MIBA's Compliance Corner

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The Increasing Risks of RESPA Section 8 Enforcement

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The risks of enforcement actions under Section 8 of RESPA might be higher than at any time in history. These increased risks are due in part to a new focus on Section 8 enforcement since the formation of the CFPB, but also in some cases due to novel interpretations of Section 8 by the regulators. The CFPB has even gone so far as to refuse to follow published HUD informal opinions on the grounds that they are not binding on the CFPB.

Section 8(a) of RESPA prohibits the payment or receipt of any fee, kickback, or thing of value as part of an agreement or understanding to refer mortgage loan or other settlement services business. Section 8(c) includes a series of exceptions and states, "Nothing in this section shall be construed as prohibiting" various payments, including "the payment to any person of a bona fide salary or other compensation for goods or facilities actually furnished or for services actually performed." Some of today's risks arise from the interplay of these two subsections

The risk of RESPA challenge under these provisions is probably the greatest when two settlement service providers have entered into a contract. Under current legal theories, evidence of referrals creates a presumption, at least in the eyes of regulators that payments under the contract are for referrals. The CFPB's current position is that the fair market value of the non-referral services contracted for is not relevant – if there are referrals, then the Section 8(c) exception for payments for non-referral services is swallowed by the Section 8(a) referral fee prohibition.

The CFPB's Section 8(c) interpretation is currently under appeal by PHH following the CFPB's decision to impose $109 million in penalties against PHH. Even if an impartial court agrees with PHH, the risks to the industry will remain. All too often the files of settlement service providers are littered with evidence that the parties to the contract saw the referral opportunities and figured that into their decision to enter the contract. Or the parties make such admissions under oath in depositions conducted by the regulator. Proving that payments for the non-referral services were based on the fair market value of those services, without regard to the value of referrals, will be very difficult. It likely would require, at a minimum, extensive FMV analyses in the file before the contract was signed, performed by recognized and otherwise neutral experts.

We see this playing out in the area of marketing services agreements (MSAs), as one example. The CFPB has said that a MSA is itself a "thing of value" under Section 8(a). Accordingly, the MSA will violate RESPA if payments under the agreement are based on the volume of referred business. The FDIC likewise considers repeated payments that are connected in any way with the volume of referred business as evidence that the payments are made pursuant to an agreement for referrals. This is not, in itself, a novel interpretation of RESPA. The new twist is that the CFPB will consider whether those persons entering into such agreements are more likely to make referrals and, if so, could conclude that the thing of value is given for referrals. Ironically, the more business the marketing agreement generates, the more RESPA risk it creates under this theory.

We also can expect the CFPB to take this approach when analyzing office lease arrangements. It has long been a Section 8(a) violation for a lender or other settlement service provider to lease office space to another provider if the lease payments are based in any way on the volume of referred business. The payments for all such leases must be based on the general market value of the leased property, without regard to potential referrals, and that means the amount that a non-settlement services provider would pay under the lease. Some industry players continue to get this wrong, and the CFPB is pursuing those companies.

More importantly, the CFPB is likely to be very skeptical of evidence of the fair market value of a lease when one settlement service provider is leasing from another. Because settlement service providers will often be in a position to refer business to one another, the CFPB could assume that the lease payments are based on the expected referrals and effectively require the contracting parties to prove their innocence. If the CFPB can find any statistical or other evidence that the price paid for the marketing services corresponded to the success of the marketing – which is of course what any person advertising would want to be the case, the CFPB could use that as evidence that the arrangement was for the referral of business.

This short article cannot address all of the potential RESPA risks faced by the industry today. It is worth noting, however, that lead generation arrangements also now face very high hurdles and affiliated business arrangements have been the subject of several CFPB enforcement actions.

The mortgage industry needs to be very careful today. If you think you have discovered a brilliant new approach to Section 8 compliance, there could be a reason why no one else has adopted it. Because our regulators will be skeptical, we need to be so too.

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