

## **MARKETING SERVICES AGREEMENTS: BEWARE**

As REALTORS® are well aware, the Consumer Finance Protection Bureau (“CFPB”) has replaced HUD as the enforcer of RESPA. While the CFPB has not been in the business very long, it is readily apparent that the CFPB views the Section 8 prohibition against referrals much more broadly than HUD has done in the past. REALTORS® may recall that the CFPB’s recent investigation of an affiliated business arrangement between an Alabama real estate brokerage and a title company resulted in a “Consent” Order by which the Alabama brokerage firm agreed to pay a \$500,000 fine. MR previously published a white paper on this situation entitled “Referrals to Affiliated Title Companies: Take Great Care” which is available on MR’s website. The penalty was based in large part on the CFPB’s objections to the language and formatting of the broker’s affiliated business disclosure form.

In Michigan, a recent CFPB investigation has resulted in a similar “Consent” Order by which a Michigan title company agreed to pay \$200,000 as a penalty for entering into marketing services agreements (“MSAs”) which the CFPB found to violate Section 8 of RESPA. REALTORS® with MSAs need to re-examine these relationships in light of this recent investigation and “Consent” Order.

It has always been the case that RESPA permits payments of compensation for goods actually furnished or services actually performed. 12 USC § 2607(c)(2). Historically, it was generally believed that this provision permits a real estate broker to be paid for marketing a title company’s services, so long as the compensation paid was not tied to the amount of business actually referred. HUD at least impliedly, if not expressly, found these arrangements to be lawful under RESPA.

In the Michigan Consent Order, the CFPB did find that the title company had set the fee amounts to be paid, in part, based on how many referrals it had received from the brokerage and the fees generated from those referrals. It was not at all surprising that the CFPB considered this fee structure arrangement to be in violation of RESPA. However, the CFPB did not stop there.

In the Consent Order, the CFPB also listed the following objections:

1. The title company had entered into the MSAs because it believed that if it did not enter into MSAs with these real estate brokers, they would refer business elsewhere. The fees paid under the MSAs were set at least in part by whether other title companies were paying real estate brokers for marketing services.
2. The title company did not determine the fair market value of the services to be provided under the MSAs or, after the arrangement was in place, check to see if the real estate brokers were actually providing these services.
3. The real estate brokers referred more business to the title company after the MSA was signed than they did previously.

Perhaps the most troubling of all was the CFPB's suggestion that the MSAs would have been deemed to be in violation of Section 8 even if the fees paid were found to be at fair market value for the marketing services the broker provided. Why? Because according to the CFPB, the MSA itself was a thing of value being provided to brokers in return for referring business. In other words, whatever the payment structure, the title company's agreement to hire marketing services from the broker violated Section 8 simply because the arrangement itself was being offered because the broker referred business to the title company.

In addition to paying the \$200,000 fine, the Consent Order required the title company to terminate all of its MSAs and agree not to enter into any new MSAs. The prohibition against future MSAs is so broad that it even prohibits the title company from buying advertising on any

broker's website. Under the Consent Order, the Michigan title company is only allowed to purchase advertising from someone who does not provide settlement services (*e.g.*, a newspaper or magazine). Finally, while the Consent Order was not directed at the real estate brokers who had received the fees, in discussing the case after the fact, CFPB officials have not ruled out the possibility of pursuing real estate brokers in the future, noting that both sides of any illegal Section 8 arrangement have potential liability under the law. In other words, Section 8 of RESPA prohibits the receipt as well as the payment of referral fees.

It is not clear from the Consent Order involving the Michigan title company whether the CFPB considered any of the stated objections alone to be enough to find a Section 8 violation or whether the focus was really on the combination of factors. If, in fact, each and every factor listed is a violation of Section 8, then it would appear that MSAs between two settlement service providers (title companies, mortgage brokers, lenders, brokers, etc.) are no longer permissible, *i.e.*, they violate RESPA.

Many REALTORS® have expressed concern about possible liability under RESPA based on the fact that they have “marketing” type of arrangements with title companies, mortgage brokers, lenders, home warranty companies or any other company that could be identified as a settlement service provider under RESPA. It is highly likely that a settlement service provider has the benefit of legal counsel who is charged with assuring compliance with RESPA. Each REALTOR® who has such a marketing arrangement should seriously consider requesting that the settlement service provider with whom he or she has the arrangement provide him or her with the basis under which they conclude that they could successfully defend a claim against themselves and the REALTOR® by the CFPB if it challenges the marketing arrangement. While these types of marketing arrangements can be quite lucrative to REALTORS®, the benefit must

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be analyzed against the potential cost, *i.e.*, fines and potential civil liability. The CFPB is the “new sheriff in town.” Great care must be taken by REALTORS® to avoid finding themselves in the same position as the Holland Michigan Title Company or Alabama Real Estate Brokerage.

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