worth noting that the California State Legislature has adopted a state abusive practices standard mirroring the CFPA. CAL. FIN. CODE § 90003(a)(1) (2020).

[125] *See, e.g.*, Straight v. Approved Fed. Sav. Bank, No. 05-5187, 2005 WL 1288091, at *2 (W.D. Wash. May 27, 2005) ("An escrow agent serves [as] a neutral depository for the monies and documents involved in a real estate deal."); *In re* Davis, 172 B.R. 437, 452 (Bankr. D.C. 1994) (holding that "the settlement agent . . . had a fiduciary responsibility to each of the parties to the transaction"); Red Lobster Inns v. Lawyers Title Ins. Corp., 492 F. Supp. 933, 941 (E.D. Ark. 1980) ("Where a person acts as escrow agent for parties to a land sale, he becomes agent of both buyer and seller and this agency creates a fiduciary relationship."), *rev'd in part on other grounds* Red Lobster Inns of Am., Inc. v. Lawyers Title Ins. Corp., 656 F.2d 381 (8th Cir. 1981); Aranki v. RKP Invs., Inc., 979 P.2d 534, 536 (Ariz. Ct. App. 1999) (recognizing that "escrow agents . . . act as fiduciaries for buyers and sellers alike"); Donovan v. Kirchner, 641 A.2d 961, 969 (Md. Ct. Spec. App. 1994) ("The third party, or escrow agent, is uninterested in the transaction and acts as a fiduciary to both the grantor and the grantee."); Zimmerman v. First Am. Title Ins. Co., 790 S.W.2d 690, 695 (Tex. App. 1990) (observing that "[a]n escrow agent is in a fiduciary relationship with the contracting parties" to a real-estate transaction); Wagman v. Lee, 457 A.2d 401, 404 (D.C. 1983) (acknowledging the "unique position" that an escrow agent occupies "in the 'triangular' relationship between purchaser and seller") (citation omitted).

example, the Arizona Association of REALTORS® recently observed that "[a] title company is a neutral third party employed to insure the title to the home and issue title-insurance policies to the buyer and mortgage lender."126 The title company's duties include researching "the history of the property to identify potential problems, claims, or discrepancies that may interrupt the transaction."127 Because "the title company is charged with formally transferring ownership from the seller to the buyer, it is critical that they serve in an impartial manner."128

But when the escrow company is a joint venture owned in part by the buyer's real-estate agent, it lacks the disinterestedness that the law requires, potentially to the detriment of the seller, who, like the buyer, is a "consumer," entitled to the CFPA's protections.

A real-estate agent might argue that because they have disclosed to the consumers their affiliated-business arrangement (as RESPA requires), their conflict of interest cannot be abusive under the CFPA. But it is unlikely that disclosure would negate an abusive-conduct claim. The Bureau has brought several enforcement actions alleging abusive acts and practices in situations where the covered person had disclosed the challenged conduct. For example, in its case against Freedom Stores, Inc., which the Bureau brought jointly with the Virginia and North Carolina attorneys general, the Bureau charged as abusive the practice of filing lawsuits in Norfolk, Virginia against consumers who had not signed their financing contracts in Virginia and did not live there when the suits were filed.129 The Bureau and

[126] *See* Scott Drucker, *Disclosure of Common Ownership Interest Between Agent and Title Company*, ARIZ. REALTORS (Nov. 13, 2020), https://www.aaronline.com/2020/11/13/disclosure-of-common-ownership-interest-between-agent-and-title-company/ [https://perma.cc/NV8B-UU7C].

[127] *Id.*

[128] *Id.*

[129] Complaint for Injunctive Relief and Damages at ¶¶ 72–78, Consumer Fin. Prot. Bureau v. Freedom Stores, Inc., No. 2:14-cv-643 (E.D. Va. filed Dec. 18, 2014), https://files.consumerfinance.gov/f/201412_cfpb_complaint_freedom-stores_va-nc.pdf [https://perma.cc/PT8Y-BU5M].

the states asserted this claim even though consumers had signed contracts that included a provision designating Virginia as the forum where any suits would be filed.130 As this case demonstrates, the Bureau believes that it is possible for conduct to be "abusive" even when it is disclosed to consumers. Indeed, the Bureau's policy statement on abusive conduct referred favorably to a Treasury Department report that observed that consumers "may retain faith that [an] intermediary is working for them and placing their interests above his or her own, even if the conflict of interest is disclosed."131 In those situations, "consumers may reasonably but mistakenly rely on advice from conflicted intermediaries."132

A real-estate agent might also argue that because affiliated-business arrangements are specifically contemplated under RESPA, they cannot be illegal under the CFPA. But this argument is unlikely to succeed. While it is true that affiliated-business arrangements can be an exception to RESPA's prohibition on kickbacks, that would be irrelevant to whether there has been a violation of a different statute, the CFPA. Indeed, the Bureau's UDAAP exam manual specifically notes that "a transaction that is in technical compliance with other federal or state laws may nevertheless violate the prohibition against UDAAPs."133

[130] *Id.* at ⁋ 51 ("The . . . credit contracts contained a non-negotiable, venue-selection clause that designated the state or federal courts of Virginia.").

[131] CFPB Policy Statement, *supra* note 104, at 21890 n.76 (citing to U.S. DEP'T OF TREASURY, FINANCIAL REGULATORY REFORM 68 (2009), https://fraser.stlouisfed.org/title/financial-regulatory-reform-5123 [https://perma.cc/9JRV-UYNN]) (emphasis added).

