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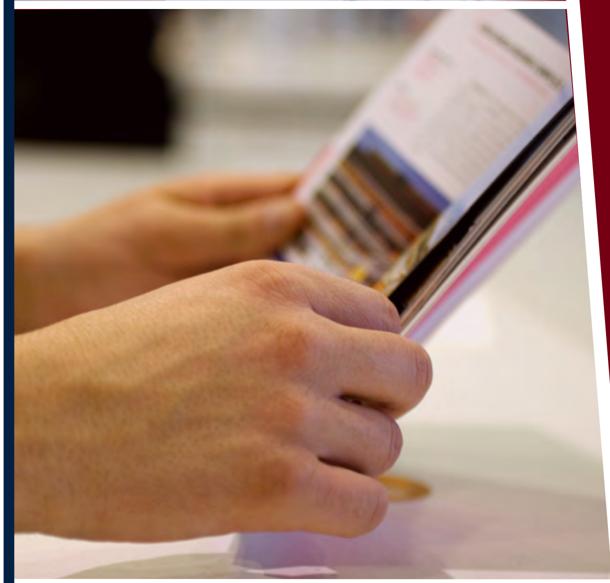

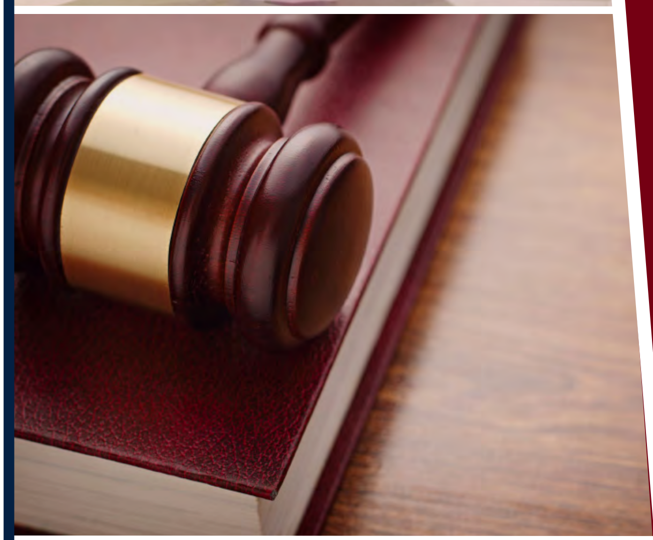

Guide to Marketing Service Agreements, RESPA and the CFPB

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Inside Mortgage Finance's

Guide to Marketing Services Agreements, RESPA and the CFPB

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INTRODUCTION: NEW FOCUS FOR REGULATORS

In recent years, the Real Estate Settlement Procedures Act hasn't been much of an issue for the mortgage industry. And based on past guidance from the Department of Housing and Urban Development, many lenders were comfortable participating in marketing services agreements or joint ventures with real estate firms and homebuilders.

The Consumer Financial Protection Bureau took over RESPA enforcement powers from HUD in 2011, as directed by the Dodd-Frank Act. By 2014, the CFPB had signaled a new focus on MSAs, including interpretations of RESPA that differed significantly from HUD's. The CFPB questioned the legitimacy of mortgage MSAs and standard joint-venture arrangements, making RESPA one of the biggest regulatory threats on the immediate mortgage-lending horizon.

This *Guide to Marketing Services Agreements, RESPA and the CFPB* covers the MSA landscape with insight and analysis from regulators and industry attorneys.

The *Guide* includes details on typical MSAs and suggestions regarding the provisions to include in an MSA contract. The application of RESPA to MSAs is also covered in detail, with insight on guidance from federal regulators dating back to 1996. The CFPB's enforcement of RESPA regarding MSAs is explored, including consent orders, enforcement actions and guidance from the federal regulator.

A controversial action by the CFPB against PHH Mortgage and its captive mortgage insurance program is also covered. The lender filed the first appeal of a CFPB administrative proceeding after Richard Cordray, director of the CFPB, assessed a $109.2 million fine relating to MSAs that allegedly violated RESPA.

Donald Lampe, Jeffrey Naimon and John Socknat provided analysis of the regulatory landscape for MSAs and RESPA during a webinar hosted by Inside Mortgage Finance Publications in October 2015.

Lampe is a partner in the financial services group at the law firm of Morrison & Foerster. He has a long history of representing mortgage lenders in government investigation and enforcement actions on a variety of different issues, including RESPA.

Naimon is a partner at the law firm of BuckleySandler. He has more than 20 years of experience helping banks and other financial service providers with regulatory enforcement and litigation matters.

Socknat is a practice leader in the mortgage banking group at the law firm of Ballard Spahr. He has a track record in helping mortgage and housing-related clients with regulatory compliance, and representing them in both state and federal enforcement actions.

January 2016

SECTION 1: OVERVIEW OF MSAS

DEFINITION OF AN MSA

A marketing services agreements is basically an agreement for a party to provide marketing services for another party in exchange for compensation for those services. In the mortgage industry, MSAs have typically involved real estate brokers providing marketing services to title companies, home warranty companies, mortgage lenders and other firms.

"The purpose behind MSAs is to permit providers of services and lenders to be able to access and provide their services to other customers that they may not otherwise have access to or be able to serve," said Donald Lampe, a partner in the financial services group at the law firm Morrison & Foerster. "The business motivation is pretty clear: to expand market share, and to obtain new business through channels that are not otherwise available to them."

He said that the term "marketing services agreement" doesn't appear to be defined in any law or regulation involving mortgages.

However, MSAs have existed for long enough that it's difficult for industry participants to determine when MSAs started. Lampe said MSAs are common in other businesses and industries besides mortgage lending. In other industries, he said market forces determine the scope and economics of the agreements.

"This is one example where RESPA specifically regulates an industry that may not be regulated by other federal law if it engaged in the same conduct," Lampe said.

COMMON SERVICES PROVIDED

Lampe said MSAs in the mortgage industry commonly involve real estate agents or others who furnish all or most of following marketing services for providers, which are typically title insurance companies or mortgage lenders:

- Advertising, often joint advertising, of providers' products and services;
- Educating customers about the provider's offerings;
- Providing facilities for provider promotional and advertising materials, such as display racks and online access;
- Providing promotional literature and other information to customers;
- Arranging educational and promotional sessions within the marketing party's business;
- Arranging and attending open houses where providers attend and engage in promotional and educational activities; and
- Subleasing or licensing facilities where providers engage in marketing and promotional activities and initiate customer contact.

He said the services provided and business terms are typically detailed in a written MSA.

ELEMENTS OF WRITTEN MSAS

Lampe stressed that written MSAs should clearly identify the parties involved in the agreement. "Sometimes it gets confusing whether the agreement is with an individual real estate agent, a group of individual real estate agents as a marketing party, or a real estate firm," he said.

Lampe said MSAs should include a description of the parties' duties including the specific marketing services that will be completed, service levels and payment of compensation. "Under RESPA, it's compensation for services actually rendered," he said. "Typically you will see these set up on a monthly fee, for example."

The term of the agreement should be included in the MSA. Lampe said that ordinarily under RESPA, the longer, the better, within commercially reasonable norms, such as one year. "And termination would be at the end of the term or for cause, not a unilateral termination, anytime somebody wants out of the agreement," he said.

Lampe suggested that MSAs should be non-exclusive. "HUD believed that exclusivity was a sign of noncompliance with RESPA," he said.

MSAs should also include monitoring of the performance of the marketing-side party.

Lampe said MSAs also typically include a provision with rights to adjust the scope of services and compensation, commensurate with circumstances. "But at no point should pricing be based on the volume of referrals," he said.

Joyce Wilkins Pollison, director of legal and regulatory compliance at Lenders Compliance Group, a consulting firm, said a fixed monthly fee is the only allowable method of compensation under an MSA.

Lampe added that if the term of an MSA is one year and adjustments are made to the MSA in that term, the adjustments might draw attention from regulators.

Phillip Schulman, a partner in the K&L Gates law firm, said MSAs should clearly state that the marketing agreement isn't payment for a referral. "What you want to pay for is general advertising, advertising to the general public," he said.

One example would be a banner on a web page. "That's advertising to the general public, such as anyone who goes on the [National Association of Realtors] webpage," Schulman said. "That's not telling an individual customer you ought to use ABC Mortgage."

Other examples include putting a sign up or installing a rack of brochures in a real estate agent's office, or attaching a rider sign on a for-sale sign.

"To me, marketing agreements are legal if they are payment for general advertising," Schulman said. "And then do what the CFPB said: Get an independent third party to value them, and make sure that you verify that the real estate broker or the builder is doing that stuff on a monthly basis. If you want to do them, you can do them properly. If you never drive a car, you'll never get a speeding ticket, but that doesn't make driving illegal, and the same can be true for MSAs."

RISKS FOR MSA PARTIES

A common issue in MSAs is the imbalance of risk tolerance between providers and marketing parties.

In general, Lampe said providers have lower risk tolerance than marketing parties. "Real estate agents generally aren't as concerned with RESPA compliance as provider-side parties like lenders," he said.

Lampe said it doesn't appear that any MSA-related enforcement actions have been brought directly against real estate brokers or agents, unless the broker or agent was part of a larger family of companies. He added that while the Consumer Financial Protection Bureau has increased regulatory oversight of MSAs, it's doubtful that the CFPB will target real estate agents.

"As a practical matter, provider-side parties have to be more cautious about compliance than marketing-side parties that are in the real estate business," Lampe said.

SECTION 2: REGULATION OF MSAS

RESPA OVERVIEW

The Real Estate Settlement Procedures Act prohibits giving or receipt of any "thing of value" pursuant to any agreement or understanding that any real estate settlement service will be referred to any person or the "splitting" of settlement services charges except for services rendered, according to Donald Lampe, a partner in the financial services group at Morrison & Foerster.

Regulation X, which implements RESPA, established that any referral of a settlement service is not a compensable service, except for the following scenario: "A referral includes any oral or written action directed to a person which has the effect of affirmatively influencing the selection by any person or a provider of settlement service or business incident to or part of a settlement service when such person will pay for such settlement service or business incident thereto or pay a charge attributable in whole or in part to such settlement service or business."

RESPA became law in 1974. Lampe noted that in the 30-plus years after the law was established, the Department of Housing and Urban Development helped industry participants understand the application of RESPA.

"There were the rules and the rulemakings, policy statements and enforcement actions," he said. "There was a common understanding, even if it wasn't written down in a code, there was a common understanding of how to enter into these arrangements and satisfy HUD, and also to limit liability to the extent applicable, from private rights of actions."

RESPA SECTION 8

Section 8(a) of RESPA prohibits giving a "fee, kickback, or thing of value" in exchange for a referral of business related to a real estate settlement service. Section 8(c) of RESPA provides various safe harbors from liability under Section 8(a), including payment of bona fide compensation for goods actually furnished or services actually performed.

Jeffrey Naimon, a partner at BuckleySandler, said Section 8(c) has historically served as the "exception" to Section 8(a) that provides the legal basis for marketing services agreements.

"Whether this is in fact an exemption from liability or is something narrower, is one of the major issues [with MSAs and the CFPB]," he said.

HUD INTERPRETATIONS OF RESPA

Under Section 19(b) of RESPA, institutions that, in good faith, abided by HUD's rules, regulations, or interpretations of RESPA would not be liable for RESPA violations. Rulemaking and enforcement authority involving RESPA transferred to the CFPB in 2011.

"If you comply with an interpretation first of HUD and now of the CFPB, there's no liability," Naimon said.

To help clarify REPSA, HUD issued a number of policy statements. Statement of Policy 1996-3 provided guidance on whether mortgage lenders are allowed to rent office space or desks in a real estate agent's office.

HUD's statement of policy said desk rental arrangements are permissible under RESPA as long as the rental payment is bona fide and not a disguised referral fee, and is not conditioned on the number of referrals.

"Without this statement of policy being an official policy, I think everyone would be looking very hard at this type of arrangement," Naimon said.

With Statement of Policy 1999-1, HUD said lender-paid compensation of mortgage brokers is permissible under RESPA as long as the compensation "is reasonably related to goods, facilities, or services furnished or performed." Naimon noted that HUD allowed lender-paid compensation of mortgage brokers "even though what a mortgage broker does is absolutely a referral."

"Mortgage broker compensation isn't a payment for the referral, but a payment for the services that the brokers are providing," Naimon said. "And that's a critical piece here."

HUD's Office of General Counsel issued an interpretive rule in 2010. The interpretive rule addressed the payment of fees to real estate brokers and real estate agents by home warranty companies.

"The interpretive rule has formed the backbone of how to do a proper marketing services agreement since 2010," Lampe said. "It confirmed a number of statements that the industry had already considered over the years."

Naimon added that the interpretive rule appeared to implicitly permit MSAs with bona fide compensation provisions and practices.

Lampe noted that the interpretive rule largely re-stated a provision included in RESPA. "HUD repeated the long-held belief that marketing agreements must include bona fide payments for services actually performed," he said. "And the services must be actual, necessary and distinct from services already being performed by the marketing party."

Lampe added that payments must be for services that are not nominal, and are not duplicative.

Naimon said the mortgage industry relied on HUD's policy statements when establishing MSAs. "These are the types of official guidance that had been provided that very strongly suggested that MSAs with a bona fide compensation structure would be permitted," he said.

PRE-CFPB ENFORCEMENT ISSUES

Lampe detailed a number of issues involving MSAs that regulators focused on before the Consumer Financial Protection Bureau took over enforcement of RESPA in 2011.

He noted that payment for services rendered shouldn’t be based on referrals, including the volume of referrals. And MSAs shouldn’t include exclusivity provisions.

Lampe said compensable marketing services should be directed to the general public and not just individuals. The Department of Housing and Urban Development cautioned that verbal “sales pitches” to individuals and simply passing out promotional materials to individuals do not meet the standard to avoid unlawful payment for referrals.

He said services provided must be more than “nominal” and must not be “duplicative.” HUD had taken action against MSAs where a marketing party would make sales pitches to try to help a consumer purchase a home. Lampe said HUD found such MSAs to be duplicative because that’s how ultimately real estate agents are compensated.

MSAs were also subject to a determination that compensation was bona fide, for actual services being performed, passing the “reasonably related” test.

REASONABLY RELATED TEST

Lampe said HUD used the “reasonably related” test to gauge the value of services rendered. Under the test, he said the reasonableness of compensation is determined based on whether the value of services is reasonably related to the value of actual services performed by marketing party.

To pass the test, payments must be commensurate with the amount normally charged for similar services, goods or facilities. Lampe said the market price used to determine whether a payment meets the test must not include referral fees or unearned fees. He said parties often rely on third-party assessments or valuations to satisfy the provision of the test.

Lampe said the MSA should provide regulators with comfort that the marketing party is actually performing contracted services, including by requiring periodic reports of services and expenditures.

He said the MSA should also include a review prior to extension or renewal to determine whether the MSA, in practice, has been operated in compliant fashion.

BEYOND MSAS

Lampe said CFPB's RESPA concerns appear to go beyond MSAs and reach to other common arrangements. "If the CFPB's interpretation of Section 8(a) and (c)(2) is validated, other arrangements could be questioned," he said.

He said the CFPB's interpretations could be applied to desk rentals, for example, or affiliated business arrangements. Lampe said the CFPB has also been critical of lead generation arrangements, raising concerns about unfair or deceptive practices.

SECTION 3:
ENFORCEMENT BY THE CFPB

OVERVIEW

The Consumer Financial Protection Bureau took over enforcement of the Real Estate Settlement Procedures Act from the Department of Housing and Urban Development in 2011. According to Donald Lampe, a partner at Morrison & Foerster, the CFPB handled RESPA and marketing services agreements differently than HUD did.

He noted an enforcement action against Lighthouse Title, an administrative proceeding against PHH, comments made by officials applauding industry participants for terminating MSAs and a bulletin regarding MSAs.

“The CFPB, before our eyes, is rewriting the law, rules and previous guidance on RESPA,” he said. “As a result, industry participants are re-examining arrangements historically thought to be compliant with RESPA, especially MSAs.”

Lampe said the CFPB has surfaced a number of new and novel interpretations of RESPA, causing widespread concerns for MSAs. The CFPB has argued that Section 8(c)(2) of RESPA, upon which MSAs are built, is a mere rule of construction, and not a true exception under Section 8 of RESPA.

He cautioned that under the CFPB’s interpretation, if the purpose or the intent of an arrangement is to obtain referrals, Section 8 may be violated, even though Section 8(c)(2) was otherwise complied with.

Officials at the CFPB have suggested that in examinations, the federal regulator has yet to see a compliant MSA. Lampe added that there is no “safe harbor” for MSAs and each arrangement must be evaluated on its own.

“Traditional factors, such as agreement terms, valuations and monitoring, are not persuasive if referrals are involved,” he said.

Jeffrey Naimon, a partner at BuckleySandler, added that Richard Cordray, director of the CFPB, has raised concerns about kickbacks that other regulators haven’t raised. “Kickbacks drive up the cost of getting a mortgage and put law-abiding companies at a disadvantage,” Cordray said in 2014 in relation to a consent order against Stonebridge Title Services.

Naimon questioned Cordray’s position. “I’m not sure that anyone has ever showed that an MSA has driven up anybody’s cost, but that’s the position that Director Cordray has taken,” he said.

CONSENT ORDER WITH LIGHTHOUSE TITLE

Naimon said the CFPB’s potentially divergent analysis of RESPA and MSAs emerged with a September 2014 consent order with Lighthouse Title. The regulator ordered the title insurance agency to pay $200,000 for entering into what the CFPB characterized as illegal quid pro quo referral agreements, in violation of RESPA.

According to the CFPB, Lighthouse entered into MSAs with various companies, such as real estate brokers, with the understanding that the companies would refer mortgage closing and title insurance business to Lighthouse.

"The agreements made it appear as if the payments would be based on marketing services the companies were supposed to provide to Lighthouse," the CFPB said. "However, Lighthouse actually set the fees it would pay under the MSAs, in part, by considering the number of referrals it received or expected to receive from each company."

The CFPB said its investigation found that the companies on average referred significantly more business to Lighthouse when they had MSAs than when they did not.

In addition to the monetary penalty, Lighthouse was required to immediately terminate any existing MSAs with companies in a position to refer business to Lighthouse, and was prohibited from entering into new MSAs with any such companies.

Lighthouse said it proactively discontinued the handful of remaining active MSAs in the months before the consent order was announced, even as several of its competitors continued the practice.

"Lighthouse, from the initial use of the MSAs, strived to be RESPA compliant first by using agreement forms provided by title insurance underwriters, later by soliciting the advice of a RESPA compliance consulting firm and by operating under the guidelines of HUD's 2010 definition," the company said. "Because of our efforts, we took a more conservative approach to the MSA model over this five-year process until terminating the few remaining agreements earlier this summer.

"While the settlement was agreed upon by both parties, Lighthouse strongly believes that it operated consistent with HUD guidelines, and the large majority of the disclosed consent matters were very much in dispute," the company added.

The CFPB said the title company allegedly violated RESPA Section 8(a) by entering into MSAs in exchange for referrals with settlement service businesses. "Entering a contract is a 'thing of value' within the meaning of Section 8, even if the fees paid under that contract are fair market value for the goods or services provided," according to the consent order.

The CFPB demonstrated that after Lighthouse entered into MSAs with counterparties, there were increased numbers of referrals between the parties, which weren't explained by seasonal or yearly fluctuations. The regulator attributed the increased number of referrals to the MSA.

