

SPECIAL ALERT: CFPB ISSUES GUIDANCE REGARDING MARKETING SERVICES AGREEMENTS

On October 8, 2015, the Consumer Financial Protection Bureau (“CFPB”) published a [compliance bulletin](#) providing guidance to mortgage industry participants regarding the permissibility of marketing services agreements (“MSAs”) under the Real Estate Settlement Procedures Act (“RESPA”).¹ The bulletin summarizes the CFPB’s “grave concerns” that settlement service providers have been improperly using MSAs to circumvent RESPA’s restrictions on the payment of kickbacks and referral fees in exchange for real estate settlement services.²

According to the bulletin, while MSAs are purportedly designed to permit individuals or entities to pay service providers bona fide compensation for goods, facilities, or services actually provided—which is expressly permitted under RESPA³—in some cases, MSAs are actually used as a cover for illegal referral fee arrangements. The bulletin further notes that even facially-compliant MSAs can be implemented in a manner that ultimately results in the impermissible exchange of compensation for referrals of settlement service business, often as a result of the significant financial pressures that exist for participants in the mortgage and settlement service markets. The CFPB’s guidance emphasizes the dangers posed to consumers by MSA arrangements that hide or indirectly or inadvertently facilitate the unlawful exchange of payment for referrals of settlement service business, including potential increases in mortgage pricing and negative impacts on consumers’ ability to freely shop for mortgages and mortgage-related settlement services.

To illustrate various RESPA compliance risks that the CFPB has identified in connection with the use of MSAs, the bulletin references recent enforcement actions and other circumstances in which the Bureau has determined that entities and/or individuals may have committed a violation in connection with an MSA relationship. The MSA-related risks highlighted by the bulletin include:

- Charging fees under the MSA that are based in whole or in part on the number of referrals of settlement service business.
- Failing to perform services or provide goods required under the MSA, while still receiving or making contractually-required payments.
- Increasing the volume of settlement service business referrals once an MSA relationship has been established.
- Directing advertising and promotional efforts provided for under an MSA toward other settlement service providers, rather than consumers, with the goal of establishing additional MSAs.
- Relying solely on third-party consultants to price goods or services provided under an MSA.

¹ *RESPA Compliance and Marketing Services Agreements*, CFPB Compliance Bulletin 2015-05 (Oct. 8, 2015).

² 12 U.S.C. § 2607(a).

³ 12 U.S.C. § 2607(c)(2).

Critically, the CFPB's guidance states that "any agreement that entails exchanging a thing of value for referrals of settlement service business involving a federally related mortgage loan likely violates RESPA, whether or not an MSA or some related arrangement is part of the transaction." This suggests that the payment of market-value compensation for services provided in connection with an MSA, in the CFPB's view, will not be sufficient to ensure RESPA compliance if the relationship also involves providing referrals in exchange for any "thing of value"—which prior enforcement actions have indicated can include the creation of, or opportunity to enter into, an MSA relationship.⁴

In addition to providing general guidance regarding the permissibility of MSAs under RESPA, the bulletin provides an overview of current industry and regulatory trends with respect to the treatment of MSAs. Specifically, the CFPB notes that several mortgage industry participants, including mortgage lenders, have announced in recent months that they intend to dissolve MSA relationships as a result of "the risks and complexity of designing and monitoring MSAs for RESPA compliance[.]" The bulletin also reiterates the CFPB's commitment to carefully examining MSA relationships for compliance with RESPA, and notes that the CFPB has already required industry participants to collectively pay more than \$75 million in connection with violations and comply with various injunctive requirements. The bulletin further states that the CFPB has held certain individuals personally liable for monetary penalties based on noncompliance.

Notably, the bulletin gives credit to "industry whistleblowers" for drawing the CFPB's attention to certain noncompliant MSAs. In discussing the role of whistleblowers, the CFPB encourages "any industry participant that suspects unlawful activity by others or that wishes to self-report its own conduct" to contact the agency. In light of this call for industry reporting, institutions should be aware that going forward, to the extent they continue to engage in MSA relationships, supervisory examinations will likely be only one of multiple potential sources of information that could form the basis for a RESPA-related enforcement action—including competitors.

Questions regarding the matters discussed in this Alert may be directed to any of our lawyers listed below, or to any other BuckleySandler attorney with whom you have consulted in the past.

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⁴ Consent Order, *In re Lighthouse Title*, 2014-CFPB-0015 (Sept. 30, 2014).