[132] *Id.*

[133] CONSUMER FIN. PROT. BUREAU, UNFAIR, DECEPTIVE, OR ABUSIVE ACTS OR PRACTICES (UDAAPS) EXAMINATION PROCEDURES 10 (Oct. 2012), https://files.consumerfinance.gov/f/documents/cfpb_unfair-deceptive-abusive-acts-practices-udaaps_procedures.pdf [https://perma.cc/QSL5-6HM3]; *see also* FED. DEPOSIT INS. CORP., CONSUMER COMPLIANCE EXAMINATION MANUAL VII-1.6 (Dec. 2024), https://www.fdic.gov/resources/supervision-and-examinations/consumer-compliance-examination-manual/documents/7/vii-1-1.pdf

And in its 2022 circular on overdraft fees, the Bureau asked, and answered in the affirmative, this question: "Can the assessment of overdraft fees constitute an unfair act or practice under the Consumer Financial Protection Act (CFPA), even if the entity complies with the Truth in Lending Act (TILA) and Regulation Z, and the Electronic Fund Transfer Act (EFTA) and Regulation E?"134 Similarly, real-estate agents might be able to form affiliated-business arrangements that insulate them from liability under RESPA but still violate the CFPA's prohibition on abusive conduct.

Proponents of joint ventures might argue that joint ventures owned by a real-estate brokerage is distinguishable from joint ventures owned by individual agents. This argument is problematic insofar as the brokerage creates informal pressure or financial incentives for agents to use a preferred settlement-services business. For example, suppose a brokerage provides its agents with an end-of-the-year bonus based in whole or in part on steering clients to the brokerage's co-owned title company or mortgage lender. These agents may still lack the disinterestedness of a fiduciary because the agent is selecting the settlement-services provider for their own benefit rather than their customer's. When a real-estate agent is an employee or independent contractor of an owner of a title or escrow company, then the agent may take unreasonable advantage of the consumer if they are not a truly disinterested third-party neutral.

V. COMPLIANCE PRINCIPLES IN SETTLEMENT JOINT VENTURES

[https://perma.cc/FD5Q-3P67] (declaring that "certain practices may violate the [CFPA] while complying with the technical requirements of other consumer protection laws").

134 CONSUMER FIN. PROT. BUREAU, CONSUMER FINANCIAL PROTECTION CIRCULAR 2022-06: UNANTICIPATED OVERDRAFT FEE ASSESSMENT PRACTICE 1 (Oct. 26, 2022), https://files.consumerfinance.gov/f/documents/cfpb_unanticipated-overdraft-fee-assessment-practices_circular_2022-10.pdf [https://perma.cc/JKH6-F8UF].

In this Part, we offer principles to assist courts, regulators, and industry counsel to decide when real-estate-settlement joint ventures are lawful with respect to concerns addressed in Parts III and IV. Specifically, how can real-estate professionals contemplating the creation of an affiliated-business arrangement ensure that they form and operate a compliant business? Subpart A discusses RESPA compliance and Subpart B discusses compliance under the Dodd-Frank Act's abusive-practices standard.

A. Un-discounted ownership: toward a fair-market-price principle in affiliated-business-arrangement formation

Our central insight in Part III is that a RESPA-compliant affiliated-business arrangement cannot be formed by providing a discounted opportunity to invest to a referring co-owner.[135] For example, an established title company cannot legally attract business by offering discounted shares in a new joint venture to a real-estate agent, because the discount itself is an impermissible thing of value given in exchange for future referrals. But if Congress's affiliated-business-arrangement exception has meaning, there must be a price point at which a referring investor can legally acquire shares in a compliant joint venture. How can courts, regulators, and businesses know whether the price of equity in a joint venture is illegally discounted?

In similar examples of the use of illusory services or payments to circumvent RESPA, first HUD and more recently the CFPB have pointed to a transaction's underlying economic reality to establish compliance. For example, when real-estate professionals used shell companies to create sham affiliated-business arrangements, HUD set out a list of ten factors to help determine whether the purported settlement company was actually a provider of settlement services.[136] Similarly,

[135] *See infra* Part III.

[136] Statement of Policy 1996-2, Regarding Sham Controlled Business Arrangements, 61 Fed. Reg. 29258 (June 7, 1996). In 2013, the Sixth Circuit

the CFPB looks to the fair-market value of services performed to determine whether a marketing-services agreement conceal kickbacks payments.[137] The Bureau has explained that a marketing-services agreement is unlawful "if the facts and circumstances show that . . . [a]n agreement to pay for

cast doubt on whether HUD's policy statement was entitled to deference. A Sixth Circuit panel declined to rely on the HUD factors arguing that the policy statement imposed a new "bona fide" provider requirement not included in RESPA itself. Carter v. Welles-Bowen Realty, Inc., 736 F.3d 722, 726 (6th Cir. 2013). Critics of the Sixth Circuit have responded that rather than imposing a new requirement, HUD's factors and the "bona fide" label associated with them merely explained that the term "service provider" within the statute and required the particular legal entity claiming to provide services to consumers actually be the entity doing the work. Minter v. Wells Fargo Bank, N.A., 924 F. Supp. 2d 627, 639 (D. Md. 2013) ("The Policy Statement did not create a new rule or requirement; it simply clarified an existing law. Sham ABAs were already prohibited; the Policy Statement simply provided a tool to evaluate whether a particular ABA was a sham."). For its part, the CFPB has not explicitly reissued HUD's policy statement. But the CFPB has cited the HUD policy statement in challenging "sham" affiliated business arrangements in its own enforcement actions. Consent Order ¶ 26, *In re* Taylor, No. 2013-CFPB-0001 (filed May 17, 2013), https://files.consumerfinance.gov/f/291305_cfpb_consent-order-0001.pdf [https://perma.cc/789B-MQFK] (citing Statement of Policy 1996-2, Regarding Sham Controlled Business Arrangements, 61 Fed. Reg. 29258 (June 7, 1996)). Similarly, the Office of the Comptroller of the Currency has also advised national banks to consider HUD's ten factors. Off. of the Comptroller of the Currency, Real Estate Settlement Procedures Act: Sham Controlled Business Arrangements (Aug. 4, 2005), https://www.occ.gov/news-issuances/bulletins/2005/bulletin-2005-27.html [https://perma.cc/FLY5-8TQP] ("HUD's policy statement contains 10 factors that will be considered in determining whether an affiliated business entity is a bona fide provider of settlement services."). Whether a court emphasizes the phrase "bona fide" or not, RESPA itself requires that a "provider of settlement services" must actually *provide* the services in order to be eligible for the affiliated business arrangement exception. *See* ANDREW G. PFIZOR ET AL., MORTGAGE LENDING § 8.4.6.2 (4th ed. 2024).

