



The CFPB Doesn't Like Your MSA

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It is no secret that marketing service agreements (“MSAs”) are under increased scrutiny. In addition to initiating numerous enforcement actions, the Consumer Financial Protection Bureau (“CFPB”) recently issued Compliance Bulletin 2015-05, titled “RESPA Compliance and Marketing Service Agreements” (“Bulletin” or “CFPB Bulletin”), which “describe[s] the substantial risks posed by entering into [MSAs].”¹ This Bulletin was expected and eagerly anticipated in light of recent CFPB activity, but was significantly lacking with respect to direction or guidance.

BRIEF HISTORY OF MSA SCRUTINY

MSAs have traditionally been used to gain access to additional potential customers. Specifically, MSAs are marketing agreements that are generally undertaken by a lender or a title company and a service provider in which the lender or title company pays the service provider a monthly fee based on the “fair market value of marketing and advertising services performed.” Critics of MSAs claim that entities enter into these agreements at the expense of customers because they decrease competition and increase the costs of services customers would incur if they shopped around.

In the past couple of years, consumers have begun to bring class action lawsuits alleging that MSAs are sham employment and marketing arrangements used to generate unearned fees and kickbacks in violation of Section 8 of the Real Estate Settlement Procedures Act (“RESPA”) (together, “Section 8”).² For example, one case alleged that defendants designated a title company as

their “exclusive settlement and title company” and provided unspecified marketing services in exchange for an excessive monthly fee.³

In addition, the CFPB has increasingly become more interested in MSAs. In 2012, the CFPB published a press release informing lenders and mortgage brokers of its focus on misleading advertising and announcing it had launched formal investigations of six companies believed to have committed serious violations of the law.⁴

Soon, the CFPB began filing more complaints and enforcement actions against companies alleging violations of Section 8 for accepting fees, kickbacks, or things of value in exchange for referrals of customers for real estate settlement services.⁵ In 2013 and 2014, the CFPB entered into 12 consent orders (six each year) to resolve allegations of Section 8 violations, one of which is the now infamous Lighthouse Title, Inc., (“Lighthouse”) Consent Order (discussed below).⁶ And the CFPB hasn’t shown signs of slowing down. As of November 10, 2015, there are two pending actions⁷ alleging Section 8 violations and three consent orders⁸ addressing the same violation – one of which is in conjunction with the Maryland Attorney General, suggesting that scrutiny is expanding beyond the bounds of the CFPB.

LIGHTHOUSE CONSENT ORDER

The Lighthouse Consent Order marked the first time the CFPB publicly addressed MSAs through an enforcement action. In September

2014, the CFPB entered into a consent order with Lighthouse addressing allegations that the company’s MSAs with several real estate brokers violated Section 8.⁹ Although the MSAs allowed for payments to brokers based on marketing services provided to Lighthouse, according to the CFPB, the brokers were actually paid, in part, based on the number of referrals generated for Lighthouse. The CFPB asserted that Lighthouse executed the MSAs “as a quid pro quo for the referral of business,” and brokers that entered into an MSA with Lighthouse referred a “statistically significant” higher volume of business than brokers who had not.

There are two significant features about the Lighthouse Consent Order. First, the CFPB defined “MSAs” broadly to include joint advertising, marketing of services to others, and agreements with any persons in a position to refer business. Second, the CFPB departed from the plain language of the statute, legal precedent, and prior Department of Housing and Urban Development (“HUD”) guidance by noting that “[e]ntering a contract is a ‘thing of value’ within the meaning of Section 8, even if the fees paid under that contract are fair market value for the goods or services provided.” This statement by the CFPB appears to severely restrict the RESPA exemption under Section 8(c)(2)¹⁰ (“8(c)(2) Exemption”), which permits compensation for goods or facilities actually furnished or for services actually performed. In other words, it is the CFPB’s position that if there is a referral involved in the

transaction, the 8(c)(2) Exemption does not apply even if the compensation is for services actually performed because the payments could be a “pretext to provide compensation for a referral.” In fact, Director Cordray reiterated this position in his decision *In the Matter of PHH Corporation, et al.* (“PHH Decision”).¹¹

The recent CFPB guidance regarding the 8(c)(2) Exemption is also in direct conflict with established HUD guidance provided in 2010 on the marketing of home warranty companies (“HWCs”) by real estate brokers and agents.¹² Although directed at HWCs, HUD indicated that its analysis may be applicable to other settlement service providers. The HUD guidance drew a sharp distinction between (1) marketing by real estate brokers of a service provider to particular homebuyers and sellers, which is more likely to be considered a referral, versus (2) undirected or “general” advertising of the service provider through a broker platform, such as a website, which is less likely to be considered a referral.

