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Updates on CFPB/RESPA/MSAs

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Holly S. Bunting

Partner

202.263.3380

hbunting@mayerbrown.com



Introduction

Today's Topics:

- RESPA Refresher
- RESPA Updates related to MSAs
- Tips for Compliant MSAs
- Other RESPA Updates
- CFPB Updates

Section 8 - Kickbacks and Fee Splits

- Most important and most controversial statute affecting settlement service industry
- Statute defies BUSINESS LOGIC
- Consequences for violating RESPA
 - Criminal penalties and fines
 - Treble damages
 - Loss of license, reputation

Section 8(a) – Anti-Kickback Provisions

1. **Idea:** Eliminate abusive practices such as payment of kickback fees that drive up cost of product to consumers
2. 5 Elements of a Section 8(a) kickback

Section 8(a) says it is illegal to Give or Receive any: (i) **thing of value** pursuant to (ii) **an agreement or understanding** to (iii) **refer** (iv) **settlement services**, in connection with (v) **a federally related mortgage loan**

Section 8(a) – Anti-Kickback Provisions

- i. **Federally Related Mortgage Loan** = Any loan secured by a first or subsequent lien on a 1 – 4 family residential property
 - Includes: Refinances, Purchase money mortgages, Second liens, ARMs, Reverse mortgages, Interest only mortgages
 - Excludes: Commercial loans, Construction loans, Temporary financing, Property over 25 acres, Business purpose loans, All cash transactions

Section 8(a) – Anti-Kickback Provisions

ii. **Settlement Services** = Anything done by Title Agents; Attorneys; Real Estate Agents; Mortgage Brokers; Lenders

- Title searches
- Credit reports / appraisals
- Origination of loans
- Title insurance, etc.
- Closing services
- Flood insurance
- Surveys
- Pest inspections
- Home warranties

Section 8(a) – Anti-Kickback Provisions

- iii. **Referral** = Conduct directed to a person that affirmatively influences the selection of a settlement service provider
- iv. **Agreement or Understanding** = Need not be in writing or even articulated or verbalized – may include a practice or course of action where the receipt of a THING OF VALUE is understood
 - Wink, wink

Section 8(a) – Anti-Kickback Provisions

v. **Thing of Value** = Broadly defined to be virtually anything one receives in consideration for making a referral

- \$
- Trips
- Scanners
- Free advertising
- Commissions
- Discounts
- Computer
- Football tickets
- Property
- Low interest loans
- iPad

IMPORTANT: ALL 5 ELEMENTS MUST BE PRESENT. ANY ONE MISSING: Not a violation of RESPA

Section 8(b) – Splitting of Unearned Fees

- No person shall give . . . No person shall accept a split or percentage in connection with a real estate settlement service **other than for services rendered**
- A referral is not required to violate Section 8(b)

Section 8(c) – Exceptions

- Congress recognized certain exceptions where paying a referral fee is ok
 - To an Attorney for services actually performed
 - By a Title Company to its duly appointed Title Agent for services performed in issuance of a title policy
 - By a Lender to its duly appointed Agent
 - Cooperative Agreements between listing and selling agents

Section 8(c) – Exceptions

- Congress recognized certain exceptions where paying a referral fee is ok (cont'd)
 - Payments by Employer to Employee
 - **Section 8(c)(2) payments for services rendered or goods/facilities actually provided**
 - Secondary Market Transactions
 - Section 8(c)(4) Affiliated Business Arrangements

Section 8(c)(2) – Payment for Goods/Services

- “Nothing in this section [Section 8] shall be construed as prohibiting...(2) 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 USC § 2607(c)(2)
- Part 1: Goods and Services
 - Actual = real
 - Necessary = useful, meaningful
 - Distinct = not done elsewhere in transaction
- Part 2: Reasonable Market Value
 - Payment commensurate with value of services and goods
 - Amount in excess of FMV considered a referral in violation Section 8(a)

Marketing Services Agreements

- What are MSAs?
 - Marketing agreements between settlement services providers, where one SSP pays another to advertise it to the other's customers
 - Typically, lender or title company pays real estate broker to advertise to broker's customers

CFPB Guidance on Strategic Alliances

- October 7, 2020 – CFPB rescinds Compliance Bulletin 2015-15, *RESPA Compliance and Marketing Services Agreements*
 - Issued under Director Cordray
 - Intended to “describe the substantial risks posed by entering into marketing services agreements (MSAs)”
 - Did not offer helpful guidance; mostly viewed as CFPB’s statement of suspicion
 - Many companies ended their MSAs after bulletin was issued
- Also on October 7, 2020 – CFPB issues RESPA Section 8 Frequently Asked Questions related to MSAs and other arrangements

Marketing Services Agreements

- CFPB effectively affirms that MSAs are permissible under RESPA as long as the agreements are carefully structured to meet the requirements of Section 8(c)(2)
 - CFPB warns that whether a particular MSA violates Section 8 will depend on specific facts and circumstances
- FAQ reinforces Section 8(c)(2) requirements:
 - A lawful MSA involves marketing services that are “actual, necessary, and distinct” (and not nominal) from the primary services performed by the person
 - Payments under the MSA must be reasonably related to the value of the services actually performed and not be a duplicative charge or a fee for referrals

Marketing Services Agreements (cont'd)

