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Has the CFPB Essentially Banned Marketing Services Agreements under RESPA?

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The Consumer Financial Protection Bureau (“CFPB” or “Bureau”) recently issued a compliance bulletin (the “Bulletin”) on the permissibility of Marketing Services Agreements (“MSAs”) in relation to real estate transactions under Section 8(a) of the Real Estate Settlement Procedures Act (“RESPA”).¹ The Bulletin provides that in the CFPB’s four limited years of experience as a supervisory and enforcement authority of RESPA, it has found MSAs present substantial “legal and regulatory” risk of running afoul the prohibition as “kickbacks” for referral services, and that these risks are greater and more difficult to control than the CFPB previously thought. Accordingly, the CFPB warns mortgage industry participants to proceed carefully when considering the advisability of continuing any MSA arrangements, and cautions that these agreements would continue to receive intense regulatory attention.

While the CFPB did not formally ban MSAs, the Bureau is sending a clear message to any entity that seeks to use them—expect significantly more regulatory scrutiny and be aware that MSAs must comply with the CFPB’s ever changing landscape of prohibited practices. Moreover, at a time when the industry has been seeking (and should be receiving) greater regulatory clarity as to how to structure a compliant MSA, the Bulletin merely details the CFPB’s past findings and insinuates that the CFPB is highly unlikely to find any MSA that could be drafted to comply with RESPA.

I. RESPA’s Prohibition on Kickbacks and MSAs

Through the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Congress transferred rule writing and enforcement of RESPA from the Department of Housing and Urban Development (“HUD”) to the CFPB.² Section 8(a) of RESPA prohibits the giving or accepting of “any fee, kickback, or thing of value” for referrals of settlement services involving federally related mortgage loans.³ Section 8(c), which provides an exception to the anti-kickback provision, states “nothing in this section shall be construed as prohibiting... the payment to any person... compensation ...for services actually performed.”⁴ These sections of RESPA are implemented by Regulation X, which was written and is primarily enforced by the CFPB.⁵ Often overlooked is RESPA Section 8(d), which imposes criminal penalties for violations of RESPA and is enforced by the Department of Justice.⁶

Though HUD traditionally examined MSAs for compliance with Section 8 of RESPA and issued informal guidance on structuring compliant MSAs, it generally found an MSA fell within the 8(c) exception to “kickbacks,” provided the marketing company actually performed marketing or advertising services.



The CFPB, however, has taken a more active role in scrutinizing MSAs primarily from the perspective of their impact on consumers.

From this perspective, the CFPB has found that a MSA will not fall within the 8(c) exception if the fee paid for the alleged marketing could be viewed as compensation for referral services, despite being denominated as consideration based upon the fair market value of advertising or marketing services. A key indication of an illegal arrangement is any type of payment or exchange of value based on the number of referrals received or the revenue generated by these referrals. The CFPB objects to these arrangements by alleging that they have the effect of increasing the cost of credit to consumers. This theory, however, has not been proven by CFPB's enforcement actions to date. No enforcement settlements have required restitution to any consumers and, instead uniformly imposed civil money penalties payable to the CFPB Civil Money Penalty Fund.

Accordingly, by promulgating the Bulletin, without formal rulemaking, the CFPB seeks to change overnight a routine industry practice into something that regulators will likely always deem unlawful. The CFPB did not issue a proposed rulemaking, seek comment, or even amend Regulation X to include official commentary. Rather, the Bureau described what it has learned through its enforcement actions and focused on factual specific practices that it has alleged to be unlawful through Enforcement settlements. Specifically, to date the CFPB has issued 11 enforcement actions involving alleged violations of Section 8(a) of RESPA, and to date these violations have cost companies over \$75 million.⁷ The initial Bureau cases include prosecuting allegedly sham entities utilized to pass referral payments,⁸ MSAs in which no actual marketing or advertising services were performed,⁹ and the payment of compensation to independent salesmen for referrals that were disguised as employee salaries.¹⁰

In a notable shift away from practices previously found acceptable by HUD, the Bureau has also alleged that the practice of renting office space could be a disguised "kickback." In one instance, the Bureau alleged that the non-bank mortgage lender renting space from a depository financial institution was doing so at an inflated price. The CFPB alleged that the rental was in reality a *quid pro quo* arrangement in which the bank agreed to refer its customers to the mortgage lender in exchange for inflated rental payments.¹¹

In another enforcement action, the CFPB alleged that a title insurance agency agreed to perform marketing and advertising services for a real estate broker. While some services were indeed performed, and the contract price was a flat fee rather than per-referral, the CFPB found the MSA did not fall within the 8(c) exception because the contract included an implied referral arrangement. Evidence of the referral arrangement included a failure to document how the businesses determined the contract price was fair market value and to ensure marketing services were actually performed. The CFPB alleged the contract price was set by the expected number of referrals the arrangement would generate, and the expected revenues associated with those referrals. The CFPB also noted that the broker received significantly more referrals from the counter-party while the MSA was in effect as compared to previous years.¹²

While omitted from the Bulletin, the cases suggest certain practices in designing MSAs that could be deemed as lawful, depending on other circumstances, including:

- Use a flat fee arrangement, rather than payment per-referral.
- Utilize an independent third party to establish that the contract price reflects market value.