Naimon said the CFPB's conclusion was troubling. "If you're successful, that's evidence that the MSA is in violation of RESPA, according to the CFPB," he said. "It may be that only unprofitable relationships and unsuccessful relationships don't trip you up under RESPA."

The CFPB also claimed marketing fees were based on referrals, and that counterparties weren't monitored to ensure performance of services.

Naimon said the CFPB made a “critical leap” with the enforcement action against Lighthouse, surprising industry participants.

“The first thought that many people had, looking at this consent order, was that the provision basically said you can’t even enter into a contract, because entering into a contract at fair market value would be a violation,” he said. “I think that caused many people to think that this was kind of a mistake, that the CFPB had just kind of blown it, that some enforcement lawyer had kind of gotten out in front of his or her skis.”

However, some suggested that the consent order represented new policy from the CFPB regarding RESPA and MSAs. “But how could it be, because Section 8(c)(2) is really clear on this issue, that the statute provides an exemption from liability,” Naimon said.

He noted that in the months after the consent order with Lighthouse, industry participants sought additional guidance from the CFPB regarding RESPA and MSAs. “We didn’t get anything useful from the bureau until the PHH decision came out in 2015,” Naimon said.

Administrative Proceeding Against PHH

The CFPB issued an administrative proceeding against PHH in January 2014. The regulator alleged that PHH harmed consumers through a mortgage insurance kickback scheme.

PHH appealed the administrative enforcement proceeding and CFPB Director Richard Cordray issued a decision on the appeal in June 2015. Cordray ruled that PHH illegally referred consumers to mortgage insurers in exchange for kickbacks. PHH was ordered to pay the CFPB $109.2 million as part of the order.

Naimon said the CFPB’s rationale included some troubling interpretations of RESPA.

“The CFPB says that the lender was referring customers to mortgage insurers on the understanding that the insurer would purchase mortgage reinsurance from the mortgage lender subsidiary at market value,” he said. “So they were not taking the position that the mortgage reinsurance was at the wrong price, the agreement to reinsure was a market-priced agreement. Yet, the agreement to reinsure was, in and of itself, a thing of value.”

Naimon said Cordray’s order established that there is no safe harbor from liability just because a company is paying or receiving fair market value for a good or service.

Cordray’s order also stated that Section 8(c) isn’t an exemption from RESPA liability, but rather a clarification of Section 8(a). According to the order, a payment is “bona fide” for the purposes of Section 8(c) only if it is made for the services performed, and not associated with any referral arrangement between the parties to the MSA.

"Section 8(c)(2) only becomes relevant if there is a question as to whether the parties actually did enter into an agreement to refer settlement service business," according to Cordray's order.

Cordray acknowledged that there was prior HUD guidance that was inconsistent with his view. However, Cordray said the conflicting guidance from HUD was neither persuasive nor controlling due to the guidance's internal inconsistencies and non-binding nature.

Naimon raised concerns about how Cordray handled the action.

"Even though there was a letter that was written by the assistant secretary of HUD – who was responsible for RESPA at HUD at the time – that set out exactly how to do mortgage reinsurance arrangements, and even though the companies involved here followed that guidance to the letter, the guidance was nonbinding and unpersuasive to Director Cordray," Naimon said. "I think it's unfortunate that that kind of a change of position by the federal government on an important statute for the mortgage industry would occur in a retroactive fashion like this."

Ron Haynie, a senior vice president for mortgage finance policy at the Independent Community Bankers of America, raised concerns about the CFPB's premise that PHH engaged in RESPA violations because it steered borrowers into loans with mortgage insurance or higher mortgage insurance premiums in order to fund its captive.

"The problem is, you can't really steer someone into mortgage insurance," Haynie explained. "You either need it or you don't. Either it's required because it's a loan over 80 percent or it's not because it's a loan under 80 percent. So that in and of itself is troubling."

PHH was not alone in setting up captive reinsurers, and the CFPB decision suggests that any such arrangement – regardless of pricing or structure – is illegal. In 2007, at the peak of the captive MI business, private MIs ceded some $928.2 million to lender captives, and PHH's Atrium unit ranked just ninth in the industry, according to an *Inside Mortgage Finance* analysis of MI annual filings.

By 2012, with all the captives in runoff mode, the private MIs still ceded $216.6 million in premiums to lender captives. Units sponsored by Chase, Citi, Washington Mutual, Countrywide and Wells Fargo were the biggest captives at that point.

From the middle of 2008 to the end of 2012, private MIs ceded an estimated $2.4 billion of insurance premiums to lender captives.

ENFORCEMENT ACTION AGAINST GENUINE TITLE

In April 2015, the CFPB and the Maryland Attorney General brought an enforcement action against a Maryland-based title company and its executives, alleging they participated in a mortgage kickback scheme, trading cash and marketing services in exchange for referrals.

The complaint named Genuine Title, as well as Jay Zukerberg, Brandon Glickstein, Gary Klopp, Adam Mandelberg, William Peterson and Angela Pobletts, along with a number of limited-liability companies controlled by certain defendants.

The CFPB and Maryland alleged that Zukerberg and Glickstein developed and operated schemes to give loan officers marketing services and cash payments in exchange for referrals of title work. The regulators said the kickback schemes violated RESPA, which prohibits giving a “fee, kickback, or thing of value” in exchange for a referral of business related to a real estate settlement service.

The CFPB and Maryland alleged that the defendants exchanged valuable marketing services for referrals. The CFPB said Genuine Title offered services, including purchasing, analyzing, and providing data on consumers, and creating letters with the loan officers’ contact information that the company printed, folded, stuffed into envelopes, and mailed. In return, the loan officers would refer homebuyers to the company for closing services.

“This scheme was especially profitable for the loan officers, who generally are paid by commission, because the marketing services increased the amount of business they generated,” the CFPB said.

The defendants also allegedly funneled illegal cash kickbacks through a network of companies. The four individual loan officers named in the filings allegedly received cash payments through companies they created and controlled. “Zukerberg knew that it would look ‘fishy’ if Genuine Title paid cash directly to the loan officers,” the CFPB said.

“So, instead, Genuine Title funneled the payments to loan officers through companies created by the loan officers.” From 2009 to 2013, Zukerberg and Glickstein allegedly arranged for cash payments to the loan officers from Genuine Title in amounts ranging from about $130,000 to $500,000.

Under the consent orders, five of the six individual defendants would be banned from the mortgage industry and required to pay a total of $662,500 in redress and penalties.

The announcement followed enforcement actions in January 2015 against Wells Fargo and JPMorgan Chase for their alleged roles in the scheme.

Under the terms of that settlement agreement, Wells was to provide $10.8 million in restitution to customers who used a Wells loan officer and closed a settlement with Genuine Title between September 2011 and early 2014. Wells Fargo was to pay penalties of $21 million to the CFPB and $3 million to the Maryland Consumer Protection Division.

Chase agreed to provide $300,000 in restitution and to pay penalties of $500,000 to the CFPB and $100,000 to the Maryland CPD.

GUIDANCE FROM THE CFPB

In October 2015, the CFPB issued guidance regarding mortgage-related MSAs. The CFPB said it found that many MSAs involve substantial legal and regulatory risks that are greater and less capable of being controlled by careful monitoring than mortgage industry participants may have recognized in the past.

"We are deeply concerned about how marketing services agreements are undermining important consumer protections against kickbacks," said CFPB Director Richard Cordray. "Companies do not seem to be recognizing the extent of the risks posed by implementing and monitoring these agreements within the bounds of the law."

CFPB Compliance Bulletin 2015-05 explained that, while MSAs are usually framed as payments for advertising or promotional services, "in some cases the payments are actually disguised compensation for referrals. Any agreement that entails exchanging a thing of value for referrals of settlement service business likely violates federal law, regardless of whether a marketing services agreement is part of the transaction."

The bulletin noted that whistleblower complaints about MSAs that violate RESPA have been increasing. "Any industry participant that suspects unlawful activity by others or that wishes to self-report its own conduct that may have violated RESPA is encouraged to contact the CFPB," the regulator said. "Self-reporting and cooperation, consistent with the Responsible Business Conduct bulletin, CFPB Bulletin 2013-06, will be taken into account in resolving such matters."

ANALYSIS OF CFPB BULLETIN

"MSAs aren't dead, but maybe they're on life support," John Socknat, a practice leader in the mortgage banking group at Ballard Spahr, said after the bulletin from the CFPB.

Naimon noted that the guidance didn't state that all MSAs are illegal. "Instead of giving legal guidance, the bureau is really giving risk guidance: We aren't going to tell you what is legal and what isn't legal. We're just going to tell you what you're doing is insufficient, and it's really risky," he said.

Naimon said the CFPB's actions regarding MSAs make it likely that if a CFPB examiner sees an MSA, they're going to scrutinize it and they're most likely going to take the view that the MSA is impermissible.

According to the bulletin, MSAs should be reviewed in light of the facts and circumstances surrounding the creation of each agreement and its implementation. Naimon suggested that lenders should address the following issues:

- Is the MSA actually designed or intended to disguise an illegal referral fee structure or other form of compensated steering?

- Does the MSA undermine consumers' ability to shop for mortgages or related settlement services?
- Are the services required under the MSA actually performed, and in the quantity and at the frequency contemplated by the agreement?
- Are the marketing services required by the MSA aimed at consumers or other settlement service providers?
- Does the number of referrals given or received increase once the MSA is in place?

He said the bulletin highlights various aspects of MSAs that may result in an increased risk of engaging in a RESPA violation. Naimon said the following activities under MSAs pose risks for lenders:

- Charging fees under an MSA based in any way on referral volume;
- Making payments pursuant to the MSA's terms even when a party fails to perform services or provide goods as required;
- Increasing the volume of referrals to a person or entity after establishing an MSA relationship with that person or entity; or
- Directing marketing efforts under an MSA toward other settlement service providers, rather than consumers, in an attempt to establish additional MSAs or referral relationships.

Michael Barone, a director of legal and regulatory compliance at Lenders Compliance Group, a consulting firm, said the bulletin "was an effort to get something out very quickly," in response to all the congressional criticism that Cordray received from critics on Capitol Hill. "It really does not have a lot of teeth at all," Barone said of the bulletin.

He added that the guidance doesn't "tell us anything more than where we were an hour before this guidance came out. I think we know the CFPB doesn't like these. They also say they are going to continue to scrutinize them, and we know that."

The Mortgage Bankers Association cautioned against operating as though the bulletin didn't include new information. "MBA views it as a strong warning to the industry to reconsider existing MSAs or any plans to establish new ones," the trade group said.

Pete Mills, senior vice president of residential policy and member engagement with the MBA, said, "The one clear test that emerges from the guidance is that if the MSA involves a referral of any kind, then it is a violation of RESPA."

He said the MBA believes that the bulletin represents a new interpretation of MSAs under RESPA, which should be completed through notice-and-comment rulemaking.

Benjamin Olson, a partner at the BuckleySandler law firm and former deputy assistant director in the CFPB's Office of Regulations, noted that the bulletin stopped short of declaring MSAs to be categorically illegal, which the regulator likely could not do without more formal action. "However, it confirms the bureau's strong skepticism and its unwillingness to identify a compliant MSA," he said.

Olson said a rulemaking that better defines what is and is not permitted under Section 8 of RESPA would be welcomed, but said he wasn't aware of any plans at the bureau to initiate a rulemaking process.

Moreover, "It's not clear whether the bureau has the authority to categorically ban all MSAs," the attorney pointed out. "Recently, courts have been unwilling to defer to the bureau's and HUD's interpretations of Section 8, but that could change in the context of a notice-and-comment rulemaking."

Richard Andreano, a partner in the mortgage banking unit of the Ballard Spahr law firm, noted that the guidance is not an official rule, "but when the CFPB lays out its view, they tend to expect you to follow it. So if they come in during an examination later on and you haven't [followed the guidance], they'll question it."

LENDERS' REACTION TO CFPB'S FOCUS ON MSAS

After Cordray's decision against PHH, Naimon said many companies started withdrawing from MSAs, or not entering into new ones if the arrangements were dependent on Section 8(c) and the use of a fair market value defense.

Mills, of the MBA, said the CFPB has a significantly different view from HUD regarding the permissibility of MSAs.

"This is not a case of something that's been unenforced for decades," he said. "Everyone knows about these. HUD for years did RESPA enforcement. But now that view has changed under the auspices of the Bureau via the enforcement action against Lighthouse and the PHH matter."

On July 30, 2015, Wells Fargo and Prospect Mortgage separately announced that they were discontinuing mortgage MSAs.

Wells said that beginning Aug. 1, 2015, it would withdraw from mortgage marketing services and desk rental agreements with real estate firms, builders and certain other referral sources. The bank said the decision was the result of increasing uncertainty surrounding regulatory oversight of these types of arrangements, along with Wells' efforts to simplify the process that customers experience when shopping for a mortgage.

"Real estate firms and builders always have been – and will continue to be – very important to Wells Fargo's retail mortgage operations, and we are exploring a number of new options for enhancing and strengthening those relationships over the long term," said Franklin Codel, executive vice president for mortgage production at the company. "Because we value our strong relationships with real estate professionals and builders, the decision to exit these marketing services agreements was difficult, but we are taking this action to ensure that we continue to conduct our business in a way that represents the best interests of all of our customers and clients.

We believe the best way to earn the relationship with real estate firms and builders is through timely, dependable service delivered by the best team in the business."

Wells said the termination of MSAs wasn't expected to have a material impact on the bank's total mortgage production.

Prospect said it would discontinue marketing activities that depend on MSAs by the end of the third quarter of 2015.

"Recent interpretations of RESPA requirements introduce substantial uncertainty as to the rules and requirements applicable to MSAs," the lender said. "Prospect has taken every precaution to ensure that it is complying with the rules and guidance under applicable law. However, in light of these recent rulings, Prospect believes that MSAs are no longer a viable marketing tool for the industry."

Prospect said it values its relationships with real estate professionals and other service providers that provide service to consumers. "Prospect will continue to work closely with industry partners to increase the understanding of the process through financial education, improved products and tools that make the purchase of a home or the refinance of a mortgage a reality for Americans and reduce the risk inherent in such transactions," the lender said.

Shortly after the CFPB issued its bulletin regarding MSAs and RESPA, Bank of America announced that it would end all MSAs the bank had with realty firms. BofA said it would discontinue all "space rental agreement programs due to recent regulatory developments."

"We expect our MSA agreements will conclude by Nov. 1, 2015, and we will terminate our lease agreements for space in accordance with their terms," BofA said. "While the decision to wind down our MSA and [space rental] programs was difficult, the end of these programs allows us to pursue different ways we might help builders and Realtors provide superior service and financing solutions for their customers."

Advice on What Not to Include in an MSA

Socknat said it's not clear how to structure an MSA to be compliant under regulation by the CFPB. However, the CFPB has provided plenty of examples of provisions not to include in an MSA.

Don't pay for services without obtaining an independent third-party evaluation of the fair market value of the goods, facilities or services that are or will be provided. "We know that, according to Cordray, paying fair market value is not a safe harbor in and of itself, but you've lost the argument at the outset if you can't justify that you are not paying more than fair market value for the services that are being provided," Socknat said.

He reiterated that an MSA shouldn't base compensation on past referral volume or anticipated future volume.

"In the old days, it wasn't uncommon to see provisions that had fairly regular reassessments of the success of the marketing services agreement as measured by how much business was generated, and then adjustments to the compensation," Socknat said. "We know that that's not going to work going forward. So, use static compensation that changes only when it's determined that all of the required services were not provided. That is the safest course."

He said an entity shouldn't attempt to justify paying more than an independently-determined fair market value based solely on the reasoning that the market pays more. "What the market pays is important, to be sure, particularly when it's less than what the fair market value is, as determined by an independent third party," Socknat said. "But it has to bear a relation to fair market value or it can create issues."

Payments should also be linked to results from monitoring. "You need to document your monitoring, document what services were and were not provided, and how that impacted any adjustments to the fees paid under the agreement," Socknat said.

He cautioned against entering into agreements that provide for exclusivity, such as being named as a preferred lender. "It's difficult to argue that arrangements that include exclusivity aren't referral arrangements," Socknat said.

Socknat said companies shouldn't enter into multi-purpose arrangements, such as an MSA and a desk rental, or an MSA and a lead agreement. "They're separate, distinct arrangements, and should be documented separately," he said. "I don't know how combining those two would ever pass muster," Socknat said of combining an MSA and a lead agreement.

He suggested lender policies and procedures should prohibit paying for the referral of business. And lenders should train employees, particularly loan originators, that giving a thing of value in return for any expectation of the referral is illegal and in violation of company policy.

Socknat said MSAs shouldn't pay for services that are duplicative, aren't necessary or aren't distinct.

Socknat stressed that lenders should individually gauge the risk of entering into MSAs.

"Business-generation arrangements can present significant risk," he said. "It may or may not be appropriate for your own company's risk tolerance. It may not be appropriate for the risk tolerance of your potential business partners, or how your employees view your institution's risk tolerance."

He noted that industry participants that are more comfortable with risk than others will continue to enter MSAs. "There no doubt are some industry players who see the concern among some members of the industry around MSAs as an opportunity to take over those relationships, enter into more MSAs or other business-generation arrangements," Socknat said.

He said lenders risk losing business or loan officers if they don't match competitors' MSAs. "But the decision has to be based on more than just: 'everyone else is doing it, so we have to as well,'" Socknat said.

ENFORCEMENT ISSUES UNDER THE CFPB

Naimon said Cordray's ruling against PHH makes it clear that entities can't merely rely on prior HUD guidance when entering into an MSA. He added that even if an MSA is drafted to be "technically compliant" with RESPA Section 8, its implementation may nevertheless result in a violation.

The CFPB has faulted MSA participants for the failure to monitor counterparties, an inability to control individual employees and even success with the MSA in the case involving Lighthouse Title.

Socknat said any agreement or arrangement with a third party that relates to a settlement service or the generation of business is susceptible to being characterized by the CFPB as a referral arrangement. "The industry is now in a position of having to potentially justify any sort of arrangement, including those that are designed to generate business," he said.

Naimon said entities can't rely entirely on third-party valuations of services performed under an MSA to justify the MSA's legality.

"What we've done for decades is used some sort of economic or consultant analysis to provide a third-party independent valuation of what the services are worth," he said. "Cordray's PHH decision determined that if there is evidence that an entity has agreed to a referral arrangement, then any payments made under that arrangement are impermissible under RESPA – even if the arrangement is an MSA with market value payments."

Naimon added that whistleblower tips are a critical resource for CFPB to identify RESPA violations.

"The night that the guidance from the CFPB came out, a client sent us a tip that they had gotten a complaint from the bureau based on an email from a tipper, claiming the company was engaged in illegal MSAs," Naimon said. "The CFPB was asking the company to provide information about their MSAs. So, this is something that you have to be very careful with and think about who in the market may set the bureau or some state regulator or someone else onto your door."

Socknat added that if a company has MSAs or other business-generation agreements such as desk rentals or lead-generation agreements, they have to expect that their own employees and competitors are going to notify regulators. He said loan officers are also more likely to prefer to work for lenders that have MSAs.

MONITORING A CONCERN

In October 2015, CFPB Director Richard Cordray showed no sign of backing down regarding MSAs and possible violations of RESPA. Speaking at the Mortgage Bankers Association's annual convention in San Diego, the director noted that his agency concluded from its enforcement experience that MSAs necessarily involve substantial legal and compliance risk for the parties to the agreements – whether they are lenders, brokers, title companies or real estate professionals.