[137] 12 C.F.R. § 1024.14(g)(2) (2024) ("If the payment of a thing of value bears no reasonable relationship to the market value of the goods or services provided, then the excess is not for services or goods actually performed or provided. These facts may be used as evidence of a violation of Section 8 . . . ."). *See also* CFPB Compliance Bulletin 2015-05, RESPA Compliance and Marketing Services Agreements 2–3 (Oct. 8, 2015).

marketing services, but the payment is in excess of the *reasonable market value* for the services performed.[138]

The CFPB has also used a fair-market-value test to determine whether a title company violates RESPA when it hosts continuing-education courses for real-estate agents.[139] For example, if a title company offers such a course, but provides the course free of charge or at a discounted value to real-estate agents who refer closing business to the title company, then the value of the course can be an illegal kickback under § 8. The CFPB has explained that a title company that provides continuing education to real-estate agents must charge "a course admission fee equivalent to the fair market value of the course" to avoid providing a kickback to real-estate agents.[140]

Akin to these well-settled principles, courts should hold that real-estate agents who acquire ownership of a settlement joint venture must pay the *fair-market value* of their equity stake. Specifically, to determine whether a settlement joint venture is lawful, courts should ask what a reasonable, disinterested investor would pay up front for the right to receive the referring party's future joint-venture dividends. Borrowing from the tax regulations, which are sensible on this point, courts should set the fair-market price of the joint venture's share as "the price at which it would change hands between a willing buyer and willing seller, neither being under any compulsion to buy or sell and both having reasonable knowledge of relevant facts."[141] The valuation of the ownership stake should be determined on the basis of all relevant factors, including a fair appraisal that includes

[138] *Real Estate Settlement Procedures Act FAQs*, CONSUMER FIN. PROT. BUREAU 13 (Oct. 7, 2020), https://www.consumerfinance.gov/compliance/compliance-resources/mortgage-resources/real-estate-settlement-procedures-act/real-estate-settlement-procedures-act-faqs/ [https://perma.cc/L7ZP-WX9R] (emphasis added).

[139] *Id.* at 9.

[140] *Id.*

[141] 26 C.F.R. § 25.2512-1 (IRS regulation setting out a general method for valuation of property).

tangible and intangible assets, good will, and the future earning capacity of the business.[142] If the referring party purchased their equity share at this price point or higher, then it did not receive an illegal discount.

Determining the fair-market value of shares in a settlement joint venture is a feasible and practical task required by the plain meaning of RESPA § 8 and Regulation X. The statute does not allow giving or accepting any "thing of value pursuant to any agreement . . . that business incident to . . . real estate settlement service . . . shall be referred to any person."[143] To know whether a thing of value is given by the joint venture's sponsor at the outset, one must know the value of the business to determine whether investors were given impermissible "discounts."[144] Fortunately, investors, regulators, and courts routinely determine the fair-market values of businesses.[145] Fund managers trading public shares are expected to know and predict the fair-market value of their positions. Small-business-loan officers estimate the value of businesses to determine the value of collateral and decide how much money they are willing to lend. Judges in divorce proceedings must measure the value of business ownership held as marital property to fairly divide the divorcing couple's assets.[146] Bankruptcy courts often must determine the value of businesses, including, for example, when bifurcating a creditor's secured claim against ownership

[142] *See* 26 C.F.R. § 25.2512-3 (IRS regulation on valuation of an interest in business).

[143] 12. U.S.C. § 2607(a).

[144] 12 C.F.R. § 1024.14(d).

[145] MARC GOEDHART & TIM KOLLER, VALUATION WORKBOOK: STEP-BY-STEP EXERCISES AND TESTS TO HELP YOU MASTER VALUATION, at XI (5th ed. 2011).

[146] *See* ROBERT D. FEDER, CHARLES T. ROSOFF & ALEZA TADRI, VALUATION STRATEGIES IN DIVORCE (4th ed. 2012); BUSINESS VALUATION IN DIVORCE: A CASE ABA COMPENDIUM (Monique Nijhout-Rowe & David Solomon eds., Bus. Valuation Res., 5th ed. 2020); J. THOMAS OLDHAM, DIVORCE, SEPARATION AND THE DISTRIBUTION OF PROPERTY § 10.01[4] (2021); Alan Zipp, *Business Valuation Standard for Divorce*, 11 AM. J. FAM. L. 167 (1997).

shares pledged by a bankrupt debtor as collateral.[147] And the value of ownership shares in a business regularly arises in tax law—indeed, there are *several hundred* sections of the tax code that require determination of fair-market value.[148]

Accounting and finance professionals responding to these market and legal needs have devised a variety of strategies for measuring fair-market value of businesses. Many books have been written about business valuation.[149] And while it is beyond the scope of this article to decide which method is best, there can be no doubt that qualified accounting, finance, and economic experts are fully capable of adapting existing business-valuation techniques to real-estate-settlement joint-venture formation.

