

Client Alert

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CFPB Bulletin on Marketing Services Agreements: Not Per Se Unlawful, But

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The Consumer Financial Protection Bureau (CFPB) on October 8, 2015 issued Compliance Bulletin 2015-05, RESPA Compliance and Marketing Services Agreements (Bulletin). The Bulletin represents another significant signpost along the agency's continuing journey to limit common arrangements that settlement-side parties have established and operated over the years under the Real Estate Settlement Procedures Act (RESPA).

BACKGROUND

The CFPB issued the Bulletin based on the agency's observations in numerous examinations, investigations and enforcement actions involving parties to marketing services agreements (MSAs) and other arrangements involving referrals by recipients of compensation. Roughly speaking, the sequence of events giving rise to the Bulletin began with CFPB public enforcement actions. These included CFPB enforcement decisions to the effect that the payment of marketing services fees may violate RESPA Section 8's prohibition on referral fees if tied to referrals from the entity receiving such fees. Then the CFPB publicly praised the decision of two significant mortgage lenders to exit MSAs. With this degree of uncertainty hanging over MSAs, some industry participants encouraged the agency to issue written guidance on the subject. So the Bulletin represents the next step in the CFPB's critical consideration of MSAs and perhaps other arrangements under Section 8. The Bulletin, however, did not include guidance for lawfully forming and operating MSAs.

"FACTS AND CIRCUMSTANCES" TEST

The CFPB's key concern in the Bulletin was that MSAs often give rise to "disguised compensation for referrals." The Bulletin did not, however, provide bright lines for determining whether particular arrangements are lawful under Section 8 of RESPA. Rather, the CFPB stated, "determining whether an MSA violates RESPA requires a review of the facts and circumstances surrounding the creation of each agreement and its implementation." Here the agency reminded interested parties that enforcement actions may provide "some guidance" but "the outcome of one matter is not necessarily dispositive of the outcome of another." However, referring to Section 8(a), while not giving weight to exceptions found elsewhere in RESPA (such as Section 8(c)(2)), the CFPB stated, "any agreement that entails exchanging a thing of value for referrals of settlement service business involving a federally related mortgage loan likely violates RESPA."

LEGAL OR NOT?

The Bulletin did not provide a list or description of agreement terms or conduct of the parties that would be found lawful under RESPA. Rather, the CFPB indicated that no single factor would be dispositive. For example, the CFPB pointed out that cost-justification of marketing services through third party evaluations of market-rate compensation alone does not suffice to ensure legality of MSAs. The CFPB noted that a well-drafted agreement,

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without additional evidence of compliance, would not be sufficient to prove compliance. The agency also expressed doubt that monitoring the activities and payments in an MSA could be effective for compliance, given the “strong financial incentives and pressures that exist in the mortgage and settlement services markets.”

QUESTIONS REMAIN

With the generalized nature of the Bulletin, there are questions remaining and considerations to ponder. For example:

- The Bulletin did not include compliance guidance. Rather, it brought to light various scenarios that the CFPB has questioned in the past under Section 8 of RESPA.
- The CFPB did not define “MSAs” but referred in the Bulletin a number of times to MSAs and other arrangements. A number of the enforcement examples in the Bulletin, for example, deal with affiliated business arrangements rather than MSAs.
- The agency refers to actions it initiated as a result of whistleblowers and encourages other whistleblowers who may observe questionable MSAs to contact the agency. This is reminiscent of the way HUD initiated Section 8 investigations in the years leading up to enactment of the Dodd-Frank Act.
- The CFPB strongly advised mortgage market participants, in light of the agency’s “grave concerns,” to give careful consideration to legal and compliance risks arising out of MSAs. The CFPB stopped short of concluding that MSAs are *per se* illegal, but again did not provide affirmative guidance on how to mitigate these risks.
- The CFPB is clear on one point, though: it will continue actively scrutinizing use of MSAs and related agreements in enforcement and supervision.

Morrison & Foerster monitors developments related to agency interpretations and actions involving RESPA-related topics. Stay tuned for future Client Alerts.

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