- Diligently monitor co-parties to ensure marketing services are performed.
- Ensure the number of referrals does not excessively rise with introduction of a MSA.

However, the CFPB tempers any positive nuggets of guidance in its enforcement actions by noting that even use of a third-party independent compliance company to establish “market-rate compensation for marketing services, alone, does not suffice to ensure the legality of an MSA.” While diligent monitoring of counterparties is recommended, the CFPB raised doubts that satisfactory monitoring could be possible. The CFPB reported that it had found that “efforts made to adequately monitor activities that in turn are performed by a wide range of individuals is inherently difficult.” Indeed, the CFPB further noted that, because of the “strong financial incentives and pressures” in the industry, behaviors that violate RESPA may “remain significant” even when an MSA has been carefully drafted to be in technical compliance with RESPA.¹³

In a not so subtle message, while indicating that the Bureau likely does not believe that an MSA can be structured without risk of an enforcement action, the CFPB noted that in previous months, a significant number of mortgage industry participants had dissolved their existing MSAs after considering the compliance risks they raised. If such suggestion of the CFPB’s true view of the propriety of MSAs was not clear enough, the Bureau then stated that any business still considering an MSA arrangement should “consider carefully” the “grave concerns” about these arrangements and the adverse consequences of non-compliance.¹⁴

II. Changing the Marketplace without Formal Regulatory Action

The Bulletin is considered unofficial guidance—that is, officially non-binding on the industry. The Bureau did not undertake formal rulemaking by issuing a proposed rule, seeking comment, and then issuing a final rule. The CFPB’s position is that it is merely stating the law as it is written and as evident by its enforcement settlements. This approach is odd, considering the Bureau’s position affirmatively overturns industry practices based upon HUD’s repeated interpretations of RESPA before HUD’s authority was transferred to the CFPB. Moreover, while the Bureau’s enforcement settlements allege what the Bureau believes to be violations of the law, no settlements of alleged violations has ever entailed a respondent admitting liability. Thus, while these settlements contain the CFPB’s allegations of wrongdoing, nothing is ever proven definitively, including interpretations of the law contained within these settlements.

Although the guidance set forth in the Bulletin lacks crystal clarity, the cost of enhanced regulatory scrutiny or a civil investigatory demand, in reality, forces market participants to abandon formerly lawful practices for a type of marketplace shaped by the CFPB, apparently without regard to the Administrative Procedures Act. Couple this informal rulemaking with the Bureau’s willingness to assert that there are no statutes-of-limitations in its administrative proceedings,¹⁵ market participants must be concerned as to what the CFPB could do next.

III. Action Items

- Review all current MSAs in light of the negative activities cited by the Bureau’s Bulletin.
- Determine your business’ potential exposure based on transaction volume and whether it is worth maintaining existing MSAs.



- If your business does continue its MSA arrangements, confirm the services are being provided at fair market value.
- Consider any new MSAs in light of the Bulletin's disdain toward the practice.



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- ¹ Consumer Financial Protection Bureau, CFPB Bull. No. 2015-05, RESPA Compliance and Marketing Services Agreements (Oct. 8, 2015), available at http://files.consumerfinance.gov/f/201510_cfpb_compliance-bulletin-2015-05-respa-compliance-and-marketing-services-agreements.pdf.
- ² 12 U.S.C. § 5581(b)(7).
- ³ 12 U.S.C. § 2607(a).
- ⁴ 12 U.S.C. § 2607(b).
- ⁵ 12 C.F.R. 1024.
- ⁶ 12 U.S.C. § 2607(d).
- ⁷ There is an additional potential \$109 million fine which has been stayed pending an appeal to the U.S. Circuit Court of Appeals.
- ⁸ <http://www.consumerfinance.gov/newsroom/the-cfpb-takes-action-against-real-estate-kickbacks/>, <http://www.consumerfinance.gov/newsroom/cfpb-files-suit-against-borders-borders-plc-for-paying-illegal-real-estate-kickbacks/>.
- ⁹ *Id.*
- ¹⁰ <http://www.consumerfinance.gov/newsroom/cfpb-takes-action-against-realtysouth-for-mortgage-disclosure-violations/>.
- ¹¹ <http://www.consumerfinance.gov/newsroom/cfpb-takes-action-against-mortgage-kickbacks/>.
- ¹² <http://www.consumerfinance.gov/newsroom/cfpb-takes-action-against-mortgage-kickback-agreements/>.
- ¹³ See CFP Bull. No. 2015-05, at 4-5.
- ¹⁴ *Id.*
- ¹⁵ <http://www.consumerfinance.gov/newsroom/cfpb-director-cordray-issues-decision-in-phh-administrative-enforcement-action/>.

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