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Friday, November 13, 2015

## CFPB versus PHH: Impact on Marketing Services Agreements

Jonathan Foxx  
President & Managing Director

On November 5<sup>th</sup>, the Consumer Financial Protection Bureau ("Bureau") stated in a brief filed with the D.C. Circuit that its \$109 million disgorgement order against PHH Corp. in a mortgage reinsurance kickback case met all statutory requirements and should be allowed to stand to keep other companies from engaging in similar schemes. The Bureau's position has significant implications for Marketing Services Agreements ("MSAs").

Due to the implications of the Bureau's authorities and powers, I cover the impact of the PHH matter in some detail in a forthcoming webinar, entitled **Marketing Services Agreements: Challenges and Choices**. My colleague, Michael Barone, will cover the ins-and-outs of MSAs. This free webinar is hosted by MortgageFlex Systems.

[Webinar Registration Link](#)

### Presenters

Jonathan Foxx, President & Managing Director  
Michael Barone, Executive Director & Director Legal & Regulatory Compliance

Title Marketing Services Agreements: Challenges and Choices

Date November 19, 2015

Time 2PM-3PM ET

Recording No

### Topics

PHH Corp – Enforcement Action  
Background regarding MSAs  
Lighthouse Title – Consent Order  
Lessons learned about MSAs  
CFPB's Bulletin 2015-05 on MSAs  
Synopsis – Three Takeaways

### Attendee Package

Webinar Slides  
Marketing Services Agreements - Checklist  
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The Bureau contends that PHH incorrectly interpreted the Real Estate Settlement Procedures Act ("RESPA") in its appeal of the \$109 million disgorgement order. The CFPB and its Director, Richard Cordray, contend that they were correct in levying the foregoing penalty, which, they claim, serves as a necessary deterrent to other firms that might consider engaging in kickback actions.

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To quote the Bureau itself:

“Eliminating kickbacks is a primary goal of RESPA. If PHH is permitted to keep the fruits of its kickback scheme merely because it claims it believed its scheme was legal, this will encourage others to take advantage of areas of statutory uncertainty.”

Further, the Bureau contested PHH's claims that the agency's 'single-director structure,' as opposed to 'multimember-commission leadership,' and funding through the Federal Reserve rather than the congressional appropriations process, violate the U.S. Constitution.

To refresh the history of this matter, the Bureau had filed administrative claims against PHH in January 2014, alleging that when PHH originated mortgages, the financial institution referred consumers to mortgage insurers with which it had relationships. In exchange for this referral, the agency claimed, these insurers purchased reinsurance from PHH's subsidiaries, and PHH took the reinsurance fees as kickbacks.

The Bureau contended that PHH also charged more money for loans to consumers who did not buy mortgage insurance from one of its supposed kickback partners and, in general, charged consumers additional percentage points on their loans.

Then, in June 2015, Director Cordray upheld a November 2014 ruling by Administrative Law Judge Cameron Elliot that PHH engaged in a mortgage insurance kickback scheme under RESPA; but, according to Director Corday, the judge incorrectly assessed the penalties.

Director Cordray's position may be outlined, as follows:

Rather than requiring that PHH face a penalty for kickbacks on mortgages that closed on or after July 21, 2008 – three years before the CFPB took over RESPA enforcement from the U.S. Department of Housing and Urban Development – *the firm should be penalized for each payment it received after that date, regardless of when the mortgage had closed.*

Mr. Cordray based his decision on the way mortgage reinsurance premiums are paid. Thus, rather than coming as a onetime payment at the closing date of a mortgage, such premiums are paid by borrowers each time they make a monthly mortgage payment.



To take a line directly from Director Cordray's opinion, "That means PHH is liable for each payment it accepted on or after July 21, 2008, even if the loan with which that payment was associated had closed prior to that date."

Thus the penalty changed as a result of a differing reading of the law, which increased PHH's penalty by over 1600% - from \$6.4 million in Judge Elliotts ruling, based on the amount borrowers paid on mortgages that closed on or after July 21, 2008 to the new penalty calculation of \$109 million!

PHH appealed the decision and the D.C. Circuit put a stay on the ruling. The firm argues that the due process clause bars the government from retroactively punishing conduct that was recognized as lawful at the time.

I cover the PHH matter in considerable depth at the beginning of the webinar, bringing in salient features of the dispute, and at the end of the webinar I provide three synopses regarding the implications of the Bureau's position and actions with respect to Marketing Services Agreements.

[Webinar Registration Link](#)

Labels: [CFPB](#), [Consumer Financial Protection Bureau](#), [Kickbacks](#), [Marketing Services Agreements](#), [MSA](#), [PHH Corp](#), [RESPA Section 8](#), [Richard Cordray](#)

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