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CFPB Withdraws Former Marketing Services Agreement Guidance; Issues New Frequently Asked Questions Regarding RESPA Section 8 and MSAs

On October 7, the Consumer Financial Protection Bureau (CFPB) took steps to clarify its interpretation of how settlement service providers may comply with the “no kickback” and “unearned fee” provisions of Section 8 of the Real Estate Settlement Procedures Act (RESPA) by promulgating a new set of Frequently Asked Questions (FAQs). The FAQs provided several concrete examples to shed light on what activities are allowed under those provisions.

At the same time, the CFPB withdrew its 2015 “RESPA Compliance and Marketing Services Agreements” Bulletin, which provided guidance regarding Marketing Service Agreement (MSA) arrangements, replacing it with FAQs that specifically discuss examples of what are and are not acceptable MSAs under Section 8. The new FAQs recognize that MSAs are legal unless their provisions or implementation violate specific requirements of RESPA, are more detailed than the prior guidance, and provide more bright line clarity about allowable MSA arrangements.

The new Section 8 and MSA FAQs can be found [here](#).

The CFPB announcement withdrawing the 2015 MSA Bulletin can be found [here](#).

Section 8 FAQs Generally

The new Section 8 FAQs discuss Section 8 generally, and then add FAQs specifically discussing unearned fees, and gifts and promotional activities. The FAQs generally cite to and reiterate specific provisions of RESPA and its related regulations (12 CFR 1024 *et seq.*). The FAQs then offer some specific comments which help define certain of these issues:

- Citing 12 USC § 2602(3) and 12 CFR § 1024.2(b), the FAQs note that “prohibited referrals are not limited to those directed to consumers. They might be directed to a number of sources, such as appraisers, real estate agents, title companies and agents, lenders, mortgage brokers, or companies that provide information in connection with settlements, such as credit reports and flood determinations.”
- At the same time, the FAQs note that generally, a lender or other settlement service provider may offer gifts or other incentives to a consumer for doing business with that entity. However, the entity may not provide incentives to a consumer in return for the consumer referring business to the entity.

Gifts and Promotional Activities

In regard to gifts and promotional activities, the FAQs noted that they are permitted if they are:

- Not conditioned on a referral of business; and
- Do not involve defraying expenses that otherwise would be incurred by the referral source.

The FAQs provided examples of when such activities likely *would be* permitted, because (1) they are not conditioned on referrals of business, and (2) they do not involve defraying expenses that would otherwise be incurred by the referral source:

- A settlement agent hosts a one-time-only drawing and includes an announcement of the drawing in an email to all previous customers and all loan originators in the city, allowing them to participate whether or not they have or are likely to make referrals to the settlement agent.
- A title company charges a course admission fee equivalent to the fair market value for an educational course on how to close loans, and invites all of the local real estate agents, regardless of their status as referral sources. The real estate agents must pay their own admission fee.
- A title company routinely hosts free seminars on recent real estate market developments. The seminars are open to the public, and they are advertised to all of the area's real estate agents, regardless of their status as referral sources.

Conversely, the FAQs give slightly modified examples of when such specific activities *would not be* permitted because the activities are either (1) conditioned on referrals of business, or (2) involve defraying expenses that would otherwise be incurred by the referral source:

- A one-time-only drawing similar to the example above, except that the announcement is sent only to select mortgage loan originators, who are given drawing entries for each referral the loan originator makes directing others to the settlement agent.
- A course offered by a title company similar to the examples above, except that which the admission fee is waived if the real estate agent makes a specified number of referrals, or the title company opens the same continuing education course to the public and charges an admission fee, but waives the fee for all real estate agents (regardless of referrals).

MSA FAQs

The now withdrawn 2015 MSA Bulletin was often criticized for expressing the CFPB's apparent hostility to MSAs, while not providing clarity or bright guidelines so that parties to such agreements could be reasonably certain of their ability to comply with RESPA restrictions.

The new FAQs offer more clarity. First, the CFPB's announcement of the withdrawal of the Bulletin recognizes that MSAs can be legal unless they are structured or implemented in a manner that violates RESPA. Second, the FAQs provide specific examples of how such MSAs can be structured to avoid key RESPA compliance issues:

- An MSA arrangement is permissible under RESPA Section 8(c)(2) if:

- The MSA or conduct under the MSA reflects an agreement for the payment for bona fide salary or compensation or other payment for goods or facilities actually furnished or for services actually performed; or
 - If the purported marketing services are actually provided, and if the payments are reasonably related to the market value of the provided services only.
- An MSA will violate RESPA if, by its express terms, or by the manner in which the parties actually operate under the agreement, it is:
- An agreement to pay for referrals.
 - An agreement to pay for marketing services, but the payment is in excess of the reasonable market value for the services performed.
 - An agreement to pay for marketing services, but either as structured or when implemented, the services are not actually performed, the services are nominal, or the payments are duplicative.
 - An agreement designed or implemented in a way to disguise the payment for kickbacks or split charges.

Based on this analysis, the FAQs set forth this example of how an MSA could violate these restrictions: A lender enters into an MSA with a real estate agent that also makes referrals to the lender. The MSA requires the real estate agent to perform marketing services, including deciding on and coordinating direct mail campaigns and media advertising for the lender. The MSA would violate RESPA if (1) the real estate agent either does not actually perform the MSA's identified marketing services or the real estate agent is paid compensation that is in excess of the reasonable market value of those marketing services; or (2) under the express or understood terms of the MSA, the lender compensates the real estate agent for client referrals to the lender.

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