Are MSAs lawful? CFPB finally makes a statement: It's all in the facts

October 8, 2015

Mentioned as forthcoming by Richard Cordray at Bricker & Eckler's Midwest Financial Services Regulatory and Compliance Conference in August, the CFPB has now published written guidance on the issue of marketing service agreements (MSAs). These agreements create significant regulatory and legal risk, given that the Real Estate Settlement Procedures Act of 1974 (RESPA) establishes significant civil and criminal sanctions for steering business or providing "kickbacks" for the referral of business among real estate settlement service providers.

In the past year, several major RESPA penalties were ordered by the CFPB, with the bureau's language striking at the very heart of whether relations between lenders and other real estate participants would ever be deemed lawful.

Now, the CFPB has spoken directly to the issue. In its October 8, 2015, Compliance Bulletin, the bureau has brought considerable doubt as to whether the exchange of money or referrals between providers can ever been free from risk. The CFPB provides a litany of examples of how MSAs may be abused and states that it has "grave concerns" about using MSAs to avoid RESPA's requirements.

Yet, the written guidance provides no concrete "test" for risk officers to consider in determining whether an MSA is lawful. The CFPB directs that "whether an MSA violates RESPA requires a review of the facts and circumstances surrounding the creation of each agreement and its implementation." The guidance states: "the outcome of one matter is not necessarily dispositive to the outcome of another." This warning is not particularly helpful to lenders who may be trying to evaluate compliance methodologies.

The most telling sign that MSAs face a dark future is this statement: "…any agreement that entails exchanging a thing of value for referrals of settlement service business…likely [emphasis added] violates RESPA…." Thus, it seems the burden of proof is on the lender — who will need to defend an MSA — given the fact that the bureau considers the existence of any relationship to likely violate RESPA.

Lesson learned: Regardless as to how the value is set for an MSA, or what steps are taken to ensure that the parties are performing as promised, the devil will be in details. The CFPB will engage in a rigorous examination of the facts that led to the very creation of the MSA, and lenders will need to justify whether that relationship is ancillary to a relationship between the parties or the very cause of that connection. If an MSA is merely a "disguise" for that relationship, there will be stiff penalties.

What's missing from the bulletin? Any hint of a warning to realtors or recipients of money under MSAs is not apparent in the bureau's statement. Thus, the question will be how is it that financial institutions will succeed in having settlement service providers stop demanding these agreements?

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