"We believe those risks are greater and less capable of being controlled by careful monitoring than mortgage industry participants may have recognized in the past," said the director. "MSAs appear to create opportunities for parties to pay or accept illegal compensation for making referrals of settlement service business."

The CFPB also found that it is inherently difficult to adequately monitor activities that are performed in turn by a wide range of individuals pursuant to such agreements.

"Especially in view of the strong financial incentives and pressures that exist in the mortgage and settlement service markets, the risk of behaviors that may violate the law are likely to remain significant," Cordray said. "That can be true even where the terms have been carefully drafted to be technically compliant with the provisions of the law."

Reiterating the CFPB's "grave concerns about the use of MSAs in ways that evade the requirements of RESPA," Cordray emphasized that "a more careful consideration of legal and compliance risk arising from these agreements would be in order for anyone that participates in the mortgage industry, including … lenders, brokers, title companies, and real estate professionals."

Such review is particularly justified, given that whistleblower complaints about legal violations with MSAs have been increasing, according to Cordray.

"Our enforcement actions against companies and individuals for violations of RESPA have resulted in more than $75 million in penalties to date, almost all of that arising from the payment of improper kickbacks and referral fees," he said. "We will remain active in scrutinizing the use of such agreements and related arrangements in the course of our enforcement and supervision work."

OUTSIDE OF THE RULEMAKING PROCESS

Jonathan Foxx, president and managing director at Lenders Compliance Group, a consulting firm, said enforcement actions are supplanting notice-and-comment rulemaking at the CFPB.

"While the CFPB also has utilized notice-and-comment rulemaking, it has increasingly resorted to enforcement actions to communicate its priorities and statutory interpretations," he said. "But many of these enforcement actions settle, leaving others unprepared for clear and distinct interpretations of regulatory mandates."

The CFPB also has issued consent orders that detail new legal positions taken by the regulator. Foxx said it seems increasingly clear that the CFPB is set on regulating via consent orders. "The director not only sets policy for the CFPB's enforcement division but also decides the merits of that policy as the first line of appellate review," he said.

Statute of Limitations

Foxx said RESPA provided a three-year statute of limitations on actions brought by the Department of Housing and Urban Development to enforce the law.

"HUD was limited to proceeding in court and had no jurisdiction to proceed administratively," he said. "HUD was entirely bound by this three-year statute of limitations for enforcing RESPA."

With the CFPB, there is no statute of limitations on administrative enforcement of RESPA. Foxx noted that the Dodd-Frank Act, which created the CPFB and reassigned HUD's RESPA enforcement, permits the bureau to bring enforcement actions either through court actions or administrative proceedings.

"Only constitutional prohibitions on retroactivity created any limitations whatsoever on the scope of the CFPB's look-back period," Foxx said.

CFPB Director Richard Cordray held that while the bureau "could not revive claims that became time-barred under HUD (and retroactively re-criminalize the conduct), it could pursue all claims which accrued within the three-year limitations period applicable to HUD."

In his action against PHH, Cordray also determined that there are no limitations for administrative enforcement for claims that accrued after the CFPB was created. With those combined powers, "PHH was held liable for all conduct from July 21, 2008, forward," Foxx said.

Regulation Beyond RESPA

Socknat cautioned that RESPA isn't the only law that can be used against MSAs. "RESPA Section 8 just happens to be the hammer that Cordray is wielding at the moment, and it's a big hammer, to be sure," he said.

Socknat said MSAs and other business-generation arrangements are susceptible to claims regarding unfair, deceptive, or abusive acts or practices. "An act or practice doesn't have to violate a statute or regulation to support a claim that it's unfair, deceptive, or abusive, and that's a scary thing," he said.

State Regulators

Socknat noted that a number of state regulators audit lenders for compliance with federal laws. He said state regulators are increasingly looking for violations of RESPA and for issues involving MSAs.

Before the CFPB released guidance regarding MSAs, Socknat said a lender faced scrutiny by Oregon regulators. The lender was licensed in the state but didn't have any licensed loan originators in Oregon and hadn't made any loans in the state during the exam period.

"Yet during the course of exam, our lender client was required to provide copies of its MSA agreements with its business partners, to provide copies of the fair market evaluation criteria that its independent third party utilized, to share copies of compensation that was paid, and was asked to go back to its marketing service partners to get them to sign affidavits that said that no other settlement service providers were allowed to participate in the meetings that were part of the marketing services arrangement," Socknat said.

He said the lender was able to push back against the requests in part because the lender hadn't originated any mortgages in the state. "The lender didn't have MSAs with parties that were in a position to help generate Oregon loans," Socknat said.

The Washington Department of Financial Institutions also announced in its fall 2015 bulletin that it will focus on the CFPB's bulletin regarding MSAs. "It is the Department's position that while MSAs do not automatically violate RESPA, we agree with the CFPB's conclusion, it is imperative that licensees ensure that their MSAs are carefully valued, expertly managed, and routinely audited to ensure they comply with Section 8," according to the DFI.

The state regulator advised lenders to engage lawyers to review MSAs. The DFI also said lenders should ensure that the services that are to be provided are clearly described in detail; ensure that fair market value is obtained, documented and updated regularly; ensure that services are audited and documented and payments are based on fair market value; and ensure that training is completed.

Lead-Generation Agreements

Unlike joint ventures and desk rentals, Socknat said there hasn't been any formal guidance from federal regulators in recent years regarding lead-generation agreements. He said HUD clarified in 1994 that payment for a list of prospects doesn't violate RESPA, so long as the payment is not conditioned on closed transactions or on other considerations such as an endorsement of the lender or the product.

"The first part of this guidance is fairly straightforward: you can't pay based on closed loans," Socknat said. "The more complicated part of this informal guidance is that you can't pay for an endorsement."

He said current lead-generation practices bear little resemblance to lead-generation practices in 1994. Socknat said the 1994 guidance likely addressed leads gathered by browsing records at a county recorder's office whereas many lead generators now collect information directly from potential borrowers.

"They get consent from those borrowers to share information with one or more lenders, and the issue of endorsement becomes more problematic, particularly given the CFPB's public position on RESPA Section 8," Socknat said.

He said lenders that purchase leads are potentially paying for an endorsement, which could prompt issues with RESPA. "I think it depends on how the arrangement is structured," Socknat said. "In light of the CFPB's position on MSAs, lead-generation arrangements probably warrant a fresh look."

JOINT VENTURES

In 1996, HUD issued a policy statement with a 10-factor test to judge whether a joint venture was in compliance with RESPA. Socknat suggested that the CFPB's focus on MSAs also puts joint ventures at risk.

"As with any lead-generation agreement, at the core of a joint venture is the goal of generating more business, and legally compensating a party that's in a position to refer business," he said. "I think it's wise to revisit how many joint ventures you have in place and how they are actually working."

Naimon said lenders haven't moved from MSAs to joint ventures because sham affiliated business arrangements are prohibited. "That means that you have to create a new joint venture entity and ensure that it's actually the real provider of services, that it's not a shell company and so forth," he said.

Socknat said setting up a joint venture requires a significant outlay of capital and resources to establish a separate company with its own employees, its own policies and procedures and its own net worth.

Naimon said regulators have targeted joint ventures that are actually MSAs that were created to cover what was really happening.

"It's difficult to create these arrangements properly and then keep them operating properly because of the necessity under the multi-factor test," he said.

Socknat added that joint ventures can raise other regulatory issues that don't necessarily impact MSAs. "Depending on the types of fees and the type of joint venture that's been created, certain fees can be required in tests for high-cost loans," he said.

In October 2015, filings with the Securities and Exchange Commission revealed that PHH adjusted the terms of its joint venture with Realogy, a real estate brokerage company. The firms removed a provision from the agreement that stated that Realogy shall be the exclusive recommended real estate firm for PHH's customers.

DESK RENTALS

While federal regulators have allowed for desk-rental agreements, Socknat said the practice should be reviewed in light of the CFPB's focus on MSAs. He said the risk varies based on how the desk-rental agreement operates.

"At one end of the spectrum is renting or subleasing from a real estate agent or builder, space that's actually within that real estate agent's office space or builder's space," Socknat said. "That would seem to me to present a higher degree of risk."

He suggested it's less risky to rent space from a landlord, where that landlord is not the real estate broker or builder, but the space just happens to be next to a builder or real estate broker's office. "It would be difficult for the CFPB to be able to dictate to a lender where they can or can't open an office or lease space, provided the office otherwise is established in compliance with state and federal law," Socknat said.

He said a more ambiguous scenario involves subleasing separate but adjacent space to a builder, where the builder is the landlord. "Space next to a builder is obviously much more valuable than space next to a barbershop, for example," Socknat said. "Even if you're paying fair market value, my concern is that, according to Cordray, just because you paid fair market value doesn't mean it's dispositive."

UNCOMPENSATED REFERRALS AND RELATIONSHIPS WITH REFERRAL SOURCES

Socknat cautioned that agreements for uncompensated referrals can be subject to scrutiny by the CFPB.

"How can you be sure that, notwithstanding the lack of any sort of agreement to pay, that a loan officer might not pay for referrals," Socknat said. "The lender obviously will have policies and procedures that are in place to prohibit giving a thing of value for referrals, but policing it is another matter."

A loan officer's relationships with real estate agents could also run afoul of the CFPB. "Cordray doesn't like steering and lack of consumer choice," Socknat said. "Even without an agreement, a relationship where a real estate agent who refers leads to a loan officer because he knows the lender will deliver could put your company at risk. I'm not suggesting that you all just give up and close up shop. It's just that it's necessary to revisit these relationships."

JOINT MARKETING

Socknat said joint marketing agreements between real estate agents and lenders don't present nearly as much risk as MSAs, though the CFPB could still find fault in such agreements.

He suggested that an agreement where a real estate agent and a lender create a joint marketing campaign, with each paying half the cost and each distributing the marketing material, would likely pass muster with the CFPB.

Naimon added that prominence in the advertisement is also a factor. “You have to pay proportionally to the amount of the advertisement that you get,” he said.

Naimon warned against agreements with real estate agents where the real estate agent works with multiple lenders and ends up not paying for the ad.

“One concern that we’ve seen is that advertisement A goes to lender A, advertisement B goes to lender B, advertisement C goes to lender C, and they ask the lenders to split in three ways the cost of those ads,” he said. “Each lender is only paying for their proportion of what comes up, but the real estate agent ends up paying nothing.”

Naimon said the lender is only allowed to pay half of their share of the cost of the ad because it’s a joint advertisement that has both the real estate agent and the lender.

Socknat cautioned that an agreement where a real estate agent and a lender create a joint marketing piece, each of them pays half, but only the real estate agent distributes the marketing piece to its client, could be viewed as an endorsement or steering.

VENDOR OVERSIGHT

The CFPB requires lenders to oversee their vendors and has made lenders liable for actions completed by vendors on behalf of lenders. Socknat said lead generators and MSA partners could fall under the definition of a vendor.

“In exams, the CFPB has advised our wholesale lender clients that they’re responsible for monitoring the marketing undertaken by their brokers,” he said. “It’s not a stretch to argue that an MSA partner or lead generator is not too different from a broker.”

Socknat suggested that as lenders consider alternatives to MSAs, it’s important to keep in mind regulatory issues that may be presented by the alternatives.

SECTION 4:
THE CFPB AND PHH

OVERVIEW

In January 2014, the Consumer Financial Protection Bureau initiated an administrative proceeding against PHH, accusing the lender of harming consumers through a mortgage insurance kickback scheme that started as early as 1995.

The crux of the dispute is the CFPB's assertion that PHH violated the Real Estate Settlement Procedures Act by illegally referring borrowers to private mortgage insurance companies that purchased reinsurance from its captive reinsurance company.

The CFPB also asserted that the reinsurance payments received by PHH from mortgage insurers were a "thing of value" received in consideration for PHH's referrals and not compensation for services performed. The payments grossly exceeded the value of the reinsurance services provided by Atrium, PHH's captive reinsurer, the CFPB alleged.

Further, the bureau alleged that PHH violated RESPA because the amounts that were ceded to Atrium constituted a split of mortgage insurance premiums paid by the borrowers.

Administrative Law Judge Cameron Elliot subsequently conducted a lengthy trial on the matter and concluded that PHH referred consumers to mortgage insurance companies in exchange for kickbacks. Elliot held that these referrals and kickbacks violated RESPA and set a $6.4 million penalty.

Both parties appealed the ALJ's recommended decision, and the appeal was fully briefed and argued.

However, in June 2015, CFPB Director Richard Cordray overrode the $6.4 million penalty set by an ALJ and ordered PHH to pay $109.2 million – all the mortgage insurance premiums it received from its captive reinsurer, Atrium, after July 2008, regardless of when the loan was originated.

July 2008 was three years (the statute of limitations on Real Estate Settlement Procedures Act actions) prior to when the CFPB took over RESPA enforcement from the Department of Housing and Urban Development. The ALJ penalty was based on MI premiums received on loans originated after July 2008.

Cordray's view is that captive reinsurance programs violate RESPA's anti-kickback provisions, whether or not they've been profitable for the lender sponsor. In this case, PHH was given no credit for the losses paid by its captive reinsurer.

The $109.2 million represents $72.8 million ceded by United Guaranty, $34.2 million from Genworth, $1.1 million from CMG and $0.96 million from Radian.

The fine was the CFPB's largest "disgorgement" to date, according to a spokesman for the regulator. Cordray also decided not to assess a civil money penalty against PHH.

PHH disputed the bureau's charges when they were first made and remained adamant in its defense. The company filed an appeal to the U.S. Court of Appeals in June 2015, marking the first appeal of a CFPB administrative proceeding.

"We strongly disagree with the decision of the director," said Dico Akseraylian, a senior vice president with PHH. "We believe this decision is inconsistent with the facts and is not in accord with well-settled legal principles and interpretations."

"We continue to believe we complied with RESPA and other laws applicable to our mortgage reinsurance activities," he continued. "The company did not provide reinsurance on loans originated after 2009. While there can be no assurances as to the final outcome of our appeal, we believe our appeal will be successful and, as a result, are not adjusting our previously issued earnings guidance for this matter."

In 2014, PHH established a $7 million reserve to cover the matter, an amount that will have to be substantially increased if it loses the appeal.

INITIAL ACTION BY THE APPEALS COURT

In August 2015, the U.S. Court of Appeals for the District Columbia issued a stay against the $109.2 million fine levied by the bureau against PHH.

"We are gratified that a unanimous panel of the D.C. Circuit found that PHH satisfied the stringent requirements for a stay pending appeal – requirements that include a likelihood of success on the merits," PHH said.

When PHH requested the stay, the lender argued that Cordray's decision was a sweeping new construction of RESPA that contradicted nearly two decades of precedent and will likely be overturned.

"Even if [Cordray's] interpretations were permissible readings of the statute, which they are not, they most certainly cannot be applied retroactively to punish conduct undertaken by petitioners based on explicit agency advice expressly approving that conduct," the company said, alluding to previous guidance from the Department of Housing and Urban Development.

PHH also noted that the due process clause of the U.S. Constitution prohibits the government from retroactively imposing "punishment based on conduct that, at the time it was undertaken, was recognized as lawful. ... Principles of fair notice alone require vacating the [director's] decision and order."

PHH added that Cordray's interpretations of RESPA can't be squared with the text of the statute and would gut its purpose. Further, "Even if Sections 8(a) or 8(c)(2) were ambiguous, those provisions must be interpreted in petitioners' favor."

The company also argued that Cordray erred in concluding that administrative enforcement actions under RESPA are not subject to any statute-of-limitations period.

PHH further asserted that the sanctions imposed by Cordray exceed the bureau's statutory authority and are otherwise invalid, and that the CFPB violates the constitutional separation of powers.

PHH said the balance of hardships and the public interest heavily favored a stay.

In arguing against a stay, the CFPB said PHH hadn't shown that it was likely to succeed in the appeal.

SUPPORT FOR PHH FROM THE CMC

In October 2015, the Consumer Mortgage Coalition, a trade group representing national mortgage lenders, servicers and service providers, filed an amicus brief in support of PHH.

The CMC said the CFPB's decision to ignore more than 40 years of established interpretation of RESPA's anti-kickback provision would deprive consumers of the benefits of risk retention and do them further harm.

The brief in support of the petitioner in *PHH Corporation, et al., v. Consumer Financial Protection Bureau* said that allowing CFPB Director Richard Cordray's decision to stand would increase closing costs, make an already lengthy closing period longer, and make the mortgage origination process more confusing for borrowers and lenders.

The CMC argued that Cordray's decision weakened the mortgage reinsurance market and specifically harms borrowers that use mortgage insurance. They include first-time homebuyers, those who can only afford lower downpayments, and other vulnerable consumers, the group said.

Captive mortgage reinsurance provides an additional form of risk retention that furthers Congress's – and the CFPB's – goal of protecting consumers, the CMC added.

"In particular, captive mortgage reinsurance aligns lenders' and insurers' incentives by having lenders shoulder a larger portion of the burden if their loans fail," the CMC said. The group noted that Atrium, the PHH captive reinsurer, paid $127.7 million in claims to United Guaranty Insurance Corp. and $28.6 million to Genworth Mortgage Insurance.

The group said RESPA also allows lenders to develop business structures that align risk retention and underwriting decisions while also protecting consumers. For decades, RESPA Section 8 has been interpreted to permit unpaid referrals under clear rules, the CMC said.

"Since the passage of RESPA in 1974, consumers have benefitted from unpaid referrals in a number of ways," the group noted. "Rather than limit the information available to a consumer during this critical time, a real estate agent, broker or lender can refer the consumer to those that can help close the loan quickly and on time. So long as any payments are not for referrals, but are bona fide payments 'for goods or services actually rendered,' referrals are permitted."

Separately, the law firm of K&L Gates noted that Cordray's ruling holds that no matter what the amount of payments made for services rendered, any quid pro quo agreement in which one party receives business as a result of referring settlement service business to another party is, in the CFPB's view, a violation of Section 8(a).

The law firm said that interpretation of RESPA might be the CFPB's Achilles' heel in PHH's appeal, "particularly if the court of appeals determines … [the defendant should be favored where there is ambiguity] and that the CFPB is therefore not entitled to deference in its interpretation of the statute."

Reply Brief from CFPB

In November 2015, the CFPB filed a brief in PHH's appeal.

The CFPB said PHH violated RESPA Section 8(a) because it entered into agreements with mortgage insurers so that whenever an insurer received a referral from PHH, the insurer paid PHH a kickback in the form of premiums for mortgage reinsurance. "PHH thus committed a separate violation every time it accepted a kickback payment," the bureau said.

"But PHH wants this court to interpret Sec. 8(a) so that its violations occurred not when it accepted kickback payments, but much earlier when it entered into loans with borrowers that might (or might not) subsequently result in kickbacks," the agency added.

Such an interpretation would land most of PHH's violations outside of the bureau's authority, but it is not what Sec. 8(a) provides, the CFPB said. "Accepting a kickback is an element of a Sec. 8(a) violation, and because PHH set up its scheme so that it received kickbacks after the loans closed, that is when it violated Sec. 8(a)," according to the regulator.

The CFPB then took on PHH's argument that Sec. 8(c)(2) is a defense to its conduct. "RESPA contains some exemptions, but Sec. 8(c)(2) is not among them," the regulator said.

Instead, Sec. 8(c)(2) clarifies that there is no violation of Sec. 8(a) when a party making referrals is paid by a party receiving referrals so long as those payments are for services actually performed and are not given in exchange for the referrals.

