CFPB: ONE CERTAIN SAFE HARBOR

As most Realtors® are aware, Section 8(a) of RESPA prohibits giving or receiving "any fee. . . pursuant to any agreement or understanding. . . that business incident to. . . a real estate settlement service. . . shall be referred." A violation of Section 8(a) can result in a crime punishable up to a year in prison and can also result in civil liability through private or public enforcement actions. However, there are exemptions to Section 8(a) in Section 8(c).

The exemption in Section 8(c)(2) has been particularly important to Realtors® for the past few decades. This exemption generally provides that payments for goods or facilities actually furnished or for services actually performed are not prohibited fees if the payment amount bears a reasonable relationship to the market value of the goods, services or facilities provided. Unfortunately, the Director of the CFPB has, in essence, now taken the position that the exemption in Section 8(c)(2) it is not really an exemption, but, instead, simply exists to aid in interpretation of Section 8(a). The CFPB takes the position that even if a fee paid or consideration provided is at or below market value, it is still not a "bona fide" payment if it is tied in any way to the referral of business. The CFPB contends that even if a payment is at market value for the services or goods provided, it is a violation of Section 8(a) of RESPA if there is any form of referral involved in the arrangement.

The current interpretation of Section 8(c)(2) by the CFPB is totally inconsistent with HUD's prior interpretations of Section 8(c)(2) and prior decisions by federal courts. The CFPB's interpretation would make what were previously permissible practices with respect to marketing agreements, office leases and joint advertising arrangements, illegal. The CFPB's position is now before the United States Court of Appeals for the District of Columbia Circuit in *PHH Corporation et al v. Consumer Finance Protection Bureau*, Case No. 15-1177. NAR has filed a powerful amicus brief seeking to reverse the position of the CFPB with respect

to Section 8(c) in an effort to preserve the legality of previously approved business arrangements.

In the meantime, there is one business arrangement in which Realtors® in Michigan can participate without substantial risk of violating Section 8(a), even under the CFPB's current interpretation of the exemption in Section 8(c). Section 8(c)(4) provides an exemption from the prohibition set forth in Section 8(a) for "affiliated business arrangements" (the "AfBA Exemption"). Historically, a Realtor® only had to meet the three (3) conditions set forth in the AfBA Exemption in order to qualify for this safe harbor. In a typical AfBA, principals in a Realtor® firm have an ownership interest in another settlement service provider, such as a title agency, and the Realtor® firm refers business to the title agency. These three conditions have been described by the United States Court of Appeals for the Sixth Circuit as follows:

1) The person making the referral must disclose the arrangement to the client;
2) The client must remain free to reject the referral; and
3) The person making the referral cannot receive any 'thing of value from the arrangement' other than 'a return on the ownership interest or franchise relationship.

Thus, Realtors® in an AfBA can relatively easily meet the requirements for the AfBA Exemption if they use the appropriate AfBA disclosure form and receive compensation from the AfBA company in the form of distributions of profits, dividends or similar returns on investment.

More recently, the CFPB has taken the position that in order to qualify for the AfBA Exemption, there is a fourth requirement which must be met. The CFPB contends that the AfBA Exemption must also meet a 10-factor test set forth in HUD's Statement of Policy 1996-2 Regarding Sham Controlled Business Arrangements, 61 Fed. Reg. 29258 (June 7, 1996) (the "Policy Statement"). The 10 factors include a determination as to whether there was sufficient initial capital and net worth at the time of the startup with the AfBA; whether the AfBA has its

own employees; and whether it is located at the same address as one of its owners, *i.e.*, real estate brokerage firm or a title company. The CFPB has relied on the Policy Statement in obtaining a consent order involving an AfBA arrangement which resulted in a jointly owned mortgage company. See *In the matter of Paul Taylor, Paul Taylor Homes Limited, and Paul Taylor Corp.*, CFPB File No. 2013-CFPB-0001.

Fortunately for Michigan Realtors® involved in AfBAs, the CFPB's contention that a fourth requirement is necessary to qualify for the AfBA Exemption (*i.e.*, compliance with the Policy Statement) has been considered and rejected by the Sixth Circuit Court of Appeals in *Carter et al v. Welles-Bowen, Inc.*, No. 10-3922 (6th Cir. 2013). In this case, it was uncontested that the defendants (primarily a real estate brokerage firm and a Chicago title insurance company) had met the three (3) requirements specifically set forth for the AfBA Exemption. However, the CFPB contended that the defendants were nonetheless in violation of Section 8(a) because they could not satisfy the 10 factors set forth in the Policy Statement.

The Sixth Circuit Court of Appeals rejected the CFPB's argument that there was a fourth requirement to qualify for the AfBA Exemption. The Court held that since the defendants in the case had met the three requirements set forth in the statute, there was no violation of Section 8(a).

If the CFPB brought an enforcement action in federal court against a Michigan Realtor® involved in an AfBA, the federal district court would be bound by the decision in *Carter v. Welles-Bowen, Inc.* Thus, unless and until the United States Supreme Court rules differently, at least one safe harbor still exists for Realtors® in Michigan regardless of whether the CFPB's new theory is adopted by other Federal courts.