

# TODAY'S AGENDA

1. RESPA enforcement on the rise
  - CFPB pronouncements have had a chilling effect on industry
2. CFPB's PHH Decision
  - attempts to gut Section 8(c)(2) exemption
3. CFPB Bulletin 2015-05
  - causing industry to rethink MSAs

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# PHH DECISION

## BACKGROUND SURROUNDING PHH MATTER

1. PHH Mortgage creates captive mortgage insurance companies
  - Refer PMI to 3 or 4 companies
  - MI companies cede portion of premium to PHH
  - PHH assumes portion of risk
2. PHH relies upon 1997 HUD Letter
3. CFPB brings action claiming violation of Section 8(a) of RESPA
4. ALJ relies upon HUD Letter, but finds PHH violated RESPA
  - \$6.4 million penalty
5. Appeal to Director Richard Cordray
  - Cordray rejects HUD Letter, ALJ recommendations and court decisions regarding Section 8(c)(2)
  - Orders \$109 disgorgement
  - PHH appeals to DC Federal Circuit Court

## Director Cordray holds that Section 8(c)(2) merely

- **“clarifies section 8(a), providing direction as to how that section should be interpreted, but does not provide a substantive exemption from section 8(a)”**
  - In essence, CFPB guts Section 8(c)(2)’s safe harbor
  - Hard to square that with plain language of the statute

# Thou Shall Not....Provisions

## Section 8(a) reads

No person shall give and no person shall accept 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.

## Section 8(b) reads

No person shall give and no person shall accept any portion, split, or percentage of any charge made or received for the rendering of a real estate settlement service in connection with a transaction involving a federally related mortgage loan other than for services actually performed.

These subsections constitute RESPA's prohibitions, and serve as the bases for enforcement proceedings and private litigation

# Permissible Conduct

Section 8(c) sets forth RESPA's permissible conduct

- . lists conduct Congress identified as acceptable

Importantly, the subsection begins “Nothing in this section [i.e., sections 8(a) and 8(b)], **shall be construed as prohibiting...**”

- the “payment of a fee” to attorneys, title company agents, or lender agents “for services actually performed” (Section 8(c)(1));
- “the payment to any person of a bona fide salary or compensation or other payment for goods or facilities actually furnished or for services actually performed” (Section 8(c)(2));
- “payments pursuant to cooperative brokerage and referral arrangements or agreements between real estate agents and brokers” (Section 8(c)(3)); and
- Affiliated business arrangements “so long as [safe harbor requirements are satisfied] (Section 8(c)(4))

## CFPB Upsets the Apple Cart

When read together Section 8(c)(2) stands for the proposition that

- “bona fide” payment for services actually performed
- falls outside the sphere of conduct prohibited by Sections 8(a) and 8(b)

Not so says Director Cordray

- Section 8(c)(2) may not pre-empt Section 8(a)
- Despite HUD, federal court holdings or plain language of Act

# HUD Uniformly Concluded that Section 8(c)(2) Provides an Exemption to Section 8(a) Liability

## HUD pronouncements

1. 1997 Letter to industry explaining how 8(c)(2) applies to captive mortgage insurance
2. Statement of Policy 1999-1 explains interplay between Sections 8(a) and 8(c)(2) regarding payments between lenders and mortgage brokers
3. Statement of Policy 2001-1 reiterates HUD's long standing policy on mortgage broker compensation under Section 8(c)(2)
4. 2011 HUD files appellate brief in *Carter v. Wells-Bowen Realty* (6<sup>th</sup> Cir.)
  - The prohibition of kickbacks and unearned fees does not apply to “bona fide \*\*\* payment(s) \*\*\* for services actually performed.” *Id.* § 2607(c)(2)



## Federal Courts Have Long Held Section 8(c)(2) Creates a Safe Harbor to Protect Conduct Otherwise Actionable Under Sections 8(a) and 8(b)

See, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup> and 11<sup>th</sup> Circuit Court opinions

1. In Howland (7<sup>th</sup> Cir.), Court stated as long as defendant provided only services...they are allowed a reasonable fee under Section 8(c)(2)
2. In Glover (8<sup>th</sup> Cir.), Court held that Section 8(c) clearly anticipates payments to individuals for goods or facilities
  - “excludes these payments from the Section 8(a) prescription”

3. In Edwards (9<sup>th</sup> Cir.) – August 2015

“Notwithstanding the general prohibition of exchanging anything of value for a referral, a statutory safe harbor exempts a payment from RESPA violation if the payment – despite being made simultaneously with a referral – was for goods or facilities actually furnished or for services actually performed.” See, Id. §2607(c)(2).