"If, as PHH urges, Sec. 8(c)(2) permits a party to operate the sort of scheme PHH used and to condition referrals on the purchase of goods or services from a subsidiary of the party, this would flout the text, structure and goals of RESPA," the CFPB continued.

Nor does the letter from HUD on the subject shield PHH, the bureau continued. "That letter is neither a model of clarity, nor does it express any sort of well-settled interpretation of Sec. 8(c)(2)," the CFPB said. "In fact, HUD regulations explain that the letter is an unofficial staff interpretation that provides no protection from RESPA liability."

The CFPB's brief conceded that RESPA Sec. 8(c)(2) is ambiguous, but the regulator said Cordray's "reasonable interpretation" of that section is entitled to *Chevron* deference, which is to say, the court should defer to the regulatory agency responsible for interpreting and enforcing a given statute.

PHH argued that because RESPA may be criminally enforced, the court should apply the rule of lenity and interpret every ambiguity in PHH's favor. The CFPB countered that when a court is interpreting a civil statute that may be criminally enforced, the rule of lenity is an interpretive tool of last resort.

"Here, there is no need for the last resort, since the director's reasonable interpretation has resolved Sec. 8(c)(2)'s ambiguity," the CFPB said.

The regulator also noted that it didn't try to assert that all marketing services agreements are unlawful or illegitimate, in and of themselves.

"Parties to illegal kickback agreements are unlikely to put those agreements into writing," the CFPB said. "So those agreements may have to be identified based on circumstantial evidence and inference. But RESPA Section 8(c)(2) clarifies when it is not proper to infer an illegal agreement. Illegality cannot be inferred merely because a party that received referrals makes payments to a party that made the referrals.

"Moreover, such an arrangement is not illegal if the payments are for services actually provided, and if the purchase of those services (by the party that received the referrals) is bona fide, i.e., in good faith, rather than a quid pro quo for referrals," the bureau added.

The CFPB also countered PHH's claim that Cordray had "declared per se illegal" affiliated mortgage reinsurance. "No," the CFPB said. "Such arrangements violate RESPA only if, as here, the purchase of the reinsurance is the price for receiving referrals."

The CFPB affirmed in its brief that "a party violates Sec. 8(a) when it enters a contract with the understanding that, in exchange, the counterparty will refer settlement service business, even if the fees paid under the contract are fair market value for the goods or services provided."

An industry attorney said the CFPB's arguments could be rejected by the appeals court.

"What the CFPB is saying is that Sec. 8(c)(2) would only be relevant if there were a question as to whether PHH had entered into an agreement to refer settlement services in exchange for kickbacks," the attorney said. "That's just wrong. That's not what Sec. 8(c)(2) says. It's as if the bureau thinks that if they just keeping saying something over and over again, sometimes in different ways, someone will eventually believe it."

RESPONSE FROM PHH

In December 2015, PHH filed a brief in response to the brief submitted by the CFPB. “The CFPB’s response is long on allegation and short on law,” PHH said.

The CFPB had claimed that Section 8(c)(2) is “irrelevant.” PHH countered that both the statute and prior agency interpretations set a longstanding precedent that payments for services such as mortgage reinsurance that are actually performed and reasonably priced are lawful.

“Cordray’s attempt to impose liability on PHH for past conduct based on a new, diametrically opposite construction of Section 8 faces a glaring and fatal problem: fair notice,” PHH said. “Cordray may try to shrug off the previous agency interpretations, but HUD, other agencies, courts, commentators, and even the ALJ and enforcement counsel in this proceeding all viewed them as binding.”

The CFPB claimed that no “official agency pronouncement” misled PHH into believing that the lender’s activities were compliant with RESPA.

“The CFPB’s argument boils down to the extraordinary assertion that the prior interpretations were just ‘unofficial’ enough to fool not only PHH but the entire industry,” PHH said.

The lender said that if the appeals court allows the CFPB’s actions involving RESPA to stand, the “bait-and-switch” would cause the practice of administrative law to resemble Russian Roulette.

PHH said the CFPB isn’t allowed to discard well-settled interpretations at will or to apply new interpretations retroactively. The lender added that due process bars an agency from punishing activity undertaken in reliance on its own official interpretation.

PHH added that Cordray’s “novel constructions of RESPA” are unlawful.

The lender said Cordray essentially eliminated Section 8(c)(2), creating staggering liability under Section 8(a), and untethered administrative enforcement from any time limitations. “That outcome cannot be squared with the statutory text or Congress’s obvious intent to allow compensation for legitimate services,” the company said.

The lender added that because Section 8 is a criminal prohibition, the rule of lenity resolves any possible ambiguity without resort to deference. “Contrary to the CFPB’s claim, deference is not a canon of statutory construction that applies at *Chevron’s* first step: It is a standard of review that governs the second step,” PHH said.

PHH said the appeals court should vacate Cordray’s actions “in light of these grave and numerous legal errors.”

OUTLOOK

Industry observers expect the appeals court to rule on the case involving PHH and the CFPB sometime in 2016. As of January 2016, it was unclear how the appeals court would rule.

"You just don't know what a court is going to do with a case like this, where there is this much at stake, and there are nuanced arguments about statutory and regulatory interpretation," said an industry attorney.

"One thing the court could do is simply say it does not agree that this doctrine should apply to PHH because PHH did not have notice of this change in the interpretation of the law by the bureau, but it is going to say this is the law going forward," he said. "So PHH could win but the case could be a disaster for the industry."

An industry lobbyist said this case is likely to make it to the U.S. Supreme Court.

APPENDIX

CFPB BULLETIN 2015-5

Consumer Financial
Protection Bureau

1700 G Street NW, Washington, DC 20552

CFPB Compliance Bulletin 2015-05

Date: October 8, 2015
Subject: RESPA Compliance and Marketing Services Agreements

The Consumer Financial Protection Bureau (CFPB or the Bureau) issues this compliance bulletin to remind participants in the mortgage industry of the prohibition on kickbacks and referral fees under the Real Estate Settlement Procedures Act (RESPA) (12 U.S.C. 2601, *et seq.*) and describe the substantial risks posed by entering into marketing services agreements (MSAs).[1] The Bureau has received numerous inquiries and whistleblower tips from industry participants describing the harm that can stem from the use of MSAs, but has not received similar input suggesting the use of those agreements benefits either consumers or industry. Based on the Bureau's investigative efforts, it appears that many MSAs are designed to evade RESPA's prohibition on the payment and acceptance of kickbacks and referral fees. This bulletin provides an overview of RESPA's prohibitions against kickbacks and unearned fees and general information on MSAs, describes examples of market behavior gleaned from CFPB's enforcement experience in this area, and describes the legal and compliance risks we have observed from such arrangements.

Overview of RESPA and Marketing Services Agreements

Congress enacted RESPA in 1974 as a response to abuses in the real estate settlement process. Thus, a primary purpose of RESPA is to "eliminat[e] … kickbacks or referral fees that tend to increase unnecessarily the costs of settlement services." 12 U.S.C. 2601(b)(2). The statute, which has both civil and criminal penalties, covers myriad settlement services, including "any service provided in connection with a real estate settlement," such as title searches, examinations, and insurance; services rendered by an attorney; document preparation; property surveys; rendering of credit reports or appraisals; inspections; services rendered by a real estate agent or broker; and

[1] Regulation X, which implements RESPA, is codified at 12 C.F.R. Part 1024.

loan origination, processing, and underwriting. 12 U.S.C. 2602(3), 12 U.S.C. 2607(d) (penalty provision); *see also* 12 C.F.R. 1024.2(b).

Section 8(a) of RESPA prohibits the giving and accepting of "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." 12 U.S.C. 2607(a); *see also* 12 C.F.R. 1024.14(b). Section 8(c)(2) states that "[n]othing in this section shall be construed as prohibiting . . . 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." 12 U.S.C. 2607(c)(2); *see also* 12 C.F.R. 1024.14(g).

MSAs often involve providers of settlement services in a mortgage loan transaction, such as a lender, real estate agent or broker, or a title company.[2] They may also involve third parties who are not settlement services providers, such as membership organizations. MSAs are usually framed as payments for advertising or promotional services, but in some cases the payments are actually disguised compensation for referrals.

Bureau Experience

In the Bureau's experience, determining whether an MSA violates RESPA requires a review of the facts and circumstances surrounding the creation of each agreement and its implementation. The nature of this fact-intensive inquiry means that, while some guidance may be found in the Bureau's previous public actions, the outcome of one matter is not necessarily dispositive to the outcome of another. Nevertheless, any agreement that entails exchanging a thing of value for referrals of settlement service business involving a federally related mortgage loan likely violates RESPA, whether or not an MSA or some related arrangement is part of the transaction.

The Bureau's Office of Enforcement has identified violations of RESPA Section 8(a) in the course of its investigations, including investigations that involved the use of oral or written MSAs. In addition, the Bureau has received numerous examples of MSAs from industry whistleblowers that, upon initial review, appear to use MSAs to disguise kickbacks and referral fees. In the course of

[2] HUD issued an interpretive rule addressing the issue of real estate brokers or agents providing marketing services for home warranty companies. *See* Real Estate Settlement Procedures Act (RESPA): Home Warranty Companies' Payments to Real Estate Brokers and Agents, 75 FR 36271 (June 25, 2010); 75 FR 74620 (Dec. 1, 2010) (response to public comments).

one investigation resulting in an enforcement action that specifically involved MSAs, the Bureau observed a title insurance company entering MSAs as a quid pro quo for the referral of business. The fees paid under the agreements were based, in part, on how many referrals the title insurance company received and the revenue generated by those referrals. From its investigation of the underlying facts, the Bureau found that the number of referrals increased significantly when MSAs existed, and the differences in referrals were statistically significant and not explained by seasonal or year-to-year fluctuations.

Impermissible actions that some MSAs attempt to disguise, such as the steering of business in connection with kickbacks and referral fees, may result in consumers paying higher prices for mortgages than would likely be the case without disguised kickback or referral fees. These practices also tend to indirectly undermine consumers' ability to shop for mortgages, which can raise costs for consumers. In terms of thwarting shopping, one investigation that ended with an enforcement action revealed that consumers' ability to shop was hindered when a settlement service provider buried the disclosure that consumers can shop for settlement services in a description of the services that its affiliate provided. *See* 12 U.S.C. 2607(c)(4); 12 C.F.R. 1024.15(b)(1). In another instance that also resulted in an enforcement action, a settlement service provider did not disclose its affiliate relationship with an appraisal management company and did not tell consumers that they had the option of shopping for services before directing them to the affiliate. The steering incentives that are inherent in many MSAs are clear enough to create tangible legal and regulatory risks for the monitoring and administration of such agreements.

The Bureau has also seen cases where companies fail to provide some or all of the services required under their agreements. In the course of investigations that have led to enforcement actions, the Bureau has found many examples of settlement service providers keeping payments received from other providers without actually performing any contractually-obligated services. They include instances of not performing underwriting, processing, and closing services; not executing title insurance work; not carrying out marketing services; and not delivering financing to fund the origination of loans. When services promised under an MSA are not performed, but payments are being made, a reasonable inference can be drawn that the MSA is part of an agreement to refer settlement services business in exchange for kickbacks.

Illegal kickbacks and referral fees, including those disguised by MSAs, present compliance risks not just for the individuals who are directly involved in the impermissible conduct, but also for the companies that employ them. As an example of such liability, in another matter that resulted in an enforcement action, a title company entered into unwritten agreements with individual loan officers in which it paid for the referrals by defraying the loan officers' marketing expenses. The title company supplied loan officers with valuable lead information and marketing materials. In exchange, the loan officers sent referrals to the title company. The lenders did not detect these RESPA violations and/or correct or prevent them, even when they had reason to know that the title company was defraying the marketing expenses of the lenders and their loan officers.

Other circumstances involving MSAs may also indicate broad risks of noncompliance with RESPA. For example, instead of directing their advertising and promotional services toward consumers, as MSAs purport to contemplate, some companies that frequently enter into MSAs actually direct the bulk of their advertising and promotional efforts toward other settlement service providers in an effort to establish more MSAs. Certain other companies use a third-party consultant to set prices for the services that the MSA purports to cover, but independently established market-rate compensation for marketing services, alone, does not suffice to ensure the legality of an MSA.

As of the date of this bulletin, the Bureau has taken a significant number of public enforcement actions under RESPA. The payment of improper kickbacks and referral fees has been the basis of almost all of these actions. Resolving these matters has entailed injunctive relief including bans on entering MSAs or working in the mortgage industry for periods of up to five years. RESPA violations have cost industry participants over $75 million in penalties so far. In addition to corporate liability, some of these enforcement actions have required individuals in charge of companies that committed the violations to pay significant monetary penalties.

Legal and Compliance Risks Created by Marketing Services Agreements

In recent months, various mortgage industry participants have publicly announced their determination that the risks and complexity of designing and monitoring MSAs for RESPA compliance outweigh the benefits of entering the agreements. Accordingly, certain lenders have dissolved existing agreements and decided that they will no longer enter into MSAs. The Bureau encourages all mortgage industry participants to consider carefully RESPA's requirements and restrictions and the adverse consequences that can follow from non-compliance.

As described above, the Bureau has found that many MSAs necessarily involve substantial legal and regulatory risk for the parties to the agreement, risks that are greater and less capable of being controlled by careful monitoring than mortgage industry participants may have recognized in the past. MSAs appear to create opportunities for parties to pay or accept illegal compensation for making referrals of settlement service business. The Bureau also found that efforts made to adequately monitor activities that in turn are performed by a wide range of individuals pursuant to MSAs are inherently difficult. Especially in view of the strong financial incentives and pressures that exist in the mortgage and settlement service markets, the risk of behaviors that may violate RESPA are likely to remain significant. That can be true even where the terms of the MSA have been carefully drafted to be technically compliant with the provisions of RESPA.

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. This review is especially warranted insofar as whistleblower complaints about MSAs that violate RESPA have been increasing. The Bureau intends to continue actively scrutinizing the use of such agreements and related arrangements in the course of its enforcement and supervision work. Any industry participant that suspects unlawful activity by others or that wishes to self-report its own conduct that may have violated RESPA is encouraged to contact the CFPB. Self-reporting and cooperation, consistent with the Responsible Business Conduct bulletin, CFPB Bulletin 2013-06, will be taken into account in resolving such matters.[3]

Regulatory Requirements

This compliance bulletin summarizes existing requirements under the law as well as findings and conclusions the Bureau has made in exercising its enforcement authority. The bulletin is a non-binding general statement of policy articulating considerations relevant to the Bureau's exercise of its supervisory and enforcement authority. It is therefore exempt from the notice and comment rulemaking requirements under the Administrative Procedure Act, pursuant to 5 U.S.C. 553(b). Because no notice of proposed rulemaking is required, the Regulatory Flexibility Act does not require an initial or final regulatory flexibility analysis.[4] The Bureau has determined that this compliance bulletin does not impose any new or revise any existing recordkeeping, reporting, or disclosure requirements on covered entities or members of the public that would be collections of information requiring OMB approval under the Paperwork Reduction Act.[5]

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[3] *See* CFPB Bulletin 2013-06, *Responsible Business Conduct: Self-Policing, Self-Reporting, Remediation, and Cooperation* (June 25, 2013), *available at* http://files.consumerfinance.gov/f/201306_cfpb_bulletin_responsible-conduct.pdf.

[4] 5 U.S.C. 603(a), 604(a).

[5] 44 U.S.C. 3501, *et seq*.

CFPB FINAL ORDER 227

UNITED STATES OF AMERICA
Before the
CONSUMER FINANCIAL PROTECTION BUREAU

ADMINISTRATIVE PROCEEDING
File No. 2014-CFPB-0002

In the Matter of	)	
PHH CORPORATION, PHH MORTGAGE CORPORATION, PHH HOME LOANS LLC, ATRIUM INSURANCE CORPORATION, and ATRIUM REINSURANCE CORPORATION	)	FINAL ORDER

For purposes of this Order, the following definitions shall apply:

1. "Respondents" means PHH Corporation, PHH Mortgage Corporation, PHH Home Loans LLC, Atrium Insurance Corporation, and Atrium Reinsurance Corporation.

2. The term "settlement service" has the meaning given in 12 U.S.C. § 2602(3) and in 12 C.F.R. § 1024.2.

3. The term "referral" has the meaning given in 12 C.F.R. § 1024.14(f).

4. The term "thing of value" has the meaning given in 12 U.S.C. § 2602(2) and in 12 C.F.R. § 1024.14(d).

I.

IT IS ORDERED that Respondents, their successors and assigns, and their officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the referral of any borrower to a provider of mortgage insurance, shall CEASE AND DESIST from violating section 8 of the Real Estate Settlement Procedures Act, 12 USC § 2607(a).

II.

IT IS FURTHER ORDERED that Respondents, their successors and assigns, and their officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, shall CEASE AND DESIST, for a period of 15 years, from entering into any captive reinsurance agreement.

III.

IT IS FURTHER ORDERED that Respondents, their successors and assigns, and their officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, shall CEASE AND DESIST, for a period of 15 years, from referring any borrower to any provider of a real estate settlement service if that provider has agreed to purchase or pay for any service from any of the Respondents, and the provider's purchase of or payment for that service is triggered by those referrals.

IV.

IT IS FURTHER ORDERED that Respondents, their successors and assigns, and their officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, shall maintain records of all things of value that any respondent receives or has received from any real estate settlement service provider to which any Respondent has referred borrowers since July 21, 2008, and for the next 15 years. This requirement applies to any thing of value that the Respondent receives or has received within 24 months of the referral. Respondents must maintain these records for five years after receipt of the thing of value, and must make them available to the Consumer Financial Protection Bureau upon request.

V.

IT IS FURTHER ORDERED that Respondents PHH Corporation, PHH Mortgage Corporation, PHH Home Loans LLC, Atrium Insurance Corporation, and Atrium Reinsurance Corporation shall pay disgorgement to the Consumer Financial Protection Bureau in the amount of $109,188,618. Within 30 days of this order, they shall pay this amount in the form of a wire transfer as instructed by counsel for the Bureau. However, if any of the Respondents appeals this decision pursuant to 12 U.S.C. § 5563(b)(4), Respondents may, within 30 days after service of this order, pay the disgorgement into an escrow account in lieu of making the payment to the Bureau. The escrow account shall be held by an entity that is chosen by Respondents and is acceptable to the Bureau. The escrow account shall be established so that if all or any portion of the disgorgement award is upheld on appeal, that amount shall be released to the Bureau within 30 days after the mandate issues on that appellate decision. Once the mandate has issued and the Bureau has received the portion of the disgorgement award to which it is entitled, any funds remaining in escrow shall be released to Respondents.

SO ORDERED the 4th day of June, 2015.

Richard Cordray

Richard Cordray
Director
Consumer Financial Protection Bureau

DECISION OF THE DIRECTOR:
IN THE MATTER OF PHH

UNITED STATES OF AMERICA
Before the
CONSUMER FINANCIAL PROTECTION BUREAU

ADMINISTRATIVE PROCEEDING
File No. 2014-CFPB-0002

In the Matter of

PHH CORPORATION,
PHH MORTGAGE CORPORATION,
PHH HOME LOANS LLC,
ATRIUM INSURANCE CORPORATION, and
ATRIUM REINSURANCE CORPORATION

DECISION OF THE DIRECTOR
(PUBLIC VERSION)

Introduction

Many view a new home as the foundation of the American dream. But buying a home is among the biggest financial decisions most people ever make, and getting a mortgage to pay for it can be a complicated and frustrating experience. When consumers arrive at their mortgage closings, they often face a pile of documents with all the intricate details of the transaction. This includes the terms of the mortgage loan and all of the closing costs, which are payments for the real estate settlement services that are involved in buying a home. Settlement services are unfamiliar to most consumers, and the costs of each service can range from negligible to substantial. Although most consumers actively shop for a home and some shop for a mortgage, very few actually shop for settlement services.

