Insights

CFPB Guidance on Marketing Service Agreements Only Creates More Questions for Real Estate Settlement Service Providers

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On October 8, 2015 the Consumer Financial Protection Bureau (the "CFPB" or the "Bureau") issued new guidance (the "Guidance") on the Real Estate Settlement Procedures Act's ("RESPA") anti-kickback provisions [1] and how they relate to marketing services agreements ("MSA(s)").[2] Unfortunately the Guidance provides little clarity to real estate settlement services providers ("Providers") with respect to what acts, terms, payments, or arrangements would be considered "bona fide" and acceptable under RESPA. Instead, the CFPB sent a clear message to Providers that their payments and arrangements with other Providers will require a high level of diligence, both before and during an MSAs effective period.

While RESPA prohibits the giving or acceptance of any "thing of value" in exchange for a referral,[3] it explicitly provides that it is not intended to prohibit a bona fide payment for "goods or facilities actually furnished or services actually performed."[4] Providers have historically relied on this provision to enter into MSAs to record and provide the terms of these bona fide arrangements.

Generally, under a MSA a Provider, such as a mortgage originator, engages another Provider, such as a broker, to perform certain marketing services in exchange for a fixed fee. These agreements may take the form of traditional advertising and signage or space-sharing, with the Provider taking over a physical space within the other Provider's office, or other legitimate reasons.

CFPB Director Richard Cordray has stated that the Bureau is "deeply concerned" with MSAs and believes that Providers do not recognize what is required of them under the law.[5] The CFPB makes clear under the Guidance that Providers must have processes and procedures in place to adequately establish the rate for payment of the services and must adequate monitor the activities to ensure that services are actually being performed. However, it remains unclear what actions will be deemed sufficient for compliance with RESPA. Under the Guidance Providers should be committed to reviewing each MSA individually.

While any Provider's payment must have a relationship to the reasonable market-rate of such services,[6] the Provider should have records to show how a determination of such market-rate was made. Actually being market-rate is unlikely to be enough on its own. This can be seen in the CFPB's 2014 enforcement action against Lighthouse Title resulting in the imposition of a $200,000 civil money penalty.[7] The consent order in that case specifically cited Lighthouse's failure to document their determination of the fair market value, but the CFPB did not appear to make its own determination, or be concerned with, whether the payments actually were a fair market value. The Guidance affirms this viewpoint and further states that even independently established market-rates (e.g. using a third-party consultant) will not be sufficient alone to ensure the legality of an MSA.

Parties that enter into MSAs must also be prepared to monitor ongoing activities under an to ensure that services are actually being performed in compliance with the agreement. However, the Guidance does not provide any particulars with respect to actions a Provider should take or even consider. The Guidance simply states that each MSA is fact specific and expresses doubts whether some MSA are even capable of being adequately monitored, providing “efforts to monitor activities that are in turn provided by a wide range of individuals pursuant MSAs are inherently difficult” and that many MSAs involve risks that are “less capable of being controlled by careful monitoring.” An MSA could provide the parties with auditing rights, reporting requirements, or other procedures to ensure services are actually being provided. But again, as with the market-rate determination described above, the CFPB makes no indication of what level of monitoring would be deemed sufficient.

Despite an explicit non-prohibition on bona fide arrangements and payments for good or services under RESPA, the current regulatory climate continues to make it harder for Providers to enter into MSAs and be comfortable they are in compliance. While MSAs remain legal under RESPA, Providers find themselves in the difficult position of balancing compliance costs with the actual benefit received from entering into such MSAs. The CFPB intends to “continue actively scrutinizing” MSAs evaluating all participants in the mortgage industry, large and small, for compliance with RESPA.

[1] 12 U.S.C. §2601

[2] http://files.consumerfinance.gov/f/201510_cfpb_compliance-bulletin-2015-05-respa-compliance-and-marketing-services-agreements.pdf

[3] 12 U.S.C. §2607(a)

[4] §2607(c)

[5] http://www.consumerfinance.gov/newsroom/cfpb-provides-guidance-about-marketing-services-agreements/

[6] 12 C.F.R. §1024.14(g)(2)

[7] http://files.consumerfinance.gov/f/201409_cfpb_consent-order_lighthouse-title.pdf