

September 11, 2020

The Honorable Kathy Kraninger
Director
Bureau of Consumer Financial Protection
1700 G Street, NW
Washington, DC 20552

Re: Withdraw of Consumer Financial Protection Bureau Compliance Bulletin 2015-05, Marketing Services Agreements

Dear Director Kraninger:

The undersigned organizations request that the Consumer Financial Protection Bureau (the Bureau) withdraw the October 8, 2015, Compliance Bulletin 2015-05 (Bulletin) on Marketing Services Agreements (MSAs) and replace it for the time being with a reassertion that the real estate industry should follow long established best practices under the *Real Estate Settlement Procedures Act* (RESPA) and associated case law. As was recently affirmed in the Bureau's Compliance Aids Policy Statement, "providing clear and useful guidance to regulated entities is an important aspect of facilitating markets that serve consumers."¹ And while guidance that minimizes compliance uncertainty can facilitate consumer access to financial products and services, guidance that creates uncertainty has the opposite effect. Such is the case with the Bulletin, which obscures the compliance requirements for MSAs. Under these circumstances, withdrawing the Bulletin would foster improved RESPA compliance by providing much needed clarity.²

Originally overseen by the U.S. Department of Housing and Urban Development, RESPA oversight and enforcement responsibilities were transferred to the Bureau when it was created by the Dodd-Frank Act. Since that time, the Bureau has issued enforcement actions and interpretations of RESPA that have resulted in ongoing confusion and uncertainty. Such ambiguity directly harms consumers involved in complicated home purchases

In its past enforcement actions, which formed the basis of the Bulletin, the Bureau consistently disregarded RESPA's express statutory language that Section 8 does not prohibit "the payment to any person of a bona fide salary or compensation or other

¹ Policy Statement on Compliance Aids, 85 Fed. Reg. 4,579 (January 27, 2020), available at <https://www.govinfo.gov/content/pkg/FR-2020-01-27/pdf/2020-00648.pdf>.

² Statements made at the Bipartisan Policy Center by Director Kraninger on April 17, 2019. "If we succeed in fostering a culture of compliance and preventing harm, we would expect the number of complaints, and the number of meritorious complaints, to decline. We would likewise expect the number and the size of the cases that are brought to shrink as well."

payment for goods or facilities actually furnished or for services actually performed.”³ For example, in its enforcement action against PHH Corporation, the Bureau took the position that payments for services in a referral situation violate RESPA even if the payments are equal to the reasonable market value for the services.⁴

As evidenced in the many industry amicus briefs submitted, the point of view in this case was inconsistent with long held interpretations of RESPA, resulting in an overwhelming rejection by the courts. The en banc D.C. Circuit, in emphatically rejecting the Bureau’s interpretation in PHH, concluded “Section 8(c) specifically bars the aggressive interpretation of Section 8(a) advanced by the CFPB in this case” and was “designed to provide certainty to businesses in the mortgage lending process.”⁵ In so doing, the court ratified prior case law and best practices under Section 8(c) of RESPA.

In addition to conflicting with the underlying statute and relevant case law, the 2015 Bulletin is strikingly inconsistent with the position recently articulated in the Bureau’s Compliance Aids policy statement that “providing clear and useful guidance to regulated entities is an important aspect of facilitating markets that serve consumers.”⁶ The Bulletin doesn’t clarify how entities can structure an MSA that complies with RESPA’s requirements. Instead, the Bulletin focuses on the difficulty of creating a compliant MSA and the risk associated with non-compliance, describing both in such a way as to create significant confusion among entities on how to structure MSAs. Thus, rather than “facilitating markets that serve consumers[,]” the Bulletin achieved the opposite. Finally, while the Bureau may or may not have the present intention to interpret RESPA in this fashion, this Bulletin remains the Bureau’s statement on the matter—and is viewed as such by some state regulators in their examinations of their regulated entities.

For these reasons, we ask you to withdraw the Compliance Bulletin and commit to working with undersigned organizations to develop new guidance under the Bureau’s Compliance Aids policy statement. In the interim, we urge you to reassert the importance of following best practices, previously applicable regulatory guidance and case law. We also welcome enforcement when there are clear-cut violations of long-established interpretations of RESPA.

In the meantime, the undersigned organizations will continue to lead on developing and issuing best practices to help practitioners comply with RESPA, which is especially important as technology and consumer needs continue to evolve. Compliance manuals, “Do’s and Don’ts” on MSAs and co-marketing, RESPA FAQs, webinars, seminars,

³ 12 U.S.C. § 2607(c)(2).

⁴ *PHH Corp. v. Consumer Fin. Prot. Bureau*, 2015 WL 6774568, at 32 (D.C. Cir.) (Respondent’s Brief).

⁵ *PHH Corp. v. Consumer Fin. Prot. Bureau*, 839 F.3d 1, 42 (D.C. Cir. 2016), *reh’g en banc granted, order vacated* (Feb. 16, 2017), *on reh’g en banc*, 881 F.3d 75 (D.C. Cir. 2018).

⁶ Policy Statement on Compliance Aids, 85 Fed. Reg. 4,579 (January 27, 2020), *available at* <https://www.govinfo.gov/content/pkg/FR-2020-01-27/pdf/2020-00648.pdf>.

conferences, and other educational resources are just some of the tools made available to our memberships on an ongoing basis. These resources are also widely circulated by RESPA attorneys across the country to support and clarify compliance under the law.

In keeping with the Bureau's increased focus on preventative measures to safeguard consumers, withdrawing the Bulletin and emphasizing best practices will adequately address the harms created by the Bulletin while giving industry a compliance road map to maximize consumer protections. We thank you for your time and consideration on this very important matter. If you have any questions, concerns, or if we may be of assistance, please do not hesitate to contact us.

Sincerely,

American Land Title Association
Mortgage Bankers Association
National Association of Home Builders
National Association of Realtors®
Real Estate Service Providers Council (RESPRO®)