In 1974, Congress found that the market for settlement services did not operate as a competitive market, but was prone to abusive and unreasonable practices. *See* 12 U.S.C. § 2601(a), (b)(2). To make the market operate more fairly, Congress enacted the Real Estate Settlement Procedures Act (RESPA), 12 U.S.C. §§ 2601-2617, and explicitly designed it to protect consumers "from unnecessarily high settlement charges caused by certain abusive practices." 12 U.S.C. § 2601(a). One of the ways RESPA seeks to achieve this goal is by prohibiting kickbacks, referral fees, and fee splits between settlement service providers and any other person, all of which can distort the competitive market and increase the costs of settlement services. *See* 12 U.S.C. § 2607(a), (b).

This is the first appeal of an administrative enforcement proceeding before the Consumer Financial Protection Bureau. Administrative Law Judge Cameron Elliot conducted a lengthy trial and concluded that PHH Corp., a mortgage lender, referred consumers to mortgage insurance companies in exchange for kickbacks, which took the form of mortgage *re*insurance premiums paid to a subsidiary of PHH. The ALJ held that these referrals and kickbacks violated RESPA.

All parties appealed the ALJ's Recommended Decision, and the appeal was fully briefed and argued. Based on the facts as developed in this proceeding, I affirm the ALJ's conclusion that PHH violated RESPA, though on somewhat different grounds. I further conclude that PHH's violations warrant disgorgement of just over $109 million, as specified below, along with additional injunctive relief. To the extent that the ALJ's findings and conclusions are consistent with this decision, I adopt them as my own. I have issued two versions of this decision – an unredacted version for the parties, and a redacted version for the public. I have made these redactions based upon the protective order entered by the ALJ, as amended. Docs. 48, 176.[1]

Findings of Fact and Legal Background

As explained below, the following facts have been established by a preponderance of the evidence in this proceeding.

A. The cast of characters

PHH Mortgage Corp. and PHH Home Loans LLC are owned, at least in part, by PHH Corp. Doc. 16 at 2. PHH Corp. is publicly owned, and through PHH Mortgage and PHH Home Loans (collectively, "PHH"), is an originator of home mortgage loans. During the relevant period, PHH was one of the nation's largest home mortgage lenders. Tr. at 2171. It sold virtually all the mortgages it originated into the secondary mortgage market, primarily to Fannie Mae and Freddie Mac. Doc. 18 at 3. In addition to originating loans, PHH purchased loans that other lenders originated. Tr. at 102-104. After it purchased these loans, PHH sold them in the secondary market. ECX 653 at Ex. F ¶ 11.

In 1994, PHH Corp. established Atrium Insurance Corp. as a wholly-owned subsidiary. ECX 153 at 57; Tr. at 123. Atrium did not have any employees of its own – all of its functions were performed by individuals who were also employees of PHH. ECX 153 at 24. In 2009, PHH established Atrium Reinsurance Corp., which took over all the functions of Atrium in January 2010. ECX 653 at 11.

Five other mortgage insurance companies that received referrals of borrowers from PHH have intervened in this proceeding to protect their rights with respect to confidential investigative information they provided to the Bureau. Doc. 40. Those companies are United Guaranty Residential Mortgage Co. (UGI); Genworth Mortgage Insurance Corp. (Genworth); Radian Guaranty Inc. (Radian); Mortgage Guaranty Insurance Co. (MGIC); and Republic Mortgage Insurance Co.

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[1] The following abbreviations appear in this decision:

Doc.	Document filed in the proceeding before the ALJ, *available at* http://www.consumerfinance.gov/administrativeadjudication/2014-cfpb-0002/
Tr.	Transcript of the proceeding before the ALJ
ECX	Exhibit submitted by Enforcement counsel in the proceeding before the ALJ
RCX	Exhibit submitted by Respondents in the proceeding before the ALJ
Oral Arg. Tr.	Transcript of the oral argument in this appeal

B. Mortgage insurance and reinsurance

Mortgage insurance provides protection for mortgage lenders (or those who become mortgage creditors) when borrowers default on mortgage loans. Although mortgage insurance provides protection for creditors, it is paid for by borrowers, who thus are paying for insurance that they will never collect. Tr. at 325-326. Borrowers are usually required to obtain mortgage insurance if they are financing more than 80% of the value of a home because Fannie Mae and Freddie Mac will not purchase such loans without this additional security in the event of foreclosure. *Id.* Mortgage insurance policies normally cover a certain percentage of a borrower's loan. Most of the policies in this case provided coverage for 25% of the loan, so that in the event of a foreclosure, the mortgage insurer would cover the lender's losses up to 25% of the mortgage amount. *Id.*

Borrowers who are required to get mortgage insurance do not normally shop for it. ECX 153 at 85; Tr. at 119. Instead, lenders designate the mortgage insurance company, and borrowers pay for the insurance – usually paying a monthly premium as part of each mortgage payment. Thus, mortgage insurance companies typically depend on lenders to "refer" business to them; they do not market directly to borrowers, and borrowers do not seek them out. Tr. at 119, 334. Mortgage insurers must file their rates with state insurance regulators, and there is generally little variation among rates charged by different mortgage insurers. ECX 153 at 198.

Throughout the 1990s, and up until the collapse of housing prices in 2008, mortgage insurance was very lucrative, though this revenue did not benefit mortgage lenders. Tr. at 340, 361-362, 2142. Atrium provided a way for PHH to capture a portion of the profits that mortgage insurers had been reaping. Tr. at 361-362, 2142; *see* ECX 682. Atrium was a mortgage *re*insurance company. ECX 653 at 9. A legitimate mortgage reinsurer assumes some of the risk that would otherwise be borne by a mortgage insurer. ECX 153 at 74; ECX 653 at 5. In return, it garners a portion of the premiums that borrowers pay to the mortgage insurer. ECX 653 at 5; Tr. at 124. At various times, beginning in 1995, Atrium entered into contracts with mortgage insurers to provide them with reinsurance on loans originated by PHH. ECX 17. To get this reinsurance, the mortgage insurer had to pay Atrium (or, to use the industry jargon, "cede" to Atrium) a portion of the mortgage insurance premium paid by the borrower. Tr. at 125. Atrium was a "captive" reinsurer, meaning it provided reinsurance only for mortgage insurers that insured mortgages generated by PHH, and only for mortgages that PHH originated or obtained from its own correspondent lenders. ECX 153 at 38-39; Tr. at 123-124.

Mortgage insurers provide payment any time a lender suffers a loss on a particular loan. Tr. at 325-326. Mortgage reinsurance works differently, because it provides coverage not for lenders, but for mortgage insurers themselves. Thus, Atrium did not provide coverage for individual loans; instead, its reinsurance covered a block of loans, known as a "book year." ECX 153 at 74; Tr. at 602. Normally, a book year consisted of all the policies written by a particular insurer on mortgages originated by PHH during a specific year. Tr. at 602. Atrium's obligation to the mortgage insurer was determined on a monthly or quarterly basis, based on the total losses attributed to the loans in that book year. ECX 153 at 12-13. If the mortgage insurer's obligation on that book year of policies exceeded the coverage threshold, Atrium would pay the insurer the amount of the excess, up to the limit of Atrium's coverage. *See, e.g.*, RCX 44.

Pursuant to its contracts, Atrium provided each reinsured book year with ten years of reinsurance – meaning that for ten years following the closing of the loans in a book year, Atrium received reinsurance premiums covering those loans and was liable for claims. After ten years, the mortgage insurer was on its own. ECX 153 at 58-59; RCX 44. Atrium established a separate trust account for each mortgage insurer that it reinsured. Tr. at 581. For the most part, claims made by a particular mortgage insurer would be paid only from that company's trust account. *Id.*

Atrium entered into its first captive contract with UGI in 1995. Tr. at 2180. Atrium entered its second contract with Genworth in 2001, its third contract in 2004 with Radian, and its fourth (and final) contract in 2006 with CMG Mortgage Insurance Co. (CMG). Tr. at 1926-27, RCX 44.

Atrium's captive reinsurance agreements could be terminated through one of two methods: "run-off" or "commutation." When an agreement went into run-off, Atrium accepted no new loans from that mortgage insurer, but remained liable for loans that it had previously accepted, and continued to receive premiums on those loans. Tr. at 460. If, instead, Atrium commuted an agreement, it terminated the relationship with that insurer entirely. As part of the commutation, Atrium and the insurer exchanged payments based on an actuarial valuation, thereby settling all past, present, and projected future obligations under the agreement. Tr. at 595-596; ECX 790 at 62-14.

From 1995 to 2001, PHH referred most of its loans that required mortgage insurance to UGI. During that period, UGI was the only mortgage insurer that had a captive reinsurance agreement with PHH. ECX 153 at 198. Beginning in 2001, when PHH had captive agreements with more than one mortgage insurer, PHH used an automated process, known as the "dialer," for assigning to mortgage insurers the loans that it had originated. Tr. at 106-107. If a mortgage insurer was not on the dialer, it would not receive referrals from PHH. Tr. at 107. As of May 2001, shortly after Atrium entered into its second captive contract (with Genworth), PHH had set its dialer to refer a portion of its loans requiring mortgage insurance to UGI, and the remainder to Genworth. ECX 654 at Ex. M. In 2003, Genworth announced a new business strategy: beginning in 2004, it would no longer pay as much for reinsurance as it had been paying to Atrium. ECX 794. Within a few weeks, PHH reset the dialer so that Genworth would receive only one-third of the referrals that it had previously been receiving and UGI would receive the referrals that Genworth had lost. *Id.* Genworth never implemented its new strategy, but it was several years before PHH modified its dialer to restore Genworth's share. Tr. at 368; ECX 654 at Ex. M. MGIC was not willing to pay Atrium's price, and recognized that it lost referrals as a result. Tr. at 339-342.

In February 2008, UGI informed PHH that it would end its relationship with Atrium at the end of May, and put all previous book years into run-off. ECX 31. Between January 1 and May 31, 2008, PHH referred [redacted] loans to UGI; from the beginning of June through the end of November, PHH referred only [redacted] loans to UGI – a decline of more than 99%. ECX 159 at 2008 tab. In late November 2008, PHH and UGI entered into a new captive reinsurance agreement. ECX 407. Six minutes after learning of the new agreement, PHH's senior vice president gave instructions to return UGI to the dialer. *Id.*

PHH had a different system for loans purchased from its correspondent lenders. If it purchased a loan requiring mortgage insurance (so that the loan could be sold in the secondary market), PHH would provide the correspondent lender with a list of preferred mortgage insurers. ECX 773; RCX 825. Most of those on the list had captive contracts with PHH. ECX 262. If a lender selected a mortgage insurer that was not on the preferred list, then PHH imposed a surcharge on the loan. RCX 825.

Although Atrium paid out more in claims than it received in premiums in some book years, its reinsurance business resulted in profits in excess of $150 million. *See* Respondents' Compilation of Material in Support of Their Appeal at tabs B and C.

C. RESPA and Bureau enforcement authority

Congress passed RESPA in 1974 based on its finding that "significant reforms in the real estate settlement process are needed to insure that consumers throughout the Nation … are protected from unnecessarily high settlement charges caused by certain abusive practices that have developed in some areas of the country." 12 U.S.C. § 2601(a). Thus, a primary purpose of RESPA is to "eliminat[e] … kickbacks or referral fees that tend to increase unnecessarily the costs of certain settlement services[.]" 12 U.S.C. § 2601(b)(2).

Section 8 of RESPA, 12 U.S.C. § 2607, is captioned "Prohibition against kickbacks and unearned fees." Section 8(a) provides:

> 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.

12 U.S.C. § 2607(a). So a RESPA 8(a) violation has four elements: (1) there must be a payment or transfer of a thing of value; (2) that payment or transfer must be made pursuant to an agreement to refer real estate settlement business; (3) a referral must actually occur; and (4) the real estate settlement service must be provided in connection with a federally related mortgage loan.

The term "settlement services" is defined in RESPA, 12 U.S.C. § 2602(3), as including a variety of services provided in connection with the settlement of a loan. That definition is fleshed out in Regulation X (the regulation that implements RESPA):

> Settlement service means any service provided in connection with a prospective or actual settlement, including, but not limited to any one or more of the following: … (10) Provision of services involving mortgage insurance; … (15) Provision of any other services for which a settlement service provider requires a borrower or seller to pay.

12 CFR § 1024.2(b) (2013).

Regulation X also defines both "agreement or understanding" and "thing of value." *See* 12 C.F.R. § 1024(14)(d)-(e). With respect to an "agreement or understanding," the regulation states:

> An agreement or understanding for the referral of business incident to or part of a settlement service need not be written or verbalized but may be established by a practice, pattern or course of conduct. When a thing of value is received repeatedly and is connected in any way with the volume or value of the business referred, the receipt of the thing of value is evidence that it is made pursuant to an agreement or understanding for the referral of business.

12 C.F.R. § 1024.14(e). A thing of value "includes, without limitation, monies [or] credits representing monies that may be paid at a future date." 12 C.F.R. § 1024.14(d).

Section 8(b) is similar to section 8(a), but describes a separate violation of RESPA. It prohibits the splitting of charges for providing real estate settlement services:

> 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.

12 U.S.C. § 2607(b). A violation of section 8(b) therefore has four elements: (1) one person gives and another person receives (2) a portion, split, or percentage of a charge that the person received for the rendering of a real estate settlement service (3) involving a "federally related mortgage loan" (4) unless that portion is "for services actually performed."

Finally, section 8(c)(2) provides that "[n]othing in this section shall be construed as prohibiting … 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." 12 U.S.C. § 2607(c)(2).

The Bureau was established by the Consumer Financial Protection Act of 2010 (CFPA), which was Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act, and began its operations on July 21, 2011. The Bureau may conduct administrative proceedings to enforce any of the laws that it is authorized to enforce. *See* 12 U.S.C. § 5563. RESPA is one of those laws. *See* 12 U.S.C. § 5481(12)(M). The Department of Housing and Urban Development (HUD) enforced RESPA prior to the Bureau's creation, *see* 12 U.S.C. § 2607(d)(4) (2006), and it was actually HUD that first conducted an investigation into the circumstances at issue here. Ultimately this matter was referred over to the Bureau, after it had assumed its full enforcement authorities under the CFPA.[2]

The Bureau's Rules of Practice govern its administrative proceedings, and those procedural rules are set forth at 12 C.F.R. Part 1081. This proceeding has followed those rules, and is the first administrative proceeding to give rise to an appeal.

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[2] At the time when HUD enforced RESPA, the implementing regulations were codified at 24 C.F.R. Part 3500. In 2011, the Bureau adopted HUD's rules as the Bureau's new Regulation X. 76 Fed. Reg. 78,978 (Dec. 20, 2011). The Bureau codified its rules at 12 C.F.R. Part 1024. Those rules duplicated HUD's rules, making only "non-substantive, technical, formatting, and stylistic changes." 76 Fed. Reg. at 78,978. The Bureau retained HUD's section numbering, so that, for example, HUD's rule 24 C.F.R. § 3500.2(b) became the Bureau's rule now denoted as 12 C.F.R. § 1024.2(b). Except as noted, the wording of the sections of Regulation X relevant in this proceeding were not changed when they were adopted by the Bureau. For convenience, this decision provides citations to the current legal authorities.

D. Procedural history

1. The notice of charges

After conducting an investigation into this matter, the Bureau's Enforcement counsel filed its notice of charges with the Bureau's Office of Administrative Adjudication on January 29, 2014. Doc. 1. The notice alleged that PHH violated section 8(a) of RESPA when it referred business to mortgage insurers that had entered into captive reinsurance agreements; that the reinsurance payments received by PHH from mortgage insurers were a "thing of value," consideration for PHH's referrals, accepted by PHH, and either not for services actually performed or grossly exceeded the value of the reinsurance services Atrium provided; and that PHH violated section 8(b) of RESPA because the amounts that were ceded to Atrium constituted a split of mortgage insurance premiums paid by the borrowers. *Id.* at 17-18. The notice charged that the violations constituted a pattern or practice that commenced in 1995 and continued until at least May 2013, and that PHH engaged in these violations knowingly or recklessly. *Id.*

The notice sought a variety of remedies, including a permanent injunction prohibiting future violations of section 8, disgorgement of kickbacks PHH received, restitution to compensate borrowers who paid more in interest and mortgage insurance premiums as a result of the kickbacks, and civil money penalties.

2. The ALJ's decisions

At the conclusion of the hearing, the ALJ issued a lengthy Recommended Decision. Earlier, he had issued two orders that are relevant to this appeal.

a. Denial of the motion to dismiss

PHH filed an initial motion to dismiss shortly after it was served with the notice of charges, Doc. 17, and the ALJ denied it, Doc. 67. He held that RESPA's three-year statute of limitations did not apply to this administrative proceeding, and that the Bureau could enforce RESPA administratively with respect to conduct that occurred prior to the date of the Bureau's creation, which again was July 21, 2011. *Id.* at 8-9, 11-13. He also gave short shrift to PHH's claim that consent orders the Bureau had entered into previously with certain mortgage insurers blocked the Bureau from challenging some aspects of PHH's conduct. *Id.* at 13-15.

b. Order on Dispositive Motions

After the start of the trial, Enforcement filed a motion for summary disposition, arguing that the relevant facts were undisputed and that the ALJ should hold, as a matter of law, that PHH had violated both sections 8(a) and 8(b) of RESPA. Doc. 102. At about the same time, PHH renewed its motion to dismiss. Doc. 101. The ALJ resolved both motions, thereby narrowing the issues that remained to be decided at trial. Doc. 152. First, he held that even if Enforcement satisfied all the elements of sections 8(a) or 8(b), PHH still had a chance to prevail by claiming and seeking to establish a defense under section 8(c)(2). *Id.* at 3-4. As to that defense, PHH would bear the burden of proof. *Id.* at 4. As to the showings that PHH would be required to make to establish that claimed defense, the ALJ found a roadmap in an August 1997 guidance letter issued by HUD. *Id.* at 4-7. That letter addresses how parties to captive reinsurance agreements could avoid violating RESPA. ECX 193 at Ex. A. The ALJ construed the letter to hold that PHH could establish a defense to violations of sections 8(a) and 8(b) by showing two things – that its reinsurance involved a real transfer of risk from the mortgage insurers to Atrium ("risk transfer"), and that the price the mortgage insurers paid did not exceed the value of the reinsurance services Atrium provided ("price commensurability"). Doc. 152 at 6-7.

The ALJ also elaborated his previous ruling on the statute of limitations. *Id.* at 10-12. He explained that claims accruing prior to July 21, 2008, would be time-barred because the Bureau could not revive claims that HUD itself could not have brought before the Bureau was established. And he decided that if PHH violated RESPA, those violations occurred only when a loan went to closing, not each time PHH received payment on a reinsurance premium. He also rejected Enforcement's theory that PHH should be liable for its conduct dating back to 1995 if that conduct constituted a pattern or practice of RESPA violations. But the ALJ did hold that, with respect to loans that closed on or after July 21, 2008, the Bureau could seek remedies including injunctive relief, disgorgement, and restitution. *Id.* at 12-14.