Some real-estate-industry compliance attorneys publicly advise their clients that joint ventures are RESPA- compliant when owners collectively invest six months of operating expenses.[150] But this is likely insufficient and misses the

[147] 11 U.S.C. § 506(a)(1). *See also* IAN RATNER, GRANT STEIN & JOHN C. WEITNAUER, BUSINESS VALUATION AND BANKRUPTCY (2012) (exploring business valuation techniques for many bankruptcy-related issues).

[148] *See* DAVID LARO & SHANNON P. PRATT, BUSINESS VALUATION AND TAXES: PROCEDURE, LAW, AND PERSPECTIVE 7 (2005) ("It is estimated that there are several hundred sections in the [Tax] Code that involve fair market value in one manner or other.").

[149] *See, e.g.*, JAY B. ABRAMS, QUANTITATIVE BUSINESS VALUATION: A MATHEMATICAL APPROACH FOR TODAY'S PROFESSIONALS (2d ed. 2010); GREGORY R. CARUSO, THE ART OF BUSINESS VALUATION: ACCURATELY VALUING A SMALL BUSINESS (2020); PAUL L. HOOD, JR. & TIMOTHY R. LEE, A REVIEWER'S HANDBOOK TO BUSINESS VALUATION : PRACTICAL GUIDANCE TO THE USE AND ABUSE OF A BUSINESS APPRAISAL (6th ed. 2011); CHRISTOPHER Z. MERCER & TRAVIS W. HARMS, BUSINESS VALUATION: AN INTEGRATED THEORY (3d ed. 2021); SHANNON P. PRATT, BUSINESS VALUATION DISCOUNTS AND PREMIUMS (2d ed. 2009); JEFFREY M. RISIUS, BUSINESS VALUATION, A PRIMER FOR THE LEGAL PROFESSIONAL (2007); ROGER TIEST, BUSINESS VALUATION FOR SMALL AND MEDIUM-SIZED COMPANIES: DUE DILIGENCE AND VALUATION TECHNIQUES (2013).

[150] Sue Johnson, *Thinking About a Joint Venture? Remember the RESPA Rules*, REAL TRENDS (Oct. 22, 2021), https://www.realtrends.com/articles/thinking-about-a-joint-venture-remember-the-respa-rules/ [https://perma.cc/GJ7P-QEWC] ("[M]any RESPA attorneys recommend an investment covering start-up costs and six months of expenses.").

essential underlying policy that animates RESPA and Regulation X. Six months' operating expenses bear little relationship to the value of dividends if most of the joint venture's costs are borne by the established title company or mortgage lender that sponsors the joint venture. A six-month rule of thumb is also inconsistent with interpretive guidance that the CFPB has adopted in related contexts. For example, in its guidance on continuing-education courses sponsored by title companies, the CFPB did not create a safe harbor based on an arbitrary duration—say, *six continuing-education credit hours*—to test whether a title company is providing a kickback to real-estate agents. Instead, real-estate agents who refer settlement business must pay the fair-market value for the educational course.[151] So, too, should referring agents pay the fair-market value for their ownership share in a settlement joint venture.

Critics of a fair-market-value test might respond that it is difficult to reliably establish a business valuation on new start-ups. But most real-estate joint ventures are not true start-ups in the common sense of that term. Most people take a start-up to refer to "companies that typically don't have a fully developed business model and, more crucially, lack adequate capital to move onto the next phase of business."[152] In real-estate-settlement joint ventures, the norm is for sponsoring companies with an existing business model to seek out agents with a proven track record. Joint ventures are less like a start-up seeking to deliver innovative technology to market or establish a new brand than they are long-standing businesses forming an alliance to exclude rivals and capture revenue from shared customers. Title companies, mortgage

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[151] *Real Estate Settlement Procedures Act FAQs*, CONSUMER FIN. PROT. BUREAU 9 (Oct. 7, 2020), https://www.consumerfinance.gov/compliance/compliance-resources/mortgage-resources/real-estate-settlement-procedures-act/real-estate-settlement-procedures-act-faqs/ [https://perma.cc/L7ZP-WX9R].

[152] Mitchell Grant, *What a Start-up Is and What's Involved in Getting One off the Ground*, INVESTOPEDIA (Jan. 22, 2024), https://www.investopedia.com/terms/s/startup.asp [https://perma.cc/T7KP-BHLM].

brokers, or developers hoping to form joint ventures often seek out the real-estate agents with the largest books of business. That track record of closings itself provides a credible basis for a valuation of the new joint venture, since this value is why the agents were desirable partners in the first place. The market-value test for ownership shares should, at least in part, be based upon the referring real-estate agents' closing track record. Intuitively, the more deals agents customarily close, the more valuable are ownership shares in their joint ventures.

Finally, proponents of joint ventures between real-estate agents and other settlement-services providers might argue that if real-estate agents must pay a fair-market price for the value of their joint-venture ownership, then, as a practical matter, the up-front cost would be prohibitive. This is to say that real-estate agents simply would not pay the up-front costs of joint-venture ownership priced according to fair-market value. While there may be some truth to this, the objection tends to confirm the underlying argument against discounted ownership. If a par price for investing in the joint business exceeds the expected marginal utility of the business structure, then the business structure is likely inefficient. If that inefficiency is still desirable, it is because the business structure seeks to capitalize on corrupt referrals that are anticompetitive and contrary to consumers' interests. It might be true that in certain joint ventures, the business advantages of good customer service, routinized processes, and shared branding make a joint venture worthwhile. If so, then it is not an unfair burden to expect referring settlement professionals to pay a fair-market price for those benefits.