- FAQs note distinctions between referrals and marketing services for purposes of RESPA
 - Example of a referral includes “directly handing clients the contact information of another settlement service provider that happens to result in the client using that other settlement service provider”
 - Example of marketing service includes placing advertisements for a settlement service provider in “widely circulated media (e.g., newspaper, a trade publication, or a website)”
 - Marketing services are not directed to a person and are generally targeted at a wide audience

Marketing Services Agreements (cont'd)

- FAQs highlight those MSAs that would be *prohibited*:
 - MSAs that provide for payments based on the number of referrals received
 - MSAs that include above-market-rate payments for marketing services
 - MSAs that involve payment for nominal services or services not actually rendered
 - MSAs that are designed or implemented in a way to disguise the payment for kickbacks or split charges are prohibited

Marketing Services Agreements (cont'd)

- Some Do's and Don'ts
 1. No exclusive arrangements
 2. No endorsements
 - No referral to "preferred" providers
 3. No pressure on agents to steer business
 4. No quid pro quo arrangements
 5. Don't use capture rates and ROI to value marketing effectiveness in discussions between the parties

Marketing Services Agreements (cont'd)

- Some Do's and Don'ts (cont'd)
 6. Independent third party valuation a must
 7. Trust but verify
 8. All advertisements directed to general public, not individual consumers or agents
 - banner ads
 - brochures
 - signage
 - rider signs
 9. Justify reasons for adjusting monthly fees
 10. Disclosure to consumer encouraged

Other Promotional Activities

- FAQs address other important promotional-related topics:
 - Consumer discounts: Section 8 does not prohibit companies from giving a consumer “a gift or incentive (e.g., a discount, refund of fees, chance to win a price, etc.)” to encourage *that consumer* to do business with the company offering the incentive
 - RESPA prohibits companies from providing an incentive to a consumer “in exchange for the consumer referring other business to that lender or other settlement service provider”
 - Gifts: Gifts are prohibited *if* given or accepted in return for referrals: tickets to professional sporting events, trips, restaurant meals, sponsorship of events, or the opportunity to win any of these items in a drawing or contest
 - No exception for gifts below a certain value

Other Promotional Activities (cont'd)

- CFPB FAQs address normal promotional/educational activities
 - RESPA permits if two conditions are met:
 - (1) The activities must not be conditioned on the referral of business
 - Is a promotion targeted to a small group of companies or individuals that have made referrals in the past, or to all settlement service providers offering similar services in a particular locality?
 - Routine and frequent promotions suggest the item or activity could be conditioned on referrals
 - (2) The activities must not involve defraying expenses that otherwise would be incurred by the referral source
 - Does the item or activity involve a good or a service that referral sources would otherwise have to pay for themselves, such as continuing education expenses, certification and license fees, and office supplies?

CFPB Updates

- Seila Law – U.S. Supreme Court
 - Decides question of whether a single director, that may only be removed for cause, violates the President’s authority to execute the laws of the land
- 5-4 decision on June 29, 2020 – CFPB single-director structure is unconstitutional
- 7-2 remedy – CFPB can continue to operate
 - Sever unconstitutional provision from Dodd-Frank Act
 - Director is now removable at will by the President
 - Acknowledges that Congress can pursue alternatives, like convert the CFPB to a multi-member agency

CFPB Updates (cont'd)

- What happens after Seila Law case?
 - CFPB continues to operate and retains all of its powers and authorities
 - Guaranteed policy shifts with each change in Administration
 - What happens to prior CFPB actions?
 - Previously-issued regulations
 - Pending enforcement actions
 - Impact on other single-director agencies
 - 5th Circuit already ruled that FHFA single-director structure is unconstitutional
 - Currently being considered by the U.S. Supreme Court
 - Will Congress convert the CFPB to a multi-member agency?

CFPB Updates (cont'd)

- President Biden's Nomination for Director
 - Rohit Chopra
 - Commissioner at Federal Trade Commission
 - Former Student Loan Ombudsman at CFPB
 - Confirmation hearing held March 2, 2021 before the Senate Banking Committee
 - Decisions at FTC, past priorities at the CFPB and statements at confirmation hearing provide clues about expected priorities and approach to enforcement

CFPB Updates (cont'd)

- Approach to Enforcement
 - Enforcement under former Director Kraninger
 - Fewer number of investigations compared to Cordray CFPB
 - Targets in public actions tended to be smaller companies
 - Less in consumer redress
 - Anticipated approach by Chopra
 - Creativity in the kinds of companies investigated and claims pursued
 - Focus on consumer redress
 - Target big and small companies
 - Willingness to litigate

CFPB Updates (cont'd)

- Priorities
 - Mortgage servicing and debt collection
 - COVID-related forbearance and other protections
 - Debt collection and UDAAP
 - Fair lending
 - Increased reliance on the disparate impact theory of liability
 - Use of technology and algorithms for decision making
 - Student lending
 - Protections for members of the military
 - For-profit institutions
 - Servicing and collection
 - Privacy – data protection

CFPB Updates (cont'd)

- What about RESPA enforcement?
 - Very active under Cordray
 - Many carried over from open HUD investigations
 - Last Section 8-focused consent order in September 2017
 - Cordray resigned in November 2017
 - Former Acting Director Mulvaney and former Director Kraninger did not focus on Section 8 of RESPA
 - Hardly any enforcement under Mulvaney
 - Kraninger RESPA focus on mortgage servicing
 - Focus under Chopra?

Questions?



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