The ALJ also granted part of Enforcement's motion for summary decision, holding that undisputed facts established that PHH had violated section 8(b). *Id.* at 18-20. He further held that Enforcement had satisfied most of the elements of a section 8(a) violation. *Id.* at 15-18. To complete the section 8(a) violation, the ALJ noted that Enforcement would have to show that PHH made referrals pursuant to an agreement that continued to be effective on or after July 21, 2008. The ALJ held that a trial would also be necessary to determine if section 8(c)(2) shielded PHH's conduct from liability under sections 8(a) and 8(b). *Id.* at 20.

c. The Recommended Decision

Following an extensive trial, the ALJ issued his Recommended Decision on November 25, 2014. Doc. 205. He concluded that Enforcement had established the final element of a section 8(a) violation – the record evidence showed that PHH orchestrated agreements to refer borrowers to mortgage insurers in return for the reinsurance premiums that the mortgage insurers paid to Atrium. *Id.* at 71-73. Evidence of these agreements came from PHH's allocation of mortgage insurance referrals – PHH's referrals of mortgage insurance business directly coincided with its captive reinsurance agreements. But this was not the only evidence. The ALJ also found that it would have been "pointless" for the mortgage insurers to enter into the captive reinsurance agreements unless they received referrals by doing so. *Id.* at 72. The ALJ concluded that PHH had entered into captive reinsurance agreements that violated section 8(a), and that, as to UGI, Genworth, and CMG, the agreements continued beyond July 21, 2008. *Id.* at 73-75.

The ALJ relied on the 1997 HUD letter to evaluate PHH's section 8(c)(2) defense. *Id.* at 63-70. To show risk transfer, PHH offered actuarial analyses of its captive reinsurance agreements prepared by the actuarial firm, Milliman, Inc. The ALJ considered this evidence, but concluded that PHH had shown adequate risk transfer as to only one of the four book years that remained open on or after July 21, 2008. *Id.* at 66. PHH relied on the same analyses to show price commensurability, but had even less success – the ALJ held that PHH had not shown price commensurability as to any book year. *Id.* at 67-70. Thus, PHH's claim to a defense under section 8(c)(2) failed.

Last came remedy. *Id.* at 83-102. The ALJ imposed liability jointly and severally on all the Respondents. He ordered that Respondents must disgorge all reinsurance premiums connected with loans that closed on or after July 21, 2008, subtracting any commutation payments PHH made to mortgage insurers to the extent the payments could be attributed to those loans. The ALJ calculated this amount at $6,442,399. The ALJ denied Enforcement's request for civil money penalties, holding that they would be available only for RESPA violations that occurred on or after July 21, 2011. Since no loans closed on or after that date, no civil money penalties would be appropriate. Finally, the ALJ's Order included three of the five injunctive provisions requested by Enforcement. He enjoined PHH from violating section 8 of RESPA and from entering into captive reinsurance agreements for the next 15 years. He also required PHH to disclose to Enforcement all services provided to PHH by any mortgage insurance company since 2004.

Both PHH and Enforcement appealed the ALJ's Recommended Decision. Docs. 206, 208. This discussion will resolve the issues raised in both appeals.

Analysis

I. STANDARD OF REVIEW

The Bureau's rules provide that, when a party appeals an ALJ's recommended decision, "the Director will consider such parts of the record as are cited or as may be necessary to resolve the issues presented and, in addition, will, to the extent necessary or desirable, exercise all powers which he or she could have exercised if he or she had made the recommended decision." 12 C.F.R. 1081.405(a). That means my review as to both facts and law is *de novo*.

The CFPA requires the Bureau to conduct its administrative adjudications "in the manner prescribed by chapter 5 of Title 5, United States Code." 12 U.S.C. § 5563(a). So this adjudication is on the record, governed by a preponderance of the evidence standard. *See SEC v. Steadman*, 450 U.S. 91, 95-102 (1981) (holding that when hearings are held on the record, the Administrative Procedure Act requires a preponderance of the evidence standard).

II. LIABILITY

PHH and Enforcement both appeal the ALJ's Recommended Decision. PHH first contends that a three-year statute of limitations applies to the Bureau, even in an administrative proceeding. PHH also disputes that it violated section 8 of RESPA, but contends that even if it did, section 8(c)(2) exempts it from liability. As explained below, I reject these arguments, as well as several other challenges PHH raises to the Bureau's authority. On the other side, Enforcement advocates a "continuing violation" theory for conduct dating back to 1995. It also contends that PHH should be held liable for violating RESPA every time it accepted an illegal kickback payment on or after July 21, 2008, even though some of those payments were associated with loans that closed before that date. I disagree with the continuing violation theory, but agree that PHH is liable for every illegal payment it accepted on or after July 21, 2008.

A. Statute of limitations and retroactivity

The ALJ held that no statute of limitations applies when the Bureau challenges a RESPA violation in an administrative proceeding, and I agree.

As mentioned previously, before the Bureau was established (on July 21, 2011), HUD enforced RESPA. *See* 12 U.S.C. § 2607(d)(4) (2006). RESPA imposed a three-year statute of limitations on the enforcement actions that HUD brought in court. 12 U.S.C. § 2614 (2006). But the CFPA gives the Bureau a choice: it may enforce laws administratively or in court. The section of the CFPA that authorizes the Bureau to enforce laws through administrative proceedings does not contain a statute of limitations. *See* 12 U.S.C. § 5563. A different section of the CFPA gives the Bureau the option to bring "civil action[s]" in court for violations of a consumer financial law. *See* 12 U.S.C. § 5564. That section contains a three-year statute of limitations for violations of the CFPA, and provides that, in "any action arising solely under an enumerated consumer law," such as RESPA, the Bureau may sue "in accordance with the requirements of that provision of law, as applicable." 12 U.S.C. § 5564(g). RESPA likewise contains a three-year statute of limitations for "actions brought by the Bureau," 12 U.S.C. § 2614, so that same limit applies when the Bureau sues to enforce RESPA in court.

The ALJ held that the word "actions" refers only to actions initiated in court, not to administrative proceedings, relying on *BP America Production Co. v. Burton*, 549 U.S. 84 (2006). That case interpreted the six-year statute of limitations for government contract actions, 28 U.S.C. § 2415(a), which applies to "every action for money damages brought by the United States ... founded upon any contract." The Court held that the word "action" is "ordinarily used in connection with judicial, not administrative proceedings." *BP America*, 549 U.S. at 91. Thus, the RESPA statute of limitations applies to the Bureau only if it brings an enforcement action in court, and because this proceeding is administrative, RESPA's time limit does not apply. HUD did not have the same choice of forum that the Bureau has – it had no administrative enforcement authority and thus could only bring an enforcement action in court. That is why RESPA's limit applied to all HUD actions.

Nonetheless, PHH claims that RESPA's limit should apply to this administrative proceeding, arguing that such a proceeding is, in fact, an "action." It contends that *BP America* can be distinguished on the ground that prior to the enactment of the six-year statute of limitations at issue in that case, no limitations period applied to government contract actions, but here, prior to the enactment of the CFPA, a three-year statute of limitations applied to HUD actions. This argument is unconvincing because RESPA's three-year statute of limitations never applied to administrative proceedings at all. Moreover, as part of the CFPA, Congress amended RESPA to transfer enforcement authority from HUD to the Bureau. Notably, it amended RESPA in the same statute, and at the same time, that it authorized the Bureau to bring enforcement actions administratively even though HUD could not. Congress could have amended RESPA to apply its three-year limit to administrative proceedings as well as court actions, but it did not.

PHH ignores the first rule of statutory construction, which is that the words of a statute are the best indication of its meaning. *Levin v. United States*, 133 S. Ct. 1224, 1231 (2013) ("In determining the meaning of a statute, we look first to its language, giving the words used their ordinary meaning." (quotation marks omitted)). As *BP America* held, the plain meaning of "action" is an action brought in a court. *See also SEC v. McCarthy*, 322 F.3d 650, 657 (9th Cir. 2003) ("An 'action' is defined as 'a civil or criminal judicial proceeding.'" (quoting *Black's Law Dictionary* 28 (7th ed. 1999)). By contrast, when Congress wants to apply a statute of limitations to administrative proceedings as well as court actions, it specifically refers to "proceedings." *See, e.g.,* 28 U.S.C. § 2462 (imposing a five-year limit on "any action, suit or proceeding" that seeks a fine or penalty); *3M Co. v. Browner*, 17 F.3d 1453, 1455-57 (D.C. Cir. 1994) (holding that 28 U.S.C. § 2462 applies to administrative proceedings); *Alden Mgmt. Servs. v. Chao*, 532 F.3d 578, 582 (7th Cir. 2008) ("Unless a federal statute directly sets a time limit, there is no period of limitations for administrative enforcement actions.").

PHH also argues that, because the Bureau's authority to bring "civil actions" to enforce laws like RESPA requires the Bureau to "commence ... the action in accordance with the requirements of that provision of law," 12 U.S.C. § 5564(g)(2)(C), RESPA's statute of limitations should apply. PHH Br. at 5. But an administrative proceeding is not a "civil action," and this matter is brought pursuant to a different section of the CFPA (12 U.S.C. § 5563, not 12 U.S.C. § 5564). Indeed, the Bureau's authority to bring "civil actions" clearly indicates that the "forum" for such actions is a court of law. *See* 12 U.S.C. § 5564(f).

Moreover, even if these provisions were in any way ambiguous, which they are not, I would interpret them to impose a limit only on court actions. RESPA's statute of limitations is captioned "Jurisdiction of courts; limitations," 12 U.S.C. § 2614, and the section of the CFPA authorizing "civil actions" is captioned "Litigation authority," 12 U.S.C. § 5564. "Captions, of course, can be 'a useful aid in resolving' a statutory text's 'ambiguity.'" *United States v. Quality Stores, Inc.*, 134 S. Ct. 1395, 1402 (2014) (quoting *FTC v. Mandel Brothers, Inc.,* 359 U.S. 385, 388–389 (1959)). The captions here refer to courts, not administrative proceedings. PHH has offered no basis for a different interpretation, apart from its mistaken claim that "action" includes administrative proceedings. Accordingly, RESPA's three-year limitation does not apply to this proceeding.

Although no statute of limitations applies here, there is, nonetheless, a presumption against the retroactive application of statutes. Thus statutes should not be applied retroactively unless Congress clearly expresses a contrary intent. *Singh v. George Washington Univ. Sch. of Med. and Health Sciences*, 667 F.3d 1, 4 (D.C. Cir. 2011) (citing *Landgraf v. USI Firm Prods.*, 511 U.S. 244, 264, 272 (1994)). A statute has a retroactive effect if it "would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Landgraf*, 511 U.S. at 280. However, there is no concern if a statute merely modifies procedural rules, including changes to the forum in which charges are prosecuted. *Id.* at 275.

The Bureau took over for HUD on July 21, 2011. As of the last day that HUD could enforce RESPA, it was limited to challenging violations that occurred no earlier than July 21, 2008. If the Bureau were to challenge violations that occurred prior to that date, this would be a retroactive application of the CFPA because it would "increase a party's liability for past conduct." *Id.* at 280. The CFPA provides no statute of limitations for administrative proceedings, but it does not contain any sort of express statement warranting the revival of time-barred claims. Accordingly, I agree with the ALJ that the Bureau could not retroactively revive claims that HUD would have been time-barred from bringing when the Bureau was created on

July 21, 2011, and hence the Bureau lacks authority to pursue violations that occurred before July 21, 2008.

Principles of retroactivity also affect remedies. The CFPA authorizes the Bureau to obtain a wide variety of remedies when it enforces RESPA. These include various forms of equitable relief, as well as damages and civil money penalties. HUD's remedies were more limited – when it enforced RESPA, it was authorized only to "bring an action to enjoin violations" of section 8. 12 U.S.C. § 2607(d)(4) (2006). PHH notes that RESPA did not specifically authorize HUD to seek disgorgement, and argues that the Bureau therefore cannot get disgorgement, at least as to conduct that occurred before July 21, 2011. PHH Br. at 9-11.

That argument is incorrect. When Congress authorizes an agency to seek injunctive relief, "in the absence of a clear and valid legislative command," a court may award the full range of equitable relief, including disgorgement. *FTC v. Bronson Partners, LLC*, 654 F.3d 359, 366 (2d Cir. 2011) (citing *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 291 (1960)). Because RESPA authorized HUD to seek injunctive relief, HUD could seek disgorgement. I therefore hold that the Bureau may seek disgorgement for conduct occurring before July 21, 2011 (but only for conduct occurring on or after July 21, 2008).

Nonetheless, RESPA did not authorize HUD to seek a civil money penalty, which is a remedy at law rather than an equitable remedy. Thus, I conclude that it would be an inappropriate retroactive application of the Bureau's authority for it to seek civil money penalties for violations that occurred before the Bureau was created. As a result, the Bureau may seek civil money penalties only for violations that occurred on or after July 21, 2011.

Finally, principles of retroactivity do not affect the Bureau's choice of forum. The Bureau's enforcement proceeding is not required to mirror precisely an action that HUD could have brought. So if the Bureau challenges conduct that HUD could have challenged (as of July 21, 2011), and if it seeks the same remedies that HUD could have sought, the Bureau may do so in an administrative proceeding, even though HUD would have been limited to bringing its challenge in court. *See Landgraf*, 511 U.S. at 275.

B. PHH violated section 8(a) of RESPA

As explained above, a violation of RESPA section 8(a) has four elements: (1) a payment or transfer of a thing of value; (2) the payment or transfer was made pursuant to an agreement to refer real estate settlement service business; (3) a referral actually occurs; and (4) the real estate settlement service involves a "federally related mortgage loan." I agree with the ALJ's conclusion that PHH's conduct satisfied all four elements of section 8(a). In this appeal, PHH raises a challenge as to only one of the elements – whether it referred business to the mortgage insurers. I will nonetheless discuss each element in turn. (The focus of PHH's appeal instead is that, even if it violated section 8(a), section 8(c)(2) excuses its conduct – a point that is addressed below.)

First, four mortgage insurance companies – UGI, Genworth, Radian, and CMG – paid reinsurance premiums to PHH during the limitations period (*i.e.*, on or after July 21, 2008). *See*

ECX 159, 198, 257, 648. Those premiums plainly were a thing of value, satisfying the first element of a section 8(a) violation.

Second, the evidence establishes an agreement between PHH and the four mortgage insurers. PHH referred borrowers to the mortgage insurers, and in return, the insurers purchased reinsurance from Atrium for every one of those borrowers who purchased mortgage insurance. ECX 747 provides written evidence of an agreement between PHH and CMG, but evidence of an agreement that violates section 8(a) need not be written, or even verbalized. It can also come from a course of conduct. *See* 12 C.F.R. § 1024.14(f). As the ALJ noted, PHH's use of its dialer charts a course of conduct. Doc. 205 at 71-73. The dialer allocated business to mortgage insurance companies, and if those companies wanted to be on the dialer, they had to enter into captive reinsurance agreements. But even before PHH began using the dialer (PHH had no need for a dialer when it only had a captive reinsurance agreement with UGI alone), it allocated more than [redacted] of borrowers to UGI. Tr. at 111. When UGI discontinued its captive agreement, PHH dropped it from the dialer. When UGI entered into a new agreement, PHH promptly returned it to the dialer. *Id.*

Similarly, if a mortgage insurer wanted to become one of PHH's preferred providers (and get business from one of PHH's correspondent lenders), it had to enter into a captive agreement. As an email from a PHH vice president to a manager at a mortgage insurer candidly described the intended framework: "Our ability to negotiate a suitable arrangement with you will enable you to b[e]come a preferred provider. Then you can market to [i]ndividual correspondents to influence their decision." ECX 773. Although PHH referred a small number of borrowers to mortgage insurers that had not entered captive agreements, the vast number of referrals went to those companies that did so. *See* ECX 159.

Further, it is significant that the *only* companies offering reinsurance to mortgage insurers during this period were captive reinsurers. ECX 153 at 202. This fact strongly suggests that mortgage insurers had no need for reinsurance unless it was connected to referrals of business. *See* Tr. at 340, 424 ([redacted]). Otherwise, insurers that were not lenders doubtless would have entered the lucrative mortgage reinsurance market. For these reasons, PHH's captive reinsurance agreements satisfy the second element of a section 8(a) violation.

Third, PHH referred mortgage insurance business to UGI, Genworth, Radian, and CMG. A referral includes "any oral or written action directed to a person which has the effect of affirmatively influencing the selection by any person of a provider of a settlement service." 12 C.F.R. § 1024.14(f)(1). PHH used its dialer to refer business to mortgage insurers by controlling their selection. PHH's vice president testified at the hearing that "[w]hen we would do a retail loan, we could select the [mortgage insurance] provider.... [T]he only way to get [mortgage insurance] in the PHH system is through the automated dialer." Tr. at 105-109. And as he explained in an email to a mortgage insurer, PHH used its dialer to "completely control" the selection of mortgage insurers for loans that PHH originated. ECX 773. PHH also made referrals by inducing its correspondent lenders to select mortgage insurers on its preferred provider list – if the lender selected an insurer not on the list, PHH imposed a surcharge (which was presumably passed on to the borrower). Tr. at 521-531. PHH's vice president stated that its correspondent lenders "can either allow me to order the [mortgage insurance], then I select the provider.… Alternatively, they can choose the provider from our preferred provider list, which we control." ECX 773.

PHH does not much dispute that it referred borrowers to mortgage insurers, but it notes that it gave its borrowers a document captioned "Affiliated Business Arrangement Disclosure Statement." PHH Br. at 28. That statement informed borrowers that PHH stood to profit from its captive reinsurance agreements, and advised borrowers that they were free to "shop around" for a mortgage insurer that was not a party to one of those agreements. RCX 790. This statement has no impact on PHH's liability under section 8(a). Although PHH claimed to be giving its borrowers a choice, the supposed choice was entirely illusory – if the borrower selected a mortgage insurer that was not a party to a captive reinsurance agreement, PHH would not approve the loan. Tr. at 383-384. Also, it is not clear whether any consumer actually selected the mortgage insurer. Tr. at 119. Even if some borrowers did so, whenever PHH influenced a borrower's choice, which was often the case, PHH made a referral.

PHH also raises a more technical argument, contending that its preferred provider list did not result in referrals because the list influenced correspondent lenders, not borrowers. PHH Br. at 28. The argument is unpersuasive. A referral is an action directed to a person that affects the selection of a mortgage service paid for by *any* person. 12 C.F.R. § 1024.14(f)(1). PHH exerted direct influence on its correspondent lenders, and indirect influence on borrowers, by threatening to impose an additional charge, which influenced the choice of mortgage insurer and constituted a referral.

Fourth, it is plain that the loans PHH originated, and the loans it received from its correspondent lenders, were federally related mortgage loans. *See* 12 U.S.C. § 2602(1) (defining "federally related mortgage loan" to include all loans that are intended to be sold to Fannie Mae, Freddie Mac, or Ginnie Mae, or that are funded by a lender that is regulated by any agency of the federal government).

Since all four of the statutory elements are satisfied, I conclude that PHH violated section 8(a) of RESPA when it accepted reinsurance premiums on or after July 21, 2008. Accordingly, it is not necessary to undertake any further determination of whether that same conduct also violated section 8(b).