B. Taking unreasonable advantage through affiliated-business arrangements

Even if a joint venture is lawfully formed through payment of fair-market value to acquire an ownership stake, the professionals involved must still operate the affiliated-business arrangement in a lawful manner. As discussed in Part IV, real-estate agents can engage in an abusive practice under the Dodd-Frank Act if they engage in self-dealing by steering their customers into the agent's own settlement-services business. When an agent refers their customers to the agent's own title or mortgage company, they may be taking "unreasonable advantage" of the consumer.153 How should courts, the CFPB, state attorneys general, and compliance counsel determine whether a real-estate agent's self-dealing rises to the level of unreasonable advantage-taking?

In its recent policy statement on abusive acts and practices, the CFPB has explained that in the context of abusive practices, the term "reasonable" means "'[f]air, proper, or moderate under the circumstances,' and conversely, 'unreasonable' means "exceeding the bounds of reason or moderation."'154 Moreover, the Bureau has elaborated:

> Evaluating unreasonable advantage involves an evaluation of the facts and circumstances that may affect the nature of the advantage and the question of whether the advantage-taking was unreasonable under the circumstances. Such an evaluation does not require an inquiry into whether advantage-taking is typical or not. And even a relatively small advantage may be abusive if it is unreasonable.[155]

When the circumstances of an alleged abusive act or practice involve self-dealt referrals by a trusted professional, courts should evaluate unreasonable advantage-taking from the perspective of the consumer. This is because the "bounds of reason or moderation" are set by the customers' expectations that the trusted advisor is providing competent and trustworthy advice.[156] In this context, the consumer is reasonable to presume that their agent will direct them to the best price available—that is, after all, what the consumer herself would choose if she had the benefit of her real-estate agent's expertise. Because consumers are entitled to "be able to rely" on trusted advisors in consumer-financial services "in

[153] *See* 12 U.S.C. § 5536(a)(1)(B).
[154] CFPB Policy Statement*, supra* note 104, at 21886.
[155] *Id.*
[156] *Id.*

a manner that is free of manipulation," anything less than the best available price from a reliable vendor would be outside the bounds of reasonable pricing under the circumstances.[157]

As the CFPB explained, "entities should not get a windfall due to a gap in understanding, unequal bargaining power, or consumer reliance."[158] Thus, any above-market price, unnecessary "Cadillac" policy or service, or other extra "junk" fee that creates windfall revenue for an affiliated-business arrangement would be "abusive" if it resulted from a self-dealt referral. The law of unreasonable advantage-taking requires that consumers are entitled to a manipulation-free price point for settlement services when the closing involves a referral to an affiliated-business arrangement.[159]

The RESPA fair-market-value test discussed in Section A of this part works in tandem with a prohibition of abusive unreasonable advantage-taking. The market value of a referring real-estate agent's ownership share in a settlement joint venture is likely to be much higher if the joint venture has tacit plans to charge unreasonable prices to referred customers. But if referring real-estate agents do not engage in unreasonable advantage-taking through self-dealing referrals, there is less value to be gained from forming an affiliated-business arrangement. Excess discounts in affiliated-business-arrangement formation violate RESPA. Excess closing costs in affiliated-business-arrangement operations violate the CFPA. Either way, settlement joint ventures require careful judicial scrutiny because of their potential for enabling an opaque web of corrupt real-estate-settlement relationships that Congress has, for decades, attempted to prevent.[160] And real-estate professionals who

[157] *Id.* at 21890.

[158] *Id.* at 21886.

[159] *Id.* at 21890. *See also* U.S. DEP'T OF TREASURY, FINANCIAL REGULATORY REFORM 68 (2009), https://fraser.stlouisfed.org/title/financial-regulatory-reform-5123 [https://perma.cc/9JRV-UYNN] ("[C]onsumers may reasonably but mistakenly rely on advice from conflicted intermediaries.").

[160] *See* Real Estate Settlement Procedures Act, Pub. L. No. 93-533, 88 Stat. 1724 (1974) (codified at 12 U.S.C. § 2601(a)) (attempting to ensure consumers "are protected from unnecessarily high settlement charges

want to preserve their reputation should treat with caution this method of "cut[ing] right to the front of the line."[161]

VI. POLICY RECOMMENDATIONS

This part sets out policy recommendations for policy makers and stakeholders. Beginning with the CFPB, the Bureau should use a variety of its tools to address the persistent and growing challenges posed by non-compliant real-estate-settlement joint ventures. First, the CFPB should issue detailed guidance in a consumer-financial-protection circular or a policy statement explaining that joint ventures do not qualify for the exception for affiliated-business arrangements unless all owners of the joint venture paid fair-market value for their equity stakes. Moreover, the guidance should clarify that even when formed in compliance with RESPA, owners can nonetheless engage in abusive conduct by self-dealing referrals that take unreasonable advantage of the affiliated-business arrangement's customers. The Bureau should then incorporate these principles into its supervision exam manual, with specific protocols and examiner training on identifying and addressing non-compliant real-estate-settlement joint ventures. The goal of this guidance should be to add clarity for courts, deter unlawful practices, and ensure compliance with RESPA and the CFPA.

Moreover, the CFPB should intensify its enforcement efforts, investigating businesses that circumvent RESPA by

caused by certain abusive practices that have developed in some areas of the country.").