The HUD guidance emphasized, among other things, that an HWC may compensate a real estate broker or agent for services when those services are actual, necessary, and distinct from the primary services provided by the real estate broker or agent, so long as those additional services are not nominal and are not services for which there is a duplicative charge. In addition, the amount of compensation from the HWC that is permitted

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under Section 8 for such additional services must be reasonably related to the value of those services and must not include compensation for referrals of business. On the other hand, payments for marketing services directed to particular homebuyers or sellers are considered payments for affirmatively influencing their choice of settlement service providers and likely violate Section 8 of RESPA as an illegal kickback for a referral, regardless of whether the payment is made to the broker or agent on a “per transaction” or a “flat fee” basis.

CFPB BULLETIN¹³

In light of recent enforcement actions, the industry expected some formal guidance regarding MSAs from

the CFPB. Rather, the Bulletin merely reiterated what the enforcement actions showed - that MSAs are high risk. In the CFPB's view, many MSAs are designed to evade Section 8's prohibitions. Further, even if the MSA technically complies with the provisions of RESPA, the agreement may be implemented in a manner that violates Section 8.

While the CFPB Bulletin does not provide guidance for structuring compliant MSAs, its discussion of recent enforcement actions identifies several Section 8 violation risks:

- Charging or paying fees based on the number of referrals received and revenue generated by the referrals.
- Steering business based on

kickbacks and referral fees received.

- Burying the required disclosure that consumers can shop for settlement services.
- Failing to disclose affiliate relationships and a consumer's option to shop for services.
- Collecting payments without providing some or all of the services required under the agreements.
- Paying for referrals by defraying loan officer marketing expenses.
- Increasing the volume of settlement service business referrals upon establishment of an MSA relationship.
- Directing advertising/promotions

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toward other settlement service providers in order to establish more MSAs rather than toward consumers.

- Relying exclusively on independently established market rate compensation for marketing services to support the legality of an MSA.

Importantly, the CFPB Bulletin noted 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.” Under this interpretation, a facially-compliant MSA will not be enough to ensure compliance with Section 8 if the relationship involves referrals in exchange for a “thing of value.”

In response to the increased CFPB activity regarding MSAs, various lenders have dissolved existing MSAs and ceased entering into MSAs.¹⁴ The CFPB has applauded these lenders’ decisions and voiced its intention to continue actively scrutinizing MSAs and related agreements.

It is also interesting to note that the CFPB mentions “whistleblowers” three times in the Bulletin and encourages industry participants to self-report suspected unlawful activity. This may mean that the CFPB is trying to identify RESPA violations from all avenues, some of which may be employees and competitors.

NEXT STEPS

Based on the CFPB’s guidance

and enforcement activity in this area, entering into and maintaining MSAs is becoming increasingly risky. As a result, companies and service providers should consider:

- Whether current MSAs and corresponding relationships give rise to a Section 8 issue—in particular, it may have been consistent with HUD’s view of MSAs but views have clearly evolved with the CFPB.
- Whether payments for marketing services are in any way tied to the referral of business.
- Whether payments are made for the fair market value of the services provided.
- Whether the services are actually performed, verified, and legitimate, and are not duplicative or nominal.
- Directing marketing to the public at large, and not to a focused group of customers of the lender or service provider.
- Avoiding exclusive relationships due to a greater likelihood of a Section 8 violation in these types of relationships.
- Analyzing whether the company should continue entering into and maintaining MSAs.
- Analyzing the adverse consequences that may arise from non-compliance or a finding that the MSAs violate Section 8.
- Assessing the risks of entering into and maintaining MSAs as compared to potential benefits.
- Revising MSA policies and training to incorporate recent CFPB guidance.

In light of the guidance regarding MSAs, companies and service providers should also consider reevaluating lead generation agreements. Neither the CFPB nor HUD has issued formal guidance on the application of RESPA to lead generation agreements. Before authority over RESPA transferred to the CFPB, HUD staff took the informal position that a real estate settlement service business could pay for a prospects list so long as the payment was for the use of the list and was not further conditioned on the number of closed transactions resulting from the list or on any other considerations, such as endorsement of the product.¹⁵

However, since inheriting authority for RESPA, the CFPB is of the opinion that it is not bound by HUD informal guidance, as evidenced by the Lighthouse Consent Order and PHH Decision.¹⁶ Furthermore, the CFPB has noted 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 ... some related arrangement is part of the transaction.”¹⁷ It would not be far-fetched for the CFPB to begin scrutinizing lead generation agreements in the near future. Nonetheless, if properly structured, lead generation agreements may provide a middle ground for lenders and service providers to generate business without running afoul of RESPA.

Based on the CFPB activity with respect to MSAs, it appears that the

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CFPB is one step closer to banning MSAs altogether. Until the CFPB takes such action, companies and service providers should take care in reevaluating MSAs and the risks associated with such agreements.



