Consumer Financial Protection Bureau

1700 G Street NW, Washington, DC 20552

CFPB Compliance Bulletin 2015-05

Date: October 8, 2015
Subject: RESPA Compliance and Marketing Services Agreements

The Consumer Financial Protection Bureau (CFPB or the Bureau) issues this compliance bulletin to remind participants in the mortgage industry of the prohibition on kickbacks and referral fees under the Real Estate Settlement Procedures Act (RESPA) (12 U.S.C. 2601, *et seq.*) and describe the substantial risks posed by entering into marketing services agreements (MSAs).[1] The Bureau has received numerous inquiries and whistleblower tips from industry participants describing the harm that can stem from the use of MSAs, but has not received similar input suggesting the use of those agreements benefits either consumers or industry. Based on the Bureau's investigative efforts, it appears that many MSAs are designed to evade RESPA's prohibition on the payment and acceptance of kickbacks and referral fees. This bulletin provides an overview of RESPA's prohibitions against kickbacks and unearned fees and general information on MSAs, describes examples of market behavior gleaned from CFPB's enforcement experience in this area, and describes the legal and compliance risks we have observed from such arrangements.

Overview of RESPA and Marketing Services Agreements

Congress enacted RESPA in 1974 as a response to abuses in the real estate settlement process. Thus, a primary purpose of RESPA is to "eliminat[e] … kickbacks or referral fees that tend to increase unnecessarily the costs of settlement services." 12 U.S.C. 2601(b)(2). The statute, which has both civil and criminal penalties, covers myriad settlement services, including "any service provided in connection with a real estate settlement," such as title searches, examinations, and insurance; services rendered by an attorney; document preparation; property surveys; rendering of credit reports or appraisals; inspections; services rendered by a real estate agent or broker; and

[1] Regulation X, which implements RESPA, is codified at 12 C.F.R. Part 1024.

loan origination, processing, and underwriting. 12 U.S.C. 2602(3), 12 U.S.C. 2607(d) (penalty provision); *see also* 12 C.F.R. 1024.2(b).

Section 8(a) of RESPA prohibits the giving and accepting of "any fee, kickback or thing of value pursuant to any agreement or understanding, oral or otherwise, that business incident to or a part of a real estate settlement service involving a federally related mortgage loan shall be referred to any person." 12 U.S.C. 2607(a); *see also* 12 C.F.R. 1024.14(b). Section 8(c)(2) states that "[n]othing in this section shall be construed as prohibiting . . . the payment to any person of a bona fide salary or compensation or other payment for goods or facilities actually furnished or for services actually performed." 12 U.S.C. 2607(c)(2); *see also* 12 C.F.R. 1024.14(g).

MSAs often involve providers of settlement services in a mortgage loan transaction, such as a lender, real estate agent or broker, or a title company.[2] They may also involve third parties who are not settlement services providers, such as membership organizations. MSAs are usually framed as payments for advertising or promotional services, but in some cases the payments are actually disguised compensation for referrals.

Bureau Experience

In the Bureau's experience, determining whether an MSA violates RESPA requires a review of the facts and circumstances surrounding the creation of each agreement and its implementation. The nature of this fact-intensive inquiry means that, while some guidance may be found in the Bureau's previous public actions, the outcome of one matter is not necessarily dispositive to the outcome of another. Nevertheless, 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.

The Bureau's Office of Enforcement has identified violations of RESPA Section 8(a) in the course of its investigations, including investigations that involved the use of oral or written MSAs. In addition, the Bureau has received numerous examples of MSAs from industry whistleblowers that, upon initial review, appear to use MSAs to disguise kickbacks and referral fees. In the course of

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[2] HUD issued an interpretive rule addressing the issue of real estate brokers or agents providing marketing services for home warranty companies. *See* Real Estate Settlement Procedures Act (RESPA): Home Warranty Companies' Payments to Real Estate Brokers and Agents, 75 FR 36271 (June 25, 2010); 75 FR 74620 (Dec. 1, 2010) (response to public comments).

one investigation resulting in an enforcement action that specifically involved MSAs, the Bureau observed a title insurance company entering MSAs as a quid pro quo for the referral of business. The fees paid under the agreements were based, in part, on how many referrals the title insurance company received and the revenue generated by those referrals. From its investigation of the underlying facts, the Bureau found that the number of referrals increased significantly when MSAs existed, and the differences in referrals were statistically significant and not explained by seasonal or year-to-year fluctuations.

Impermissible actions that some MSAs attempt to disguise, such as the steering of business in connection with kickbacks and referral fees, may result in consumers paying higher prices for mortgages than would likely be the case without disguised kickback or referral fees. These practices also tend to indirectly undermine consumers' ability to shop for mortgages, which can raise costs for consumers. In terms of thwarting shopping, one investigation that ended with an enforcement action revealed that consumers' ability to shop was hindered when a settlement service provider buried the disclosure that consumers can shop for settlement services in a description of the services that its affiliate provided. *See* 12 U.S.C. 2607(c)(4); 12 C.F.R. 1024.15(b)(1). In another instance that also resulted in an enforcement action, a settlement service provider did not disclose its affiliate relationship with an appraisal management company and did not tell consumers that they had the option of shopping for services before directing them to the affiliate. The steering incentives that are inherent in many MSAs are clear enough to create tangible legal and regulatory risks for the monitoring and administration of such agreements.

