

PUBLICATION

The Writing is On the Wall – The CFPB Wants MSAs Gone; What Does This Mean for You?

November 13, 2015

The CFPB's mission is to promote policies and adopt regulations to allow consumers to make a fully educated decision when they purchase any consumer loan product, with the goal of such consumers taking control over their economic lives. The CFPB has made it clear that it believes Marketing Services Agreements (MSAs) can make that goal difficult to achieve. The CFPB has not adopted regulations that make MSAs illegal, but has recently issued guidance along with unofficial statements that convey a message to the industry that the CFPB is prepared to challenge the legality of such agreements. For example, in his [address](#) to the Mortgage Bankers Association (MBA) at its annual convention recently, Director Cordray stated, "We will remain active in scrutinizing the use of such agreements and related arrangements in the course of our enforcement and supervision work."

A week prior to Director Cordray's remarks to the MBA, the CFPB issued [guidance](#) on RESPA Compliance and MSAs. In the guidance the CFPB refers to Section 8(a) of the Real Estates Settlement Procedures Act (RESPA), which prohibits the giving and accepting of "any fee, kickback or thing of value pursuant to any agreement or understanding, oral or otherwise, that business incident to or a part of a real estate settlement service involving a federally related mortgage loan shall be referred to any person." The guidance then continues to illustrate that, through the CFPB's work, it has found various forms of MSAs to have violated RESPA.

The CFPB's guidance does not illustrate how an MSA can comply with RESPA, but is focused upon all the ways in which a MSA does not comply with RESPA. The guidance provides "the Bureau has received numerous inquiries and whistleblower tips from industry participants describing the harm that can stem from the use of MSAs, but has not received similar input suggesting the use of those agreements benefits either consumers or industry." While the guidance is a clear sign that the CFPB does not believe it is possible to comply with RESPA, the CFPB hasn't definitively ruled against MSAs. As a result, many banks with existing MSAs are left wondering whether to take action to terminate MSAs or keep them in place pending further guidance from the regulators. The risk, of course, is that regulators will criticize existing MSAs, even those arrangements carefully constructed to comply with former HUD guidance. However, prematurely terminating an MSA may also lead to negative consequences in terms of relationships with third parties as well as an uneven playing field where more aggressive institutions may continue such arrangements and obtain a competitive advantage compared to those institutions which heed the CFPB's advice and terminate such agreements. [The MBA has stressed that "clear rules of the road are essential to a fair and competitive market to protect consumers."](#)

In July of this year Wells Fargo and Prospect Mortgage both announced they were ceasing their use of MSAs. They pointed to the regulatory environment and penalties leveled to date as motivation for their change in approach. The fines can be huge. PHH Mortgage is currently appealing a case where the [CFPB secured a \\$109 million disgorgement order](#) in a matter where the CFPB found PHH had illegally referred consumers to mortgage insurers in exchange for kickbacks. For perspective, that is a little more than 9.25 percent of PHH's market cap. The CFPB filed a brief in the appeal, stating they "were correct in levying that penalty [referring to its size], which should serve as a necessary deterrent to other firms that might consider engaging in such actions."

You should review your current situation, and determine whether termination of an existing MSA is prudent given the current regulatory environment, in spite of the economic cost of doing so. Even if you do not have an MSA arrangement in place, the current regulatory environment warrants a review of your sales teams and marketing teams in the consumer lending divisions of your institution. These reviews should focus upon whether controls are sufficient in protecting your institution from employees creating their own MSA arrangements (whether written or oral) with any of the institution's vendors or referral sources.

If you have questions regarding MSA's you would like to discuss with us, feel free to reach out to a member of our Financial Services team.