C. Neither section 8(c)(2) nor the HUD letter excuses PHH's violation of section 8(a)

Section 8(c)(2) and HUD's 1997 letter are crucial to this case. Section 8(c)(2) provides that "[n]othing in [section 8] shall be construed as prohibiting … 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." According to the ALJ, this section provided PHH with an affirmative defense to violations of section 8(a) or 8(b). Doc. 205 at 75-76.

The ALJ relied primarily on the 1997 HUD letter, ECX 193 at Att. A, to help him interpret section 8(c)(2). That letter addresses captive reinsurance agreements such as those at issue here. The ALJ read the letter to hold that, even if a captive reinsurance agreement violates section 8(a), the parties to the agreement can escape liability "if the payments to the reinsurer are for reinsurance services actually furnished or for services performed, and are bona fide compensation that does not exceed the value of such services." Doc. 152 at 6. This interpretation shaped the hearing in this proceeding – much of the evidence focused on whether PHH could show that Atrium actually furnished reinsurance services to mortgage insurers (that is, whether there was risk transfer), and whether the price of that reinsurance exceeded the value of the services (that is, whether there was price commensurability).

Enforcement argues that section 8(c)(2) does not provide a defense for PHH's violations of either section 8(a) or 8(b), and that the ALJ misinterpreted the HUD letter. Enf. Br. at 23-25. Instead, Enforcement contends that it is a violation of section 8(a) when a lender makes referrals to a real estate settlement service provider in exchange for the purchase of "goods or services – *at any price* – as consideration for making referrals," and that such a violation cannot be saved by Section 8(c)(2). *Id.* at 23. In other words, even if the mortgage insurers paid a fair price for the reinsurance, PHH violated RESPA by conditioning the referrals it made on the purchase of reinsurance. Enforcement notes that a "thing of value" which constitutes a kickback for a referral under section 8(a) "is broadly defined, and includes not only the payment of money in the course of a transaction, but also the very opportunity to engage in the transaction – even one that would otherwise be legitimate and is priced at a fair market value" so that it would naturally tend to yield a fair profit. *Id.* at 24. Accordingly, Enforcement contends that the business "opportunity to sell 'reinsurance' to the [mortgage insurers] was itself a thing of value to PHH." *Id.* at 25.

On this point, PHH argues in support of the ALJ. It argues that the introductory clause of section 8(c) – "[n]othing in this section shall be construed as prohibiting" – means that section 8(c)(2) exempts reinsurance agreements from section 8(a), "*even if* those agreements had been entered into in exchange for the referral of real estate settlement services." PHH Opp. Br. at 18. PHH also argues that Enforcement's interpretation of section 8(c)(2) conflicts with other provisions of section 8 and other interpretative guidance provided by HUD. *Id.* at 21-22. Finally, because a RESPA violation can lead to criminal liability, *see* 12 U.S.C. § 2607(d)(1), PHH contends that the rule of lenity should cause any ambiguity in RESPA to be interpreted in its favor. PHH Opp. Br. at 23-24.

1. Section 8(c)(2)

The ALJ's interpretation of section 8(c)(2) is neither the best reading of the section's textual language, which is perhaps not entirely clear when read in isolation, nor is it consistent with a fuller reading of the text, structure, and goals of RESPA.

To begin with, as the Eleventh Circuit has noted, "Section 8(c)'s language starts with 'nothing in this section shall be construed as prohibiting,' not with 'notwithstanding § 8(a)' or any other plain exception language." *Culpepper v. Irwin Mort. Corp.* 253 F.3d 1324, 1330 (11th Cir. 2001), *superseded on other grounds as recognized by Heimmermann v. First Union Mort. Corp.*, 305 F.3d 1257 (11th Cir. 2002). And comparing usage within the same statute, section 7 of RESPA uses the word "exempt" to create an exemption, 12 U.S.C. § 2606, but section 8(c) uses the very different term "construe." To "construe" means "to analyze the arrangement and connection of words in (a sentence or part of a sentence)" and is more akin to an interpretation. *Webster's Third New Int'l Dictionary (Unabridged)* 489 (2002). Taken together, these textual points indicate that section 8(c) *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). The Eleventh Circuit considered section 8(c)(2) and reached the same conclusion: "If § 8(c) is only a gloss on § 8(a), making clear what § 8(a) allows in certain contexts, we should avoid reading § 8(c) to bless conduct that § 8(a) plainly outlaws." *Culpepper,* 253 F.3d at 1330.

Further, reading section 8(c)(2) as an exemption would substantially undermine the protections of section 8. The goal of section 8 is "the elimination of kickbacks or referral fees that tend to increase unnecessarily the costs of certain settlement services." 12 U.S.C. § 2601(b)(2); *see* also 12 U.S.C. § 2601(a); S. Rep. 93-866 at 3 (1974). That is, section 8 seeks to restore competition to the market for settlement services. *See Arthur v. Ticor Title Ins. Co.*, 569 F.3d 154, 158 (4th Cir. 2009) ("Congress directed § 8 against a particular kind of abuse that it believed interfered with the operation of free markets."). If section 8(c)(2) permitted compensated referrals, this would distort the market in ways that the statute as a whole plainly sought to prevent by anchoring its prohibitions on the broad term, "thing of value." This distortion occurs no matter the form of the "thing of value," even if the compensation takes the form of payments for a (profitable) service.

That result can be readily seen from the facts at issue here. PHH agreed to make referrals to the mortgage insurers. The mortgage insurers agreed to pay PHH for those referrals by purchasing reinsurance from Atrium. Regardless of whether the price that the mortgage insurers paid was inflated or was set at the fair market value of the reinsurance they received, PHH still benefited from the arrangement because Atrium received (profitable) business from the mortgage insurers that it would not otherwise have received. Accordingly, that agreement distorted the market for mortgage insurance, in direct contravention of RESPA's core provisions.

On this understanding of section 8(c)(2), it fills an important role in clarifying the application of section 8(a). Referral agreements that violate section 8(a) can be difficult to detect; indeed, Regulation X recognizes that, in some instances, those agreements may be neither written nor verbal. 12 C.F.R. § 1024.14(e). Thus, there may be no direct evidence of an agreement. If a party in a position to *make* such referrals receives payments of any kind from a party in a position to *receive* the referrals, this could give rise to an inference of an agreement violating section 8(a), particularly where those payments are tied to the volume of business that is referred. But section 8(c)(2) indicates that such an inference is inappropriate as long as the payment is "a bona fide salary or compensation or other payment for goods or facilities actually furnished or for services actually performed." 12 U.S.C. § 2607(c)(2).

Other parts of the text of section 8(c)(2) confirm this interpretation. For section 8(c)(2) to apply, the payment must meet two criteria: it must be both "bona fide" and "for services actually performed." The phrase "for services actually performed" also appears in section 8(b), but without mention of "bona fide." *See* 12 U.S.C. § 2607(b) ("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 ... other than *for services actually performed.*" (emphasis added)). Thus, the two phrases have distinct meanings. In PHH's view, "bona fide" means that the payment was "reasonable compensation" for the services received. Oral Arg. Tr. at 17. But PHH's interpretation means that the phrase "for services actually performed" would pull no weight because it would not, by itself, imply that the services were for reasonable compensation without the addition of "bona fide." If that were so, then section 8(b), which does not refer at all to "bona fide" payments, would not make sense, because a mortgage service provider could avoid liability by receiving even token services in return for a much more lucrative split of any charge for settlement services.

A better interpretation gives meaning to both phrases. A payment is "for services actually performed" only if it involves reasonable compensation for the services. Then the distinct meaning of "bona fide" in section 8(c)(2) is that the payment must be solely for the service actually being provided on its own merits, but cannot be a payment that is tied in any way to a referral of business.

This interpretation also better comports with the literal meaning of the Latin term "bona fide"– "in good faith." A payment made "in good faith" for services performed is made for the services themselves, not as a pretext to provide compensation for a referral. The phrase "bona fide payment" thus refers to the purpose of the payment, not to its amount. To be sure, if a payment is unreasonably high, this may suggest that it is not being made solely for the services. But even a reasonable payment may not be "bona fide" if it is not made solely for the services but also for a referral.

Hence, I interpret section 8(c)(2) to clarify the application of section 8(a), not as a substantive exemption to liability. Then section 8(c)(2) only becomes relevant if there is a question as to whether the parties actually did enter into an agreement to refer settlement service business. Section 8(c)(2) is not relevant on the facts here because there is no need to strain to infer the existence of such an agreement. As explained above, there is ample evidence in the record that PHH and the mortgage insurers entered into agreements for referrals of mortgage insurance business.

2. The 1997 HUD letter

The ALJ interpreted the 1997 HUD letter to mean that section 8(c)(2) provides an exemption from liability for conduct that violates section 8(a), though the letter is unclear on that point and may be internally inconsistent. To the extent that the letter is inconsistent with my textual and structural interpretation of section 8(c)(2), I reject it.

The HUD letter is not in such a form as to be binding on any adjudicator. The letter responded to a lender seeking HUD's guidance on the application of section 8 to captive reinsurance agreements. *See* ECX 193 at Att. A, pp. 1-2. Unlike some other forms of written guidance issued by HUD, the letter was never published in the Federal Register. Thus, pursuant to the applicable provisions of Regulation X in effect at the time of the events at issue in this proceeding (and pursuant to HUD's own regulations in effect at the time of the letter), the letter provides no protection to PHH in this proceeding. *See* 12 C.F.R. § 1024.4(b) (2013) (restating 24 C.F.R. § 3500.4(b) (1997)) (indicating that documents not published in the Federal Register do not constitute a "rule, regulation or interpretation," and do not offer any protection for purposes of RESPA liability).[3] The ALJ noted that the court in *Munoz v. PHH*, No. 1:08-cv-0759, 2013 WL 2146925 (E.D. Cal. May 14, 2013), relied on the HUD letter. Doc. 205 at 41.

[3] The Bureau removed 1024.4(b) from Regulation X, effective January 2014, yet it incorporated the concept of the provision into the introduction to the Bureau's commentary to Regulation X.

But the court in *Munoz* mistakenly believed that the letter constituted an official HUD policy statement, failing to note that the letter was never published in the Federal Register. *See* 2013 WL 2146925 at *5 n.3.

Not only is the letter not binding, but it also contains statements that seem to be internally inconsistent. The letter recognizes that a lender "has a financial interest in having the primary insurer in that captive reinsurance program selected to provide the mortgage insurance." ECX 193 at Att. A, p. 1. It then warns that, "so long as payments for reinsurance under captive reinsurance arrangements are solely 'payments for goods or facilities actually furnished or for services actually performed,' these arrangements are permissible under RESPA." *Id.* I agree with this statement – if the payments are solely for services actually performed (*i.e.*, not for referrals), then the payments are "bona fide." But the statement does not help PHH in this case because here the mortgage insurers made payments that were not "solely" for reinsurance – the payments purchased not just reinsurance but also referrals because the two were tied together.

I also agree with the following cautionary statement in the HUD letter: "If the lender or its reinsurance affiliate is merely given a thing of value by the primary insurer in return for this referral, in monies o*r the opportunity to participate in a money-making program*, then section 8 would be violated ...." ECX 193 at Att. A, p. 3 (emphasis added). That is, in fact, what the mortgage insurers did here: in return for referrals, they gave PHH the opportunity to make a profit by participating in its mortgage reinsurance program. Yet I disagree with a possible implication of the very next sentence: "If, however, the lender's reinsurance affiliate actually performs reinsurance services and compensation from the primary insurer is bona fide and does not exceed the value of the reinsurance, then such payments would be permissible under subsection 8(c)." *Id.* If this sentence suggests that payments are "bona fide" as long as they do not exceed the value of the reinsurance, then the sentence conflates the two requirements of section 8(c)(2) and is flatly inconsistent with the prior sentence, which recognized that even "the opportunity to participate in a money-making program" would be enough to find a violation, regardless of what amounts were paid for that opportunity. *Id.* Thus the error of this approach would be to permit a mortgage insurer to pay for referrals as long as the payments take the form of reinsurance premiums, which is simply inconsistent with RESPA.

3. PHH's other arguments about section 8(c)(2)

PHH argues that my interpretation of section 8(c)(2) conflicts with *Glover v. Standard Federal Bank*, 283 F.3d 953 (8th Cir. 2002). PHH Opp. Br. at 19. In the passage quoted by PHH, the court states that section 8(c)(2) "clearly states that reasonable payments for goods, facilities or services actually furnished are *not prohibited* by RESPA, even when done in connection with the referral of a particular loan to a particular lender." *Glover*, 283 F.3d at 964. There is no actual conflict between this language and my construction of the statute. A person does not violate section 8(a) merely by making a payment "in connection with the referral of a particular loan to a particular lender," but by making a payment in exchange for a referral pursuant to an "agreement or understanding" to refer settlement service business. There could be circumstances where a party makes a referral and is paid for providing services in connection with that referral, but is not being paid for the referral. (For example, see the discussion below of HUD's interpretive rule on home warranty companies.) *Glover* is also distinguishable because it did not involve the sorts of agreements and payments for referrals that are present here. And *Glover* viewed the text of section 8(c)(2) as ambiguous. *See id.* at 961 (holding that "the intent of Congress on this issue is not expressly set forth in the statute").

Nor does my interpretation clash with other portions of section 8(c)(1), or "retroactively criminalize a broad array of conduct" that is otherwise permitted by RESPA. *See* PHH Opp. Br. at 20-21. PHH focuses on section 8(c)(1)(B), which states that "[n]othing in [section 8] shall be construed as prohibiting … the payment of a fee … by a title company to its duly appointed agent for services actually performed in the issuance of a policy of title insurance." PHH argues that the "logical extension" of my interpretation of section 8(c)(2) would undermine the protection that 8(c)(1)(B) provides. PHH Opp. Br. at 20. But section 8(c)(1)(B) is different from section 8(c)(2). Although both sections begin with the same introductory phrase, the remainder of section 8(c)(1)(B), unlike the remainder of section 8(c)(2), describes conduct that would otherwise violate section 8(a). An agent for a title insurance company, by the very nature of the job, is a party to an agreement to refer title insurance business to the title insurance company that is the agent's principal. Section 8(c)(1)(B) simply permits the title insurance company to compensate its own agent. Absent section 8(c)(1)(B), the payment of a commission to the agent would violate section 8(a). Thus, 8(c)(1)(B), unlike 8(c)(2), is an exemption from 8(a).

Far from clashing with 8(c)(1)(B), my interpretation of 8(c)(2) is consistent with it. If 8(c)(2) created a broad exemption from 8(a) by permitting payments pursuant to referral agreements as long as the payments were made for "services actually performed," then section 8(c)(1)(B) would be surplusage. There would be no need for a provision specifically permitting payments to title insurance agents since those payments would already be permitted by section 8(c)(2). Similarly, if PHH's interpretation were correct, then section 8(c)(1)(C), which permits payments by lenders to their agents, would also be surplusage. But section 8(c) must be interpreted to give effect to all of its provisions. *See Clark v. Rameker*, 134 S. Ct. 2242, 2248 (2014) ("'[A] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous.'" (quoting *Corley v. United States*, 556 U.S. 303, 314 (2009)).

Nor does my interpretation conflict with section 8(b). *See* PHH Opp. Br. at 22-23. As explained above, section 8(c)(2) explains that, if two criteria are met, a payment made by a party in a position to receive referrals to a party in a position to make referrals will not give rise to an inference of an agreement violating section 8(a). Section 8(b) involves splits, and has nothing to do with referral agreements. Thus, section 8(c)(2) does not apply to section 8(b).

PHH claims that my interpretation of section 8(c)(2) would "undo[] years' worth of official interpretations and policy statements issued by HUD." PHH Opp. Br. at 21-22. Whether or not PHH may have interpreted the letter or other HUD statements to justify captive reinsurance agreements in ways that furthered its interests is not particularly germane. More to the point, PHH has failed to present any "official interpretations" or "policy statements" that support its view of section 8(c)(2). PHH does cite a HUD interpretive rule captioned "Home Warranty Companies' Payments to Real Estate Brokers and Agents," 75 Fed. Reg. 36271 (June 25, 2010), but it does not support PHH's position.

A homeowner's warranty purchased at closing is a settlement service. *See* 12 C.F.R. § 1024.2. HUD explained that RESPA permits several things: it permits a broker to refer a borrower to a warranty company, permits the broker to perform services on behalf of the warranty company (such as examining the property for preexisting conditions), and permits the warranty company to compensate the broker for performing those services. Nonetheless, it forbids the warranty company from paying the broker for the referral. This is fully consistent with my analysis: PHH could refer consumers to mortgage insurers and, separately, Atrium could perform reinsurance services for mortgage insurers. PHH's violation of section 8(a) occurred because the mortgage insurers' payments were linked to (and therefore served as compensation for) PHH's referrals.

The home warranty rule also explains how HUD assessed whether a payment from a warranty company to a broker is a payment for a referral. HUD looked for two red flags: first, is the payment "contingent on an arrangement that prohibits the … broker … from performing services for other" warranty companies, and, second, are the payments "based on, or adjusted in future agreements according to, the number of transactions referred." 75 Fed. Reg. at 36272. HUD notes that even if both flags indicate the payment may be, at least in part, for the referral, "[i]f it is subsequently determined, however, that the payment at issue is for only compensable services," the payment would be permissible. Adjusting for the context of this proceeding, the reinsurance premiums paid pursuant to PHH's captive reinsurance agreements raise the first red flag: the agreements are restrictive because PHH almost exclusively referred borrowers to companies that entered into captive reinsurance agreements. And the second red flag is raised because PHH would receive more reinsurance premiums from a mortgage insurance company whenever it referred a larger number of borrowers to that company.

As PHH points out, HUD's rule has a caveat – the red flags create a presumption, but that presumption is rebuttable if the payment "is only for compensable services." PHH believes it can rebut the presumption created by its agreements because, it contends, the price that the mortgage insurers paid was commensurate with the reinsurance they received. But the evidence here shows that the mortgage insurers purchased the reinsurance because they wanted to get referrals from PHH, and they would not have purchased the reinsurance if it had not been tied to referrals. Thus, even if the mortgage insurers paid a commensurate price, the payments were not made "only for compensable services."

Finally, I reject PHH's contention that the rule of lenity applies to override the text, structure, and goals of section 8(c)(2) and RESPA as a whole. That rule "'only applies if, after considering text, structure, history, and purpose, there remains a grievous ambiguity or uncertainty in the statute such that the Court must simply guess as to what Congress intended.'" *Maracich v. Spears*, 133 S. Ct. 2191, 2209 (2013) (quoting *Barber v. Thomas,* 560 U.S. 474, 488 (2010)). There is no such "grievous ambiguity or uncertainty" here.

4. Alternative theory of liability under section 8(c)(2)

In the alternative, even if I were to accept PHH's contention that section 8(c)(2) creates a substantive exemption for conduct that violates 8(a) – which, for the reasons explained, it does not – I would still conclude that PHH violated RESPA in this matter. If section 8(c)(2) were construed as an exemption to shield conduct that would otherwise violate 8(a), then PHH would bear the burden of showing that its conduct met the exemption. *See Meacham v. Knolls Atomic Power Lab.*, 554 U.S. 84, 91 (2008) ("[W]hen a proviso carves an exception out of the body of a statute …, those who set up such an exception must prove it." (quotation marks omitted)). PHH tried to make that showing at trial. Based on its view of the 1997 HUD letter, PHH argued that section 8(c)(2) would exempt it from RESPA liability if it could show both that it took on risk from the mortgage insurers and that the price it charged was commensurate with the risk it took on. PHH relied on the reports prepared by Milliman to make those showings. Tr. at 568, 1585; ECX 153 at 127.

