NAR Issue Summaries

Business / RESPA-CFPB

NAR Committee:

Business Issues Policy Committee

What is the fundamental issue?

Recent regulatory actions have called into question whether marketing agreements are legitimate under the *Real Estate Settlement Procedures Act* (RESPA), and if so, what is the right way to do one.

I am a real estate professional. What does this mean for my business?

Actions by the Consumer Financial Protection Bureau(CFPB) have departed from longstanding prior interpretations of the *Real Estate Settlement Procedures Act* (RESPA), calling into question whether and under what circumstances real estate professionals can receive money for marketing other settlement services and service providers. This has led to much confusion in the industry and numerous lawsuits.

NAR Policy:

NAR believes that real estate professionals and brokers should be able to be compensated for services performed and marketing done. NAR supports improved guidance from the CFPB and specifically rejects the contention that the marketing of settlement services is a mere referral.

Opposition Arguments:

Marketing agreements are a subterfuge for paying real estate professionals and brokers a fee for referrals.

Legislative/Regulatory Status/Outlook

Responsibility for enforcement of RESPA transferred from HUD to the CFPB in 2012. NAR and its industry partners have long disputed a 2010 HUD ruling that the sale of home warranty contracts by real estate agents for compensation was a per se violation of RESPA. NAR believes HUD erroneously limited the ability of real estate professionals to market home warranty products to the detriment of consumers who benefit from such products. Legislation has been introduced over the years to exempt home warranty companies from RESPA, which NAR has supported.

The CFPB previously embarked on a broader effort to prohibit the use of marketing service agreements (MSAs). In addition to engaging in various enforcement actions, on October 8, 2015, the CFPB issued Compliance Bulletin 2015-05 addressing MSAs, which offered little additional guidance on the CFPB's insight for enforcement actions. NAR strongly advocated for removal of this problematic guidance, including most recently sending a letter on September 11, 2020, along with industry partners. On October 7, 2020, the CFPB rescinded the problematic 2015 Compliance Bulletin and updated their Frequently Asked Questions (FAQs), recognizing industry best practices and focusing on a facts and circumstances analysis

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for determining RESPA compliance. The updated guidance includes common scenarios and examples that address RESPA compliance questions related to MSAs, as well as gifts and promotional activities. In September 2023, the CFPB also issued an non-exhaustive list of HUD's official rules, interpretations, or policy statements that are applied by the CFPB to reinforce RESPA compliance. This list should be read with the 2011 Transfer of Authority Notice, which identified the scope of the CFPB's authority and HUD's authority.

Another noteworthy action by the CFPB came on June 4, 2015, when the CFPB issued a decision against PHH Corporation and a number of other defendants for violating Section 8 of RESPA by paying for referrals when there is a federally related mortgage. Former CFPB Director Cordray's decision in this instance called into question practices relating to reinsurance arrangements and attempted to expand the agency's statute of limitations authority. As a result of the CFPB's action, Wells Fargo, Prospect Mortgage, and other lending institutions discontinued participation in MSAs with real estate agents and brokers. The PHH case was subsequently litigated at the U.S. Court of Appeals for the District of Columbia, which NAR filed two amici, or "Friend of the Court," briefs defending properly implemented MSAs in this case.

On October 11, 2016, the D.C. Circuit Court held in favor of PHH and stating that **payments for bona fide services provided and made at fair market value do not violate RESPA**. The court also held that the unilateral authority of the CFPB vested in a single person (the Director of the CFPB) was unconstitutional. The CFPB appealed the decision (issued by a three-judge panel) to the full bench ("en banc") of the D.C. Circuit, which reheard the case on May 24, 2017. The en banc court issued a decision on January 31, 2018, reinstating the panel's decision that PHH did not violate Section 8(c)(2) of RESPA. The court also held the CFPB's structure was constitutional, where the for-cause removal by the President gave the CFPB director independence while also giving the President ample oversight authority.

Following the PHH litigation, the CFPB continued enforcement actions with respect to payments tied directly to referrals. In January 2017, the CFPB issued multiple enforcement actions for RESPA violations against a mortgage lender, mortgage servicer, and two real estate brokers for accepting illegal payment for referrals related to lead agreements, marketing service agreements, desk-licensing agreements, and/or steering of consumers to pre-qualify for mortgages. The CFPB was also investigating a third-party marketing platform for RESPA violations, but did not result in an enforcement action, ending the investigation.

At the end of 2017, CFPB Director Cordray left his position rather than serving his full term that was set to expire in July 2018, and the President appointed an acting Director. This resulted in a legal challenge under the Federal Vacancies Reform Act of 1998 by CFPB Chief of Staff, which was dropped when the President announced a nominee for the permanent director position. In December 2018, Kathy Kraninger was confirmed as the new Director of the CFPB for a five-year term. NAR supported Ms. Kraninger's confirmation, which included spearheading a coalition letter to the full Senate prior to her confirmation vote. In another case,*Seila Law LLC v. CFPB*, the Supreme Court ruled on June 29, 2020, that the Director's "for-cause" removal protections (removal only for "inefficiency, neglect of duty, or malfeasance in office") under Dodd-Frank are unconstitutional. As a result, the CFPB Director is now serving at the discretion of the president and can be removed at will. NAR submitted anamicus briefin this case, along with other industry partners, advocating for the least possible disruption to the Bureau and the housing market.

Also, in 2019, the CFPB announced a revised "No Action Letter" (NAL) policy designed to provide regulatory

certainty, facilitate compliance, and promote innovation without fear of supervisory or enforcement actions for products or services offered subject to certain facts and circumstances. The Department of Housing and Urban Development (HUD) filed for No-Action Letter application with the Bureau on behalf of housing counseling agencies that expressed RESPA concerns about the agencies entering in arrangements with mortgage lenders for housing counseling services for consumers. In September 2019, the Bureau issued its first No-Action Letter under the new policy to HUD, explaining that it would not take any supervisory or enforcement action under RESPA Section 8 against the housing counseling agencies, if the arrangements with the mortgage lenders for counseling services met specified conditions. In January 2020, the CFPB issued another No-Action Letter to a mortgage lender interested in pursuing funding arrangements with housing counseling agencies to provide counseling services to consumers.

NAR continues to work with the CFPB and industry partners to ensure that helpful RESPA guidance is provided to practitioners. NAR published a list of Do's and Don'ts for real estate professionals when engaging in MSA's and co-marketing activities via social media and other web-based marketing tools (found under the References tab at nar.realtor/respa). These educational resources are intended to help real estate professionals comply with RESPA when co-marketing with other settlement service providers. NAR will also work with Congress to ensure that any future legislative changes improve RESPA without imposing undue burdens on real estate professionals.

In May 2024, the Supreme Court ruled that the funding mechanism for the CFPB was constitutional in the *Consumer Financial Protection Bureau v. Community Financial Services Association of America*case.

NAR will continue to track legislative and regulatory actions regarding RESPA compliance.

Current Legislation/Regulation (bill number or regulation)

None at this time.

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