

Client Alert

June 23, 2014

The RESPA Respite Is Over

By Angela E. Kleine and Donald C. Lampe*

RESPA Section 8 enforcement is back. It was in abeyance during the transition of RESPA enforcement from HUD to the CFPB over the last few years. In fact, the last announced HUD Section 8 settlement dates from almost three years ago. But the CFPB is picking up where HUD left off, and then some. The latest in the Bureau's flurry of Section 8 activity is a consent order against a New Jersey title services company. That is the third recent consent order dealing with allegations of a relatively basic Section 8 violation. The Bureau is going after harder to hook fish too, though, pursuing creative (some would say discredited) theories in contested actions.

NUTS AND BOLTS

Section 8(a) of the Real Estate Settlement Procedures Act (RESPA) prohibits paying a referral fee in connection with a residential mortgage transaction. That can include mortgage insurance and title services transactions. Specifically, Section 8(a), as promulgated by Regulation X, prohibits "accept[ing] any fee, kickback, or thing of value pursuant to any agreement or understanding, oral or otherwise" in exchange for the referral of any real estate settlement business. A Section 8 violation may result in civil and/or criminal liability, including a fine of up to \$10,000, imprisonment of up to one year, and civil liability of up to three times the amount paid for the settlement service at issue.

The CFPB seems to be focused, first and foremost, on basic compliance cleanup. It recently announced a consent order with the New Jersey title services company Stonebridge Title Services. The Bureau alleged that from 2008 through 2013, Stonebridge solicited independent salespeople to provide referrals of title insurance business, "offering to pay commissions of up to 40% of the title insurance premiums Stonebridge itself received." Section 8 generally permits paying such commissions only to employees, and not third parties; otherwise, payment may be an illegal "kickback." Here, the CFPB alleged that "although the individuals received W-2 tax forms . . . [they] were independent contractors and not bona fide employees." The action originated with a HUD investigation and apparently languished there until the CFPB brought it to completion with a \$30,000 civil monetary penalty (CMP).

Similarly, in the recent RealtySouth action, the CFPB imposed a \$500,000 CMP on "the largest real estate firm in Alabama" for purported technical flaws in disclosures about the use of an affiliated title company's services. Earlier this year, the CFPB rewarded a Connecticut mortgage lender for self-reporting fee-splitting violations on 83 of its loans with a public enforcement action and an \$83,000 CMP. And in January 2014, it ordered a non-depository mortgage lender and its president to pay about \$81,000 (including a \$54,000 CMP) for allegedly paying kickbacks to a bank in exchange for loan referrals, which the lender allegedly disguised as inflated lease payments on an office space that it rented from the bank.

Client Alert

MORE CREATIVE THEORIES

There are exceptions to the Bureau's "simple violations" approach, though. Take the Bureau's suit against the Kentucky law firm Borders & Borders. The Bureau alleged the firm violated RESPA Section 8 by using a network of sham affiliated business arrangements (ABAs) to pay kickbacks for real estate settlement business referrals. A month after the Bureau filed the complaint, the Sixth Circuit issued its long-awaited decision in *Carter v. Welles-Bowen Realty, Inc.*, 736 F.3d 722 (6th Cir. 2013), striking down the HUD-created policy on the 10 elements of a lawful ABA. The CFPB is pushing ahead in *Borders*, though, arguing that in any event, the Borders ABA disclosure did not comply with RESPA and Reg. X.

The Bureau also is pushing ahead in its suit against PHH Corporation, alleging a "mortgage insurance kickback scheme" by its mortgage origination and reinsurance subsidiaries, and involving "hundreds of millions of dollars" in allegedly improper reinsurance fees. As discussed in our client alert, the action follows on the heels of the Bureau's consent orders totaling \$15.5 million with five mortgage insurers, which settled claims that the insurers' agreements with mortgage originators violated the RESPA.

CONCLUSION

Now, more than ever, RESPA compliance matters. The risk of detection of even minor or technical errors is higher now than it has been over the last few years, because the new "cop on the beat"—the CFPB—is out in full force.

Contact:

Angela E. Kleine
(415) 268-6214
akleine@mofo.com

Donald C. Lampe
(202) 887-1524
dlampe@mofo.com

About Morrison & Foerster:

We are Morrison & Foerster—a global firm of exceptional credentials. Our clients include some of the largest financial institutions, investment banks, Fortune 100, technology and life science companies. We've been included on *The American Lawyer's* A-List for 10 straight years, and *Fortune* named us one of the "100 Best Companies to Work For." Our lawyers are committed to achieving innovative and business-minded results for our clients, while preserving the differences that make us stronger. This is MoFo. Visit us at www.mofo.com.

Because of the generality of this update, the information provided herein may not be applicable in all situations and should not be acted upon without specific legal advice based on particular situations. Prior results do not guarantee a similar outcome.

* Not admitted in the District of Columbia; limited to federal practice; admitted only in North Carolina.