The Bureau has also seen cases where companies fail to provide some or all of the services required under their agreements. In the course of investigations that have led to enforcement actions, the Bureau has found many examples of settlement service providers keeping payments received from other providers without actually performing any contractually-obligated services. They include instances of not performing underwriting, processing, and closing services; not executing title insurance work; not carrying out marketing services; and not delivering financing to fund the origination of loans. When services promised under an MSA are not performed, but payments are being made, a reasonable inference can be drawn that the MSA is part of an agreement to refer settlement services business in exchange for kickbacks.

Illegal kickbacks and referral fees, including those disguised by MSAs, present compliance risks not just for the individuals who are directly involved in the impermissible conduct, but also for the companies that employ them. As an example of such liability, in another matter that resulted in an enforcement action, a title company entered into unwritten agreements with individual loan officers in which it paid for the referrals by defraying the loan officers' marketing expenses. The title company supplied loan officers with valuable lead information and marketing materials. In exchange, the loan officers sent referrals to the title company. The lenders did not detect these RESPA violations and/or correct or prevent them, even when they had reason to know that the title company was defraying the marketing expenses of the lenders and their loan officers.

Other circumstances involving MSAs may also indicate broad risks of noncompliance with RESPA. For example, instead of directing their advertising and promotional services toward consumers, as MSAs purport to contemplate, some companies that frequently enter into MSAs actually direct the bulk of their advertising and promotional efforts toward other settlement service providers in an effort to establish more MSAs. Certain other companies use a third-party consultant to set prices for the services that the MSA purports to cover, but independently established market-rate compensation for marketing services, alone, does not suffice to ensure the legality of an MSA.

As of the date of this bulletin, the Bureau has taken a significant number of public enforcement actions under RESPA. The payment of improper kickbacks and referral fees has been the basis of almost all of these actions. Resolving these matters has entailed injunctive relief including bans on entering MSAs or working in the mortgage industry for periods of up to five years. RESPA violations have cost industry participants over $75 million in penalties so far. In addition to corporate liability, some of these enforcement actions have required individuals in charge of companies that committed the violations to pay significant monetary penalties.

Legal and Compliance Risks Created by Marketing Services Agreements

In recent months, various mortgage industry participants have publicly announced their determination that the risks and complexity of designing and monitoring MSAs for RESPA compliance outweigh the benefits of entering the agreements. Accordingly, certain lenders have dissolved existing agreements and decided that they will no longer enter into MSAs. The Bureau encourages all mortgage industry participants to consider carefully RESPA's requirements and restrictions and the adverse consequences that can follow from non-compliance.

As described above, the Bureau has found that many MSAs necessarily involve substantial legal and regulatory risk for the parties to the agreement, risks that are greater and less capable of being controlled by careful monitoring than mortgage industry participants may have recognized in the past. MSAs appear to create opportunities for parties to pay or accept illegal compensation for making referrals of settlement service business. The Bureau also found that efforts made to adequately monitor activities that in turn are performed by a wide range of individuals pursuant to MSAs are inherently difficult. Especially in view of the strong financial incentives and pressures that exist in the mortgage and settlement service markets, the risk of behaviors that may violate RESPA are likely to remain significant. That can be true even where the terms of the MSA have been carefully drafted to be technically compliant with the provisions of RESPA.

In sum, the Bureau's experience in this area gives rise to grave concerns about the use of MSAs in ways that evade the requirements of RESPA. In consequence, the Bureau reiterates that a more careful consideration of legal and compliance risk arising from MSAs would be in order for mortgage industry participants generally. This review is especially warranted insofar as whistleblower complaints about MSAs that violate RESPA have been increasing. The Bureau intends to continue actively scrutinizing the use of such agreements and related arrangements in the course of its enforcement and supervision work. Any industry participant that suspects unlawful activity by others or that wishes to self-report its own conduct that may have violated RESPA is encouraged to contact the CFPB. Self-reporting and cooperation, consistent with the Responsible Business Conduct bulletin, CFPB Bulletin 2013-06, will be taken into account in resolving such matters.[3]

Regulatory Requirements

This compliance bulletin summarizes existing requirements under the law as well as findings and conclusions the Bureau has made in exercising its enforcement authority. The bulletin is a non-binding general statement of policy articulating considerations relevant to the Bureau's exercise of its supervisory and enforcement authority. It is therefore exempt from the notice and comment rulemaking requirements under the Administrative Procedure Act, pursuant to 5 U.S.C. 553(b). Because no notice of proposed rulemaking is required, the Regulatory Flexibility Act does not require an initial or final regulatory flexibility analysis.[4] The Bureau has determined that this compliance bulletin does not impose any new or revise any existing recordkeeping, reporting, or disclosure requirements on covered entities or members of the public that would be collections of information requiring OMB approval under the Paperwork Reduction Act.[5]

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[3] *See* CFPB Bulletin 2013-06, *Responsible Business Conduct: Self-Policing, Self-Reporting, Remediation, and Cooperation* (June 25, 2013), *available at* http://files.consumerfinance.gov/f/201306_cfpb_bulletin_responsible-conduct.pdf.

[4] 5 U.S.C. 603(a), 604(a).

[5] 44 U.S.C. 3501, *et seq.*