



July 31, 2015

Mr. Richard Cordray
Director
Consumer Financial Protection Bureau (CFPB)
1275 First Street, N.E.
Washington, D.C. 20002

Dear Director Cordray:

RE: Acceptable Marketing Services Agreements

On behalf of the Mortgage Bankers Association, I would like to formally request that the Consumer Financial Protection Bureau issue clear rules regarding the use of Marketing Services Agreements (MSAs) under the Real Estate Settlement Procedures Act (RESPA).

MSAs are agreements between settlement service providers. Under such agreements one party markets the services available from the other to its customers for fair compensation. As you are aware, Section 8(a) of RESPA prohibits giving or accepting "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." At the same time, Section 8(c)(2) provides "[n]othing in this section [8] shall be construed as prohibiting the payment of bona fide salary or compensation or other payment for goods or facilities actually furnished or for services actually performed."

Based upon decades of Department of Housing and Urban Development (HUD) guidance concerning 8(c)(2), some lenders have entered into arrangements with real estate brokers and other settlement service providers to market to their customers pursuant to an MSA. Most of these agreements have been structured to follow the guidance provided by HUD and reviewed by counsel to ensure compliance with these standards. The basic test for legality of these arrangements has been whether (1) actual, necessary and distinct services were performed; *and* (2) any payment or thing of value was exchanged at fair market value for the services performed. These tests are usually supported by independent, third party valuations of the services provided, with monitoring by the parties to ensure that the services were actually performed.

Since the Dodd-Frank Act transferred responsibility for RESPA from HUD to the Consumer Financial Protection Bureau (CFPB or Bureau), recent enforcement actions of the CFPB indicate that the Bureau may not be applying the same criteria as HUD and may not regard MSAs as permissible at all.

In a recent consent order entered into in the case of *Lighthouse Title*, the Bureau indicated that entering into an agreement was a thing of value *even if* the fees under the contract are provided at fair market value. The CFPB also appears to have concluded that a significant statistical

difference between the business volume when an MSA is in place and when it is not would support the position that an MSA was both a “thing of value” and an agreement to refer business.

Most recently, your own decision of June 4, 2015, in the *Matter of PHH* indicates that the CFPB does not believe that Section 8(c)(2) is an exception to Section 8(a) of RESPA. That is, if a referral arrangement is found, Section 8(c)(2) will not support the legality of the transaction even where there is reasonable compensation for goods and services actually provided. Moreover, in reaching this conclusion, the Bureau disregarded a 1997 letter from the HUD Assistant Secretary responsible for RESPA. That HUD letter provided explicit guidance applying Section 8(c)(2) to the reinsurance arrangements at issue.

In light of the clear divergence of the CFPB from prior views of HUD that have been widely relied on by the industry and by counsel, the CFPB’s decisions have caused extraordinary confusion and uncertainty about the application of Section 8(c)(2) of RESPA. Because RESPA is a criminal statute, the uncertainty caused by the change in position needs a clear and prospective resolution. Accordingly, we respectfully request that the CFPB propose new rules to clarify the applicability of RESPA to MSAs through notice and comment rulemaking.

MBA strongly believes clear, widely applicable rules of the road--not a series of unique enforcement cases--are the appropriate means to establish consistent standards in the marketplace to protect consumers.

Thank you for your attention to this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Pete Mills". The signature is fluid and cursive, with the first name being more prominent.

Pete Mills
Senior Vice President, Residential Policy and Membership Engagement