[161] Wade Vander Molen, *Should My Real Estate Team Sign a Title Company Joint Venture?*, YOUTUBE (June 2, 2022), https://youtu.be/6sheCsQ1qmE [https://perma.cc/725V-5D8V] ("That's why this is happening . . . . It's the easiest path to business. We'll just cut the line. We'll just go right to the front. Versus hey I'm actually building the relationships. I'm adding value. I'm helping them generate listings. I'm helping them target market people. I'm helping them with an online presence. I'm helping them fix their website because it's not very good. I'm teaching them stuff all the time. Ok—That's all great. But these title companies are like, we're just going to cut right to the front of the line right.").

offering and accepting discounted opportunities to purchase ownership in settlement joint ventures. While HUD had the luxury of focusing on RESPA enforcement, the Bureau must enforce more than a dozen laws across a multitude of markets. The Bureau must inevitably make difficult resource-allocation decisions. But discounted joint ventures should be among the Bureau's priorities. Even though individual RESPA enforcement cases are unlikely to produce eye-popping consumer redress more typical in actions against the largest national banks, the social value generated from thoughtful RESPA enforcement is nevertheless considerable. Many small and medium-sized real-estate businesses carefully watch the Bureau's enforcement cases for clues about the direction of future regulation. The CFPB should deter the use of joint ventures to facilitate illegal kickbacks or unreasonable advantage-taking through a series of cases across different geographic regions against title companies, mortgage originators, and individual real-estate agents.

But the CFPB need not act alone. State regulators, including attorneys general, insurance commissioners, and financial-services administrators, should also act more assertively to stop illegal real-estate-settlement joint ventures within their jurisdictions. In addition to their authority under state law, RESPA provides enforcement authority for § 8 kickback violations to "the attorney general or the insurance commissioner of any State."[162] And state attorneys general and financial-institution regulators have federal law-enforcement powers delegated by Congress after the 2008 financial crisis.[163] Section 1042(a)(1) of the Dodd-Frank Act provides that states "may bring a civil action in the name of such State . . . to enforce provisions of this title or regulations issued under this title, and to secure remedies under provisions of this title or remedies otherwise provided under other law."[164] Section 1036(a)(1)(A) makes it "unlawful for any

[162] 12 U.S.C. 2607(d)(4).

[163] Authority of States to Enforce the Consumer Financial Protection Act of 2010, 87 Fed. Reg. 31940, 31941 (May 26, 2022).

[164] 12 U.S.C. § 5552(a)(1). Likewise, other state regulators "may bring a civil action or other appropriate proceeding to enforce the provisions of this

covered person or service provider" to violate "Federal consumer financial law," which includes RESPA.[165] And § 1036(a)(1)(B) makes it unlawful for any "covered person" or "service provider" to "engage in any unfair, deceptive, or abusive act or practice."[166] When covered persons or service providers violate these provisions, the states should act.

State regulators should use these authorities to play a more strident role in upholding anti-corruption principles in their local housing markets.[167] With their proximity to local market dynamics and their ability to swiftly address violations, state regulators possess insight into regional practices and can efficiently investigate and prosecute violations.[168] By actively engaging in enforcement actions, state regulators not only complement the efforts of federal agencies but also ensure a more comprehensive and effective enforcement framework.[169]

title or regulations issued under this title with respect to any entity that is State-chartered, incorporated, licensed, or otherwise authorized to do business under State law . . . and to secure remedies under provisions of this title or remedies otherwise provided under other provisions of law with respect to such an entity." *Id.*

[165] *Id.* at § 5536(a)(1)(A).

[166] *Id.* at § 5536(a)(1)(B).

[167] *See* Authority of States to Enforce the Consumer Financial Protection Act of 2010, 87 Fed. Reg. 31940, 31941 (May 26, 2022) (final interpretive rule explaining 12 C.F.R. Chapter X that emphasizes the importance of state enforcement efforts within the federal consumer financial regulatory framework). *See also* Arthur E. Wilmarth, Jr., *The Dodd-Frank Act's Expansion of State Authority to Protect Consumers of Financial Services*, 36 J. CORP. L. 893, 949–52 (2011) (arguing active state enforcement promotes beneficial cooperation and competition while reducing the risk of CFPB agency capture); Mark Totten, *Credit Reform and the States: The Vital Role of Attorneys General after Dodd-Frank*, 99 IOWA L. REV. 115, 174 (2013) (arguing it is "vital" for states to be "cooperative but also competitive co-enforcers" of federal consumer financial protection law).

[168] S. Rep. No. 111-176, at 16 (2010) (pointing to state efforts to stop the 2008 financial crisis when federal regulators failed to act).

[169] Authority of States to Enforce the Consumer Financial Protection Act of 2010, 87 Fed. Reg. 31940, 31941 (May 26, 2022) ("The CFPA recognizes the important role that States play in overseeing the consumer financial marketplace.")

Private counsel also have an important role in using existing law to promote homebuying affordability. While the CFPB and state regulators play significant roles in enforcing RESPA, Congress recognized that private plaintiffs' counsel offer unique advantages in representing individual consumers and advocacy groups directly affected by housing-affordability challenges.[170] By litigating RESPA violations, these attorneys not only seek remedies for affected parties but also contribute to setting legal precedents and establishing deterrents against exploitative practices in the real-estate industry. Many states also have unfair-and-deceptive-practices laws with private causes of action that could be adapted to challenge self-dealing referrals. California, for example, has adopted a state prohibition of abusive practices modeled on the Consumer Financial Protection Act that is actionable under its state unfair-competition law.[171] And industry compliance counsel should carefully advise clients on the serious legal risks that settlement joint ventures pose both in formation and operation. They should also consider advising clients on how to unwind noncompliant joint ventures.