# PHH Decision Charts a New Course

According to PHH Decision

- Section 8(c)(2) “does not provide a substantive exemption from Section 8(a)”
- Section 8(a) prohibits “a payment that is tied in any way to referral of business”

In other words, CFPB’s rationale is that:

- even if payment was for services rendered at or even below market rate
- Section 8(c)(2) “does not insulate parties from liability under Section 8(a) if there is a referral in the transaction”
- if there is a referral in the transaction then payments would be a “pretext to provide compensation for a referral”

CFPB guts the Section 8(c)(2) safe harbor

## CFPB Holding in this Decision Has ENORMOUS IMPACT on Lenders

- Marketing and Services Agreements
- Co-advertising Arrangements
- Lead Generation Agreements
- Desk and Room Rentals
- Payments to Mortgage Brokers
- Any payments by settlement service providers to other settlement service providers for goods or services

## PHH DECISION APPEALED TO DC CIRCUIT COURT

1. PHH appeals Cordray's June 2015 decision
2. DC Circuit Court stays Cordray Order
  - PHH not required to place \$109M in escrow
3. PHH brief submitted on September 28
4. Six Amicus Briefs filed in support of PHH
  - NAR
  - ALTA
  - MBA
  - US Chamber of Commerce
  - Consumer Mortgage Coalition
  - RESPRO, to name a few
5. CFPB brief due November 5<sup>th</sup>
6. PHH reply brief due November 23<sup>rd</sup>
7. Oral argument not yet scheduled

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# **Marketing and Service Agreements (MSAs)**

## MSAs BACKGROUND

1. MSAs been around for 20-25 years
  - Popular with real estate brokers
  - Lenders and title companies pay brokers to advertise their products and services to public
  - Brokers typically paid flat monthly fee
2. Section 8(c)(2) relied upon for RESPA compliance
3. HUD issued Interpretive Rule in June 2010

## HUD Interpretive Rule June 2010

1. HUD stuck with 8(c)(2) Exemption
2. But HUD chips away at Exemption
  - opposes direct consumer solicitations
  - opposes directly handing consumer information
  - opposes exclusivity
  - prefers referrer be an agent
  - prefers written agreement
  - prefers written disclosure

## CFPB Views on MSAs and Section 8(c)(2)

1. Lighthouse Title Consent Order
  - September 2014
2. PHH Appeal Decision – June 2015
  - 8(c)(2) does not exempt prohibited conduct under Section 8(a)
3. CFPB Bulletin 2015-05
  - October 2015



## Lighthouse Title Consent Order

1. CFPB finds Lighthouse MSAs violate Section 8(a) of RESPA
  - quid-pro-quo arrangements for pay
  - no determination of FMV under the MSA
  - no verification that broker performed any services
2. Contract is a “thing of value” even if fees paid under contract are at FMV
3. Entering into a contract with understanding that brokers will refer business violates Section 8(a)
  - any referral of business for a fee violates 8(a)
4. In CFPB review MSAs considered toxic
  - not illegal, but toxic

## CFPB's PHH DECISION

1. Although not a case involving MSAs, PHH relies on Section 8(c)(2) to justify compliance with RESPA
2. CFPB holds Section 8(c)(2) does not exempt conduct that violates Section 8(a)
  - CFPB guts Section 8(c)(2)

## CFPB Bulletin 2015-05 on MSAs

1. There's no "there" there
  - industry hungers for guidance
  - but Bulletin neither provides legal clarity nor a clear roadmap for what can and cannot be done
2. Bulletin can best be summed up by this quote:
  - **"In sum, the Bureau's experience in this area gives rise to grave concerns about the use of MSAs in ways that evade the requirements of RESPA. In consequence, the Bureau reiterates that a more careful consideration of legal and compliance risk arising from MSAs would be in order for mortgage industry participants generally."**
3. Translation
  - MSAs not per se illegal
  - Difficult to administer
  - We don't like them – many are disguised compensation for referrals
  - Think twice before undertaking

## CFPB Bulletin 2015-05 on MSAs (cont'd)

4. CFPB acknowledges determining validity of MSA requires evaluation of:
  - facts and circumstances surrounding creation of each agreement
  - as well as its implementation
5. CFPB makes clear
  - any agreement that entails exchanging thing of value for referrals of SS business violates RESPA
  - whether or not MSA is part of the transaction
  - veiled reference here to PHH Decision

# MSAs Best Practices For Those Engaged in MSAs

1. Avoid quid-pro-quo agreements
  - payments never for referral of business
2. Independent third party valuation a must
3. Trust but Verify
  - have Broker certify to services performed
  - but conduct periodic on-site audits
4. Services should be geared to advertising to general public
  - not individual consumers
5. Do not pay for direct consumer solicitations
  - nor access to sales staff

## MSAs Best Practices (cont'd)

6. Avoid exclusive arrangements
7. Avoid preferential designations
8. Disclosure Statement to consumers encouraged
9. Justify reasons for adjusting monthly fees
10. Comply with Section 8(c)(2)

## Alternatives to MSAs

1. Co-advertising arrangements
2. Lead generation arrangements
3. Co-sponsorship of training sessions
  - for professionals
  - for consumers
4. Affiliated business arrangements
  - joint venture mortgage companies
  - joint venture title agencies

## What's a Settlement Service Provider to Do?

1. Again, CFPB careful not to say MSAs per se illegal
2. But they warn:
  - MSAs are risky
  - many are disguised compensation for referrals
  - difficult to monitor
  - CFPB will continue to actively scrutinize MSAs
3. CFPB cautions careful consideration of legal and compliance risks for those choosing to engage in MSAs