

Client Alert.

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CFPB as HUD: Another Section 8 Consent Order Displays CFPB's RESPA Approach

By Donald Lampe and Ashley Hutto-Schultz

In a recent Real Estate Settlement Procedures Act ("RESPA") enforcement action, the Consumer Financial Protection Bureau ("CFPB") negotiated a consent order with Lighthouse Title, Inc. ("Lighthouse") for alleged violations of RESPA's prohibition against kickbacks. RESPA Section 8(a) and its implementing regulation, Regulation X, prohibit parties from entering into an agreement to exchange fees, kickbacks, or things of value for the referral of settlement services in connection with a "federally related mortgage loan." 12 CFR 1024.14(b). In the Consent Order, the CFPB claimed that Lighthouse entered into marketing services agreements ("MSAs") for advertising with parties such as real estate brokers, and made payments related to these agreements based on the "volume or value of business referred" by such counterparties. As a result of this practice, the CFPB alleged that Lighthouse violated RESPA both for entering into the MSAs and for varying the fees it paid based on the referral of business provided by the counterparties. As evidence of the violations, the CFPB cited the following:

- Lighthouse failed to determine, or document a method for a determination of, the fair market value for services it received under the MSAs.
- Lighthouse determined the fees it paid under the MSA, in part, based on the number and value of referrals received by the related counterparty.
- Lighthouse did not monitor whether it was receiving the services for which it contracted.
- The number of referrals provided to Lighthouse by counterparties was significantly greater if Lighthouse had entered into an MSA with the counterparty.

In sum, the CFPB asserted that Lighthouse was unable to provide a legitimate fair market basis for its pricing under the MSAs and believed that there was a strong correlation between the pricing for each counterparty and the number of referrals Lighthouse received per the subject MSA's. Pursuant to the Consent Order, Lighthouse agreed to pay \$200,000 in civil money penalties, terminate any MSA that is currently in effect, abstain from entering into any MSAs, provide continuous reporting of its activities to the CFPB, among other administrative measures. The CFPB set a \$5.00 maximum on "things of value" that lawfully may be provided to referral sources.

Takeaways from this action include:

- As expected, the CFPB will look beyond the face of an MSA and consider the facts behind implementation, performance, and payments as between the settlement service provider and the referring party.
- The CFPB in the Consent Order created a broad definition of "marketing services agreement," a term that is not defined in RESPA.

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- The CFPB emphasized that an objective determination of “fair market value” of marketing services to be rendered must be performed with written documentation of the determination that is retained and available for review.
- In the fair market value analysis, the CFPB frowned on the settlement service provider’s consideration of what other title companies in the market were willing to pay to referral sources for marketing services.
- The necessity of monitoring MSA performance to ensure that services contracted for are actually delivered.
- MSAs that result in more business being referred to the settlement service provider than is referred by the same referral sources not pursuant to MSAs provides evidence of a violation of RESPA §8(a). How the CFPB determined these differences is not clear from the Consent Order.

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