Federal and state courts should carefully consider cases alleging illegal practices in real-estate-settlement joint

[170] Congress provided that any person or persons who violate RESPA Section 8's kickback prohibition are to be held jointly and severally liable to their customers "for the settlement service involved in the violation in an amount equal to three times the amount of any charge paid for such settlement service." 12 U.S.C. § 2607(d)(2). RESPA also provides for reasonable attorneys fees and costs in successful private claims. *Id.* at § 2607 (d)(5).

[171] CAL. FIN. CODE § 90012(a) (authorizing state law enforcement actions "against a covered person or service provider who engages, has engaged, or proposes to engage in unfair, deceptive, or abusive practices with respect to consumer financial products or services"). *See also* CAL. BUS. & PROF. CODE § 17200 (prohibiting "any unlawful . . . business act or practice" and providing a private cause of action to consumers who suffer damages from a violation of either California's or the federal prohibition abusive practices). *See* Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co., 20 Cal. 4th 163, 180 (1999) ("By proscribing *any unlawful* business practice, section 17200 'borrows' violations of other laws and treats them as unlawful practices that the unfair competition law makes independently actionable.") (emphasis added) (internal quotations omitted) (citations omitted).

ventures. The country needs judges to police the real-estate closing market to ensure the integrity of transactions, safeguard consumers from exploitative schemes, and protect law-abiding businesses from unfair competition. Additionally, courts should facilitate the robust discovery needed to uncover evidence of wrongdoing and ensure a thorough examination of the facts. In cases where violations are substantiated, courts should be empowered to award attorneys' fees that reflect the complexity and significance of these matters, incentivizing competent representation and promoting access to justice. While more strident kickback enforcement alone may not resolve America's affordable-homebuying challenges, enhanced public and private enforcement efforts represent a critical step toward addressing systemic issues and promoting fairness and transparency in real-estate practices.

Finally, the complexity and potential for abuse inherent in affiliated-business arrangements suggest that the exception may have been ill-advised. As Congress contemplates measures to address affordable homebuying, the repeal of the safe harbor for affiliated-business arrangements should be one component of broader legislative-reform efforts. The propensity for circumvention, ambiguity, and lack of consumer benefit associated with affiliated-business arrangements underscore the need for reform. Repealing this exception would not only enhance transparency and accountability in the real-estate sector, but it would also strengthen consumer protections by eliminating loopholes that can be exploited to the detriment of homebuyers, sellers, and honest competitors.

Meanwhile, state legislatures need not wait for Congress to act. While RESPA preempts inconsistent state laws, it also provides that a state law is not preempted if it "gives greater protection to the consumer."[172] RESPA's implementing regulation, Regulation X, explains further that state laws "that impose more stringent limitations on affiliated business

[172] 12 U.S.C. § 2616.

arrangements" are not preempted "so long as they give more protection to consumers and/or competition."[173]

Several states have used this authority to place more stringent limitations on affiliated-business arrangements. The District of Columbia (which RESPA defines as a "state"[174]), for example, has made no exception for affiliated-business arrangements and plainly bans all kickbacks for the referral of title business: "A title insurer or other person shall not give or receive, directly or indirectly, any consideration for the referral of title insurance business or escrow or other service provided by a title insurer."[175] The laws of Arizona and New York similarly restrict referral payments and do not have an exception for affiliated-business-arrangements[176]—effectively reproducing federal law before 1983. The attorneys general of these states should enforce their respective laws. Other states could follow suit and could ensure enforcement with a private cause of action backed up by mandatory fee shifting to prevailing plaintiffs. Unlike affordable-housing programs that raise taxes to fund costly development projects, reforming the settlement-services market to be more efficient,

[173] 12 C.F.R. § 1024.5(c)(2)(ii).

[174] 15 U.S.C. § 1602(s).

[175] D.C. CODE § 31-5031.15.

[176] *See* ARIZ. REV. STAT. § 20-1585 ("[N]o title insurance agent shall pay or give to any . . . agent . . . of the prospective owner . . . of the real property[,] either directly or indirectly, any commission or any part of its fees or charges including, but not limited to, fees for escrow services performed by a title insurer or title insurance agent, or any other consideration or valuable thing, as an inducement for, or as compensation for, any title insurance business."); N.Y. INS. LAW § 6409(d) (making it unlawful for a "title insurance agent . . . [to] pay or give to . . . any person . . . acting as agent . . . of the owner . . . or the prospective owner . . . of the real property[,] either directly or indirectly, any . . . consideration or valuable thing, as an inducement for, or as compensation for, any title insurance business."); *id.* (making it unlawful for "any person . . . acting as agent . . . of the owner . . . or of the prospective owner . . . of the real property [to] knowingly receive, directly or indirectly, any such . . . consideration or valuable thing."); D.C. CODE § 31-5031.15 ("A title insurer or other person shall not give or receive, directly or indirectly, any consideration for the referral of title insurance business or escrow or other service provided by a title insurer.").

transparent, and fair to consumers imposes no burden on the public fisc.

VII. CONCLUSION

This Article has highlighted harm to consumers arising from real-estate-settlement vendors who form jointly owned businesses to extract higher closing costs from consumers. These joint ventures most commonly involve real-estate agents on the one hand and mortgage brokers or title-insurance companies on the other. We argue that real-estate-settlement joint ventures can significantly dampen vendors' motivation to compete by providing consumers with lower prices, because referring parties stand to earn more by directing homebuyers toward a jointly owned venture. Self-dealing in settlement joint ventures can violate the law in at least two ways. First, a large and growing number of established settlement businesses, such as title companies, offer real-estate agents equity shares in a new joint venture at a discounted price. This discount is a thing of value paid in anticipation of future referrals that itself violates RESPA. And the dividends paid by such an arrangement, which we stylize as a discounted joint venture, are unlawful kickback payments because they are not paid out of a RESPA-compliant affiliated-business-arrangement. Second, it is an abusive practice under federal law for a real-estate agent or other settlement vendor to refer business to their own affiliated-business venture when a better deal is available elsewhere. The technical details of compliant real-estate settlement are important because closing costs are one of the most substantial barriers consumers face when struggling to purchase a home.