- 1 Consumer Financial Protection Bureau ("CFPB"), RESPA Compliance and Marketing Service Agreements, CFPB Compliance Bulletin 2015-05 (Oct. 8, 2015).
- 2 See *Henson v. Fid. Nat. Fin. Inc.*, 2:14-CV-01240 (C.D. Cal. Mar. 21, 2014); *Baehr, et al., v. The Creig Northrop Team, P.C., et al.*, 1:2013-CV-00933 (D. Md. Mar. 27, 2013).
- 3 *Baehr*, 2013 WL 1250074 at ¶ 20.
- 4 CFPB, Press Release, Consumer Financial Protection Bureau Warns Companies Against Misleading Consumers with False Mortgage Advertisements (Nov. 19, 2012).
- 5 *In the Matter of Paul Taylor, et al.*, Consent Order, 2013-CFPB-0001 (May 17, 2013); *Consumer Fin. Prot. Bureau v. Borders & Borders*, Complaint, 3:13-MC-99999 (W.D. Ky. Oct. 24, 2103).
- 6 2013 Consent Orders: *Consumer Fin. Prot. Bureau v. Radian Guaranty Inc.*, Consent Judgment, 1:13-CV-21188 (S.D. Fl. Apr. 4, 2013); *Consumer Fin. Prot. Bureau v. United Guaranty Corp.*, Complaint, 1:13-CV-21189 (S.D. Fl. Apr. 4, 2013); *Consumer Fin. Prot. Bureau v. Genworth Mortg. Ins. Corp.*, Consent Judgment, 1:13-CV-21183 (S.D. Fl. Apr. 5, 2013); *Consumer Fin. Prot. Bureau v. Mortg. Guaranty Ins. Corp.*, Consent Judgment, 1:13-CV-21187 (S.D. Fl. Apr. 5, 2013); *In the Matter of: Paul Taylor, Paul Taylor Homes Limited, and Paul Taylor Corp.*, Consent Order, 2013-CFPB-0001 (May 17, 2013); *Consumer Fin. Prot. Bureau v. Republic Mortg. Ins. Co.*, 1:13-CV-24146 (S.D. Fl. Nov. 15, 2013). 2014 Consent Orders: *In the Matter of: Fidelity Mortg. Corp. et al.*, Consent Order, 2014-CFPB-0001 (Jan. 16, 2014); *In the Matter of: 1st Alliance Lending, LLC*, Consent Order, 2014-CFPB-0003 (Feb. 24, 2014); *In the Matter of: JRHBW Realty, Inc., d/b/a RealtySouth; TitleSouth, LLC*, Consent Order, 2014-CFPB-0005 (May 28, 2014); *In the Matter of: Stonebridge Title Serv., Inc.*, Consent Order, 2014-CFPB-0006 (June 12, 2014); *In the Matter of: Amerisave*

- Mortgage Corporation, et al.*, Consent Order, 2014-CFPB-0010 (Aug. 12, 2014); *In the Matter of: Lighthouse Title, Inc.*, Consent Order, 2014-CFPB-0015 (Sept. 30, 2014).
- 7 See *Borders & Borders*, Complaint; *In the Matter of PHH Corporation, et al.*, 2014-CFPB-0002 (Notice of charges filed Jan. 29, 2014).
- 8 See *Consumer Fin. Prot. Bureau, et al., v. Wells Fargo Bank, et al.*, Consent Judgments, 1:15-CV-00179 (D. Md. Feb. 5, 2015); *In the Matter of: Newday Fin., LLC*, Consent Order, 2015-CFPB-0004 (Feb. 10, 2015); *Consumer Fin. Prot. Bureau, et al., v. Genuine Title, LLC, et al.*, Final Judgment, 1:15-CV-01235 (May 1, 2015)(for Genuine Title, LLC).
- 9 *In the Matter of: Lighthouse Title, Inc.*, Consent Order.
- 10 12 U.S.C. § 2607(c)(2).
- 11 *In the Matter of: PHH Corp., et al.*, Decision of the Director, 2014-CFPB-0002 (June 4, 2015).
- 12 *Real Estate Settlement Procedures Act (RESPA): Home Warranty Companies' Payments to Real Estate Brokers and Agents*, 75 Fed. Reg. 36271 (Jun. 25, 2010); *Real Estate Settlement Procedures Act (RESPA): Home Warranty Companies' Payments to Real Estate Brokers and Agents Interpretive Rule: Response to Public Comments*, 75 Fed. Reg. 74620 (Dec. 1, 2010).
- 13 RESPA Compliance and Marketing Service Agreements, CFPB Compliance Bulletin 2015-05.
- 14 See Trey Garrison, *CFPB to mortgage industry: Get out of MSAs*, HousingWire.com (Jul. 30, 2015, 3:50 PM), <http://www.housingwire.com/articles/34641-cfpb-to-mortgage-industry-get-out-of-msas>.
- 15 See Letter to Computel from Grant E. Mitchell, Senior Attorney, HUD, dated Mar. 24, 1994, reprinted in P. Barron & M. Berenson, *Federal Regulation of Real Estate and Mortgage Lending*, 4th, app. 2B2.
- 16 See 12 C.F.R. § 1024.4(a)(ii); *In the Matter of: PHH Corp., et al.*, Decision of the Director; *In the Matter of: Lighthouse Title, Inc.*, Consent Order.
- 17 RESPA Compliance and Marketing Service Agreements, CFPB Compliance Bulletin 2015-05, p. 2.