We call for several policy reforms. The CFPB should issue detailed guidance on discounted joint ventures and abusive self-interested referrals. Moreover, the CFPB should also intensify its enforcement efforts against businesses that circumvent RESPA with noncompliant joint ventures to illegally profit from junk fees, overpriced services, and self-dealing. Similarly, state attorneys general, insurance commissioners, and financial-services administrators should also act more assertively to stop illegal real estate-settlement joint ventures within their jurisdictions. Compliance counsel, consumer plaintiffs' attorneys, and courts all have a role to play in policing corrupt real-estate practices. Congress should consider eliminating the affiliated-business-arrangement exception as one part of a larger agenda to address housing affordability. But state legislatures need not wait for federal action. Because RESPA explicitly authorizes states to adopt rules that are more protective of consumers and competition, legislatures should follow those jurisdictions that explicitly prohibit all kickback payments in residential-real-estate transactions.

VIII. APPENDIX A. TITLE INSURANCE JOINT VENTURE PRO FORMA

1) Marketing
1) Failed lawyer
~~[illegible] RESPA Attorney~~
→ RESPA Attorneys 1200.00 Hour

Respa Attorney opinion letter!

Joint Venture Scenarios:
Confidential - Please do not share

10 Partner JV	DEALS PER MONTH							
PROFORMA	25	30	35	50	60			
Average purchase price per deal	$ 700,000	$ 700,000	$ 700,000	$ 700,000	$ 700,000			
GROSS PROFIT								
Real Estate sales	$ 210,000,000	$ 252,000,000	$ 294,000,000	$ 420,000,000	$ 504,000,000			
Transactions per month	25	30	35	50	60			
Total transactions a year	300	360	420	600	720			
Avg title premium Gross Profit per deal	$3,000	$3,000	$3,000	$3,000	$3,000			
Total Premium Revenue	$900,000	$1,080,000	$1,260,000	$1,800,000	$2,160,000			
Fixed Fee Revenue ($1200 profit per deal)	$360,000	$432,000	$504,000	$720,000	$864,000			
TOTAL OVERALL REVENUE	$1,260,000	$1,512,000	$1,764,000	$2,520,000	$3,024,000			
EXPENSES A YEAR:								
Office space & supplies	$30,000	$30,000	$30,000	$30,000	$30,000			
Sales & Mktg	$2,000	$2,000	$2,000	$2,000	$2,000			
Title searches	$45,000	$54,000	$63,000	$90,000	$108,000			
employee (processor) & benefits, payroll, taxes	$90,000	$90,000	$90,000	$90,000	$90,000			
Service agmt: Administration Fees (post closing, pre processor, attorney, payroll, audit)	$60,000	$70,000	$80,000	$80,000	$80,000			
Insurance (fidelity, E&O, Surety, Cyber)	$8,000	$8,000	$8,000	$8,000	$8,000			
reconciliation / title software fees / Fedex	$12,000	$14,400	$16,800	$19,200	$19,200			
attorney fees / unbudgeted expenses / losses	$3,000	$3,000	$3,000	$3,000	$3,000			
TOTAL ANNUAL EXPENSES	$250,000	$271,400	$292,800	$322,200	$340,200			
NET PROFIT PER YEAR:								
TOTAL COMPANY NET PROFIT	$1,010,000	$1,240,600	$1,471,200	$2,197,800	$2,683,800	Capital Contribution	Estimated Volume Sold	Equity
JV Partner 9% equity - 120 Million	$90,900	$111,654	$132,408	$197,802	$241,542	$5,400	120M	9.0%
JV Partner 8% equity - 100 Million	$80,800	$99,248	$117,696	$175,824	$214,704	$4,800	100M	8.0%
JV Partner 6% equity - 70 Million	$60,600	$74,436	$88,272	$131,868	$161,028	$3,600	70M	6.0%
JV Partner 5% equity - 60 Million	$50,500	$62,030	$73,560	$109,890	$134,190	$3,000	60M	5.0%
JV Partner 4.5% equity - 50 Million	$45,450	$55,827	$66,204	$98,901	$120,771	$2,700	50M	4.5%
JV Partner 3% equity - 40 Million.	$30,300	$37,218	$44,136	$65,934	$80,514	$1,800	40M	3.0%
JV Partner 3% equity - 40 Million	$30,300	$37,218	$44,136	$65,934	$80,514	$1,800	40M	3.0%
JV Partner 2.5% equity - 35 Million	$25,250	$31,015	$36,780	$54,945	$67,095	$1,500	35M	2.5%
JV Partner 2% equity - 30 Million	$20,200	$24,812	$29,424	$43,956	$53,676	$1,200	30M	2.0%
JV Partner 2% equity - 30 Million	$20,200	$24,812	$29,424	$43,956	$53,676	$1,200	30M	2.0%
Total Profit for the JV Partners owning 45%	**$454,500**	**$558,270**	**$662,040**	**$989,010**	**$1,207,710**	$27,000	575M	45.0%

Note: This does not include refis. If you bring on your lender partners we will run their refis through. We make ~$1500 per refi