Because the ALJ believed that the Bureau could only hold PHH liable with respect to loans that closed on or after July 21, 2008, he did not analyze book years that closed prior to that date. Only four book years remained open on or after July 21, 2008: UGI 2009, Genworth 2008-B, Radian 2008, and CMG 2008. Yet PHH has offered no Milliman reports for the Radian and CMG 2008 book years. So as to those book years, PHH would not be entitled to an exemption even under its view of section 8(c)(2). With respect to the two book years that closed on or after July 21, 2008, the ALJ further concluded that PHH failed to make the required showings as to either the Genworth 2008-B book year or the UGI 2009 book year. *See* Doc. 205 at 66-70. For the reasons set out below, I agree with the ALJ's conclusions on these points.

Even under its view of section 8(c)(2), PHH failed to make the required showings with respect to the Genworth 2008-B book year because of two distinct problems. The Milliman report that PHH offered for that book year concluded that PHH took on sufficient risk with respect to the loans in that book. ECX 194 at 9. But Milliman conditioned its conclusion on its assumption that PHH did not make any withdrawals from the Genworth trust account. *See* ECX 194 at 7. If that assumption were wrong, then withdrawals would limit PHH's risk because claims with respect to a particular mortgage insurer were generally paid only from funds in that company's trust account. *See* Tr. at 1986-90. Despite this caveat, PHH actually did withdraw [redacted] from the Genworth trust account, which contradicts Milliman's analysis. Additionally, the reinsurance agreement that Milliman analyzed was not, in fact, the actual agreement between Genworth and Atrium. Milliman conducted its analysis based on its assumption that Atrium would be reinsuring a specific band of risk. In fact, Atrium's contract with Genworth provided that Atrium would insure a band that exposed Atrium to less risk. *See* ECX 194 at 6. PHH offered no other evidence to support its claim for an exemption covering the Genworth 2008-B book year. I therefore conclude that, even assuming that section 8(c)(2) could be read to constitute an exemption, PHH failed to offer sufficient evidence that it met the requirements of section 8(c)(2) with respect to this book year.

Moreover, even under its view of section 8(c)(2), PHH also failed to make the required showings with respect to the UGI 2009 book year. Milliman did not prepare any analysis of that book year, so PHH sought to rely on a "preliminary draft" of an analysis of a different UGI book year, which Milliman prepared in July 2008. RCX 2002. The ALJ used that draft analysis to evaluate the UGI 2009 book year, *see* Doc. 205 at 66, even though the 2009 book year did not commence until March 1, 2009, *see* ECX 520. That was a mistake. As a Milliman actuary stated at trial, Milliman cannot analyze a book year until it knows the loans that are included, and thus a proper analysis can only be conducted at the end of the book year. *See* Tr. at 1856. The draft analysis of an earlier book year cannot possibly take account of risk that results from the specific loans that were ultimately included in the 2009 book year. In addition, the draft of the earlier book year, unlike other Milliman reports, failed to conclude that the payments PHH received were in fact reasonably related to the risk it bore. *See* Doc. 205 at 67-68; RCX 2002; EXC 194 at 9. Accordingly, even assuming that section 8(c)(2) could be construed to provide an exemption, PHH did not offer sufficient evidence to meet the requirements of 8(c)(2) with respect to the UGI 2009 book year.

Hence, even if I had agreed with PHH that section 8(c)(2) provides a substantive exemption from liability under section 8(a), I would still conclude that PHH failed to qualify for that exemption with respect to all four book years that closed on or after July 21, 2008. Thus, even if PHH were right about section 8(c)(2), it still would be liable under RESPA on the facts established in the record of this proceeding.

D. PHH violated RESPA every time it accepted a reinsurance payment

As explained above, PHH's conduct satisfied all four elements of section 8(a) of RESPA. I now conclude that PHH committed a separate violation of RESPA every time it accepted a reinsurance payment from a mortgage insurer. That means PHH is liable for each payment it accepted on or after July 21, 2008, even if the loan with which that payment was associated had closed prior to that date.

I base this conclusion chiefly on the text of RESPA. Section 8(a) of RESPA states: "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." 12 U.S.C. § 2607(a). So it is the "accept[ance]" of a "fee, kickback, or thing of value pursuant to" a referral agreement that triggers a RESPA violation. Thus, PHH violated RESPA every time it accepted a reinsurance premium from a mortgage insurer pursuant to a captive reinsurance agreement because those reinsurance premiums were kickbacks.

The ALJ incorrectly held that PHH violated section 8 only at the very moment that a particular loan closed, not each time the mortgage insurer forwarded a premium payment to Atrium. *See* Doc. 152 at 11-12. He based this holding on *Snow v. First American Title*, 332 F.3d 356 (5th Cir. 2003), a RESPA case involving referrals for title insurance. The ALJ "found no cases clearly inconsistent" with *Snow*, and held that, "persuasive or not," the case's "doctrine is authoritative." Doc. 152 at 11-12. For the reasons stated below, I disagree with the ALJ on this point.

I believe the ALJ misunderstood *Snow*. The borrowers in *Snow* paid for their title insurance policies in full, with one payment, when their loans closed. At that time, the agents who referred the borrowers to the title insurance companies received a "credit toward future payment." *Snow*, 332 F.3d at 358. That credit was a kickback: "the agents earned the allegedly prohibited 'thing of value'" when they received the credit, and the statute of limitations began to run at that time. *Id.* at 358-59. *Snow* rejected the argument that a separate violation occurred when, at a later date, the agents were paid for the value of the credits they had previously received. *Id.* Here, by contrast, borrowers did not pay in full for mortgage insurance at closing, and PHH was not compensated in full for the referral at that time. Instead, borrowers paid for the insurance as part of every mortgage payment, and PHH received a separate thing of value – a portion of each borrower's payment – every time borrowers made their payments, and only after they made each payment. Unlike the agents in *Snow*, PHH cannot be said to have received the value of the future payments at closing; instead, PHH did not receive its payments unless and until consumers subsequently paid for the mortgage insurance in installments over time. *See* ECX 584 (contract between UGI and Atrium). In *Snow*, the borrowers sought to avoid a statute of limitations by arguing that a single kickback payment to the agents could be treated as two separate violations – akin to suggesting that the receipt of a check, and cashing that same check, are separate payments. The court refused to allow this, but recognized that the result would have been different if the borrowers had paid for a settlement service other than at closing, such as by subsequent payments. *Snow*, 332 F.3d at 359 n.3. Here, the mortgage insurers made a series of separate kickback payments to Atrium, and each was a separate violation.

Because of this crucial factual distinction, *Snow*'s reasoning does not apply here. The court noted that RESPA's purpose is to prevent "'unnecessarily high settlement charges' caused by kickbacks" and that "[t]his ill occurs, if at all, when the plaintiff pays for the service, typically at the closing." *Id.* at 359-60 (quoting 12 U.S.C. § 2601(a)). That description is accurate where, as in *Snow*, borrowers pay for a settlement service all at once at closing. Here, however, the borrowers did not do that; instead, they paid for mortgage insurance each month, so, to the extent that those payments were distorted as a result of the kickbacks PHH received, borrowers felt that impact every month.

The court in *Snow* also was concerned that if one payment could give rise to two violations, this "would create absurd results": it would permit borrowers to recover twice for the same settlement service payment, and would allow the statute of limitations to start anew whenever the agents actually collected on the credits they had already received. *Id.* at 360-61. But there is no risk of double recovery here because one payment made by a borrower (and the resulting kickback payment to Atrium) gives rise to a remedy based only on that one borrower's payment. Overall, borrowers would be limited to a recovery based only on the payments they had made during the limitations period (*i.e.*, within the preceding year). *See* 12 U.S.C. § 2607(d)(2) (providing liability "in an amount equal to three times the amount of any charge paid for such settlement service"); 12 U.S.C. § 2614 (imposing a one-year statute of limitations on private actions). And the statute of limitations would not run twice with respect to any one payment made by a mortgage insurer to Atrium because each payment would be a separate violation and would have only one limitations period. The court in *Snow* was also concerned that "like plaintiffs would face unalike limitations periods," noting that two borrowers who paid for settlement services on the same day could sue at different times depending on when their agents actually received payments. *Snow*, 332 F.3d at 360-61. The same concern does not arise on the facts of this case: here, the referral payments were linked to the actual payments made by borrowers, so borrowers who made identical payments would have identical causes of action.

If *Snow* is being read to suggest instead that a violation of section 8(a) of RESPA can occur only at closing, *see id.* at 360, it is hard to see why that must be so or how it could be squared with the statute. The court in *Snow* observed that RESPA's statute of limitations refers to "a single triggering violation, not multiple violations," and then reasoned that "[h]ad Congress wanted the various steps in a single transaction to trigger the statute of limitations multiple times, it would have spoken of multiple 'violations.'" *Id.* at 359. But the use of the singular "violation" in the statute of limitations indicates only that there is one limitations period for one violation, not that a transaction involving multiple kickback payments would result in only a single violation. It is well settled that a single course of conduct can result in multiple violations of a statute, regardless of whether the relevant statute of limitations refers to a single cause of action. *See,* *e.g.*, *Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp.*, 522 U.S. 192, 201-02, 206 (1997) (holding that each missed payment required under ERISA is a separate violation, even though all the payment obligations could be traced to a single employer plan withdrawal); *see also Petrella v. Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962, 1970 & n.7 (2014) (same under Copyright Act, discussing *Bay Area Laundry*).

PHH echoes the ALJ by arguing that section 8(a) is violated only at the moment a loan closes. PHH Br. at 5. Yet PHH has no good response to the text of section 8(a). When asked at oral argument to comment on the text of section 8(a), PHH's counsel stated that "the statute goes on to talk about one violation and one occurrence of a violation itself." Oral Arg. Tr. at 48. But here again, the reference to "violation" in the statute of limitations is irrelevant – although one violation cannot be split into multiple violations, each payment accepted by PHH created a separate violation of the anti-kickback provisions in RESPA.

Although PHH relies primarily on *Snow*, it also cites a few other cases. PHH Opp. Br. at 10-12. Of those decisions, *Mullinax v. Radian Guaranty Inc.*, 199 F. Supp. 2d 311 (M.D.N.C. 2002), is the most relevant. The facts in *Mullinax* are similar to the facts here. The complaint alleged that a mortgage lender referred borrowers to a mortgage insurer, and that the mortgage insurer violated section 8 of RESPA by paying kickbacks to the lender through, among other things, a captive reinsurance agreement. *See id.* at 314-15. The court considered, and rejected, the "conten[tion] that a violation of the statute occurs upon each monthly payment for primary mortgage insurance premiums that a borrower makes after the settlement closing." *Id.* at 324-25. The court relied on RESPA's statute of limitations, which refers to "the violation" in the singular, and held that "the violation occurs when the borrower is overcharged by a provider of settlement services," *i.e.*, "at the closing settlement." *Id.*

I disagree with *Mullinax* because, once again, its conclusion cannot be squared with the text of section 8(a). RESPA's prohibition is quite specific: section 8(a) prohibits the "giv[ing]" or the "accept[ing]" of an illegal payment by a settlement service provider, 12 U.S.C. § 2607(a), not overcharging the consumer. To be sure, the broader purpose of section 8 may be to prevent overcharging the consumer in the settlement process. *See* 12 U.S.C. § 2601(b) ("It is the purpose of this chapter to effect certain changes in the settlement process for residential real estate that will result ... in the elimination of kickbacks or referral fees that tend to increase unnecessarily the costs of certain settlement services."). But RESPA's statement of purpose does not define the range of conduct that the statute prohibits. Although RESPA is indeed "focus[ed] on the settlement transaction itself," *Mullinax*, 199 F. Supp. 2d at 325, I disagree that this "focus" somehow alters the plain meaning of section 8(a).

Moreover, *Mullinax* did not consider the theory of liability discussed and adopted here. In *Mullinax*, the borrowers argued that "a violation [of section 8(a)] occurs whenever *a borrower* makes a payment towards an overcharged [settlement] service." *Id.* at 325 (emphasis added). The court rejected this theory because it would "create disparate results [with respect to the application of RESPA's one-year statute of limitations for private rights of action] among borrowers, who apparently can elect either to pay for their insurance in one lump sum or through multiple payments." *Id.* I do not hold that PHH violated RESPA every time *a borrower* made a payment for mortgage insurance. Instead, PHH violated RESPA every time it accepted a kickback payment from the mortgage insurance companies. Of course, each payment that PHH accepted was, in fact, derived from monthly payments that borrowers made to their mortgage insurers. But that is merely an incidental feature of how PHH and the mortgage insurers structured their referral agreements.

The "disparate results" that resulted from the timing of borrower payments, and that concerned the court in *Mullinax*, are not present here. Instead, the RESPA violation occurred, and the one-year statute of limitations for private actions began to run, each time the mortgage insurer conveyed, and PHH accepted, a kickback payment. Because of the way PHH structured its agreements (regardless of any choice made by borrowers), PHH committed multiple violations over time in connection with a single loan. This hardly suggests problematic disparate results, since the extent of PHH's liability was entirely within its control. Indeed, PHH could have limited the scope of its liability at any time simply by no longer accepting the ongoing kickback payments.

Both *Snow* and *Mullinax* contend that RESPA focuses on the mortgage closing. *See Snow*, 322 F.3d at 359; *Mullinax*, 199 F. Supp. 2d at 325. It is true that RESPA seeks to prevent distortions in the market for settlement services, and that borrowers usually "purchase" those services at closing. But this emphasis on the closing is nowhere specified in the text of the statute, and it fails to recognize that section 8, RESPA's enforcement mechanism, combats these distortions by restricting the conduct of settlement service providers and those who refer borrowers to them. Although ultimately RESPA is intended to address the harm done to borrowers, the culpable conduct under the statute is the giving and accepting of kickbacks, which does not necessarily occur only at closing but might occur at other stages of the process.

Although PHH claims that many other decisions support its argument, no other decision has surfaced that considers both the factual situation (*i.e.*, multiple kickback payments) and the legal issues presented here. In *Menichino v. Citibank,* No. 12–0058, 2013 WL 3802451 (W.D. Pa. July 19, 2013); *see* PHH Opp. Br. at 11, for example, the court considered a similar factual situation – the case involved RESPA violations arising from a captive reinsurance agreement. But the court did not have to address when the RESPA violations occurred because the "Plaintiffs readily acknowledge[d] that their cause of action f[ell] outside of RESPA's one-year statute of limitations" for private suits, and the only issue before the court was whether the statute of limitations could be equitably tolled. *Id.* at *4-*12.

PHH also mentions other cases that cite *Snow*. PHH Opp. Br. at 10-11 (citing *Drennen v. PNC Bank Nat'l Ass'n* (*In re Community Bank of N. Va.*), 622 F.3d 275 (3d Cir. 2010); *Clemmons v. Mortg. Elec. Registration Sys.*, 2014 U.S. App. LEXIS 21589 (10th Cir. Nov. 12, 2014); *Haase v. Countrywide Home Loans, Inc.*, 748 F.3d 624 (5th Cir. 2014)). But these cases merely rely on *Snow* for the unremarkable observation that the statute of limitations "begins to run 'from the date of the occurrence of the violation,' *i.e.,* the date the loan closed." *Drennen,* 622 F.3d at 281. Of course, that is what normally happens when a borrower pays in full at closing for a settlement service and the service provider pays the kickback at the same time. None of these cases involved multiple kickback payments made *after* closing, which is the crucial factual distinction here. And though PHH claims that its position is supported by "more than 130 decisions of federal and state court judges," PHH Opp. Br. at 10, it fails to cite these cases or, more important, to show that they address situations involving multiple kickback payments made after closing.

Finally, PHH claims support for its argument that violations occurred only at closing from *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007), *superseded by statute,* Lily Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5. *See* PHH Opp. Br. at 6-7; Oral Arg. Tr. at 48-49. Yet *Ledbetter* has nothing to do with this case. The plaintiff in *Ledbetter* alleged that her rights under the Civil Rights Act of 1964 had been violated as a result of discriminatory pay decisions. She conceded that those decisions had been made outside the limitations period, but argued that her case should go forward because she was receiving lower pay during the limitations period as a result of those earlier decisions. *Ledbetter*, 550 U.S. at 628 ("Ledbetter, as noted, makes no claim that intentionally discriminatory conduct occurred during the charging period .... Instead, she argues simply that Goodyear's conduct during the charging period gave present effect to discriminatory conduct outside of that period."). The Court held that Ledbetter's claim was untimely, *id.* at 632, but recognized that, if a party engages in distinct acts each constituting a violation, "then a fresh violation takes place when each act is committed," *id.* at 628. That is what happened here: PHH committed "fresh" violations each time it accepted a kickback payment. So the principle of Ledbetter is fully consistent with the approach taken here in applying RESPA on these facts.

E. "Continuing violation" liability is not warranted here

Enforcement further argues that, because PHH's violations were part of a continuing course of unlawful conduct that occurred over an 18-year period, the "continuing violation" doctrine should apply. Enf. Br. at 3-5. That is, it contends that PHH should be liable for every RESPA violation that resulted from the captive reinsurance agreements, going all the way back to 1995. The ALJ believed that the Bureau has "authority to interpret RESPA as articulating a continuing violation," but noted that the Bureau "has not done so yet." Doc. 152 at 12. Thus, he relied on existing RESPA cases only, and he determined that the case law did not support the application of the doctrine. *Id.* at 12-13. I agree with this conclusion.

The continuing violation doctrine is "most frequently applied in employment discrimination." *Cowell v. Palmer Township,* 263 F.3d 286, 292 (3d Cir. 2001). A continuing violation is "often invoked in cases involving a pattern or policy of employment discrimination in which there has been no single act of discrimination sufficient to trigger the running of the limitations period." *Velazquez v. Chardon*, 736 F.2d 831, 833 (1st Cir. 1984); *see also, e.g., Mandel v. M & Q Packaging Corp.*, 706 F.3d 157, 165 (3d Cir. 2013) ("Under the continuing violation doctrine, discriminatory acts that are not individually actionable may be aggregated to make out a hostile work environment claim ....").

The key distinction here is that unlike violations of the laws that prohibit employment discrimination, violations of section 8 of RESPA are individually actionable acts. PHH violated RESPA each time that it "accept[ed] any fee, kickback, or thing of value pursuant to any agreement" to refer settlement service business. 12 U.S.C. § 2607(a). Enforcement is correct that, under existing regulations, the existence of a referral agreement "may be established by a practice, pattern or course of conduct." 12 C.F.R. § 1024.14(e). But once that agreement has been established, PHH committed a separate (and separately actionable) violation of RESPA every time it accepted a payment pursuant to such an agreement.

Enforcement points out that the continuing violation doctrine may apply even where a violation could have been established during the limitations period. Enf. Br. at 3 (citing *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 117-18 (2002)). But the Court made that determination "precisely because the entire hostile work environment encompasses a single unlawful employment practice." *Morgan*, 536 U.S. at 117; *see also id.* at 115. By contrast, the text of section 8(a) of RESPA provides that only the "giv[ing]" or "accept[ing]" of each illegal referral payment constitutes a violation.

In sum, I agree with the court in *Menichino*: "Courts have been willing to apply the continuing violations theory to time-limited claims like hostile work environment because, to make out a cause of action, the plaintiff must show a series of discrete events over time whose 'cumulative effect' comprises a 'discriminatory practice.' But the plain language of RESPA does not envision such a cumulated series of events as giving rise to a cause of action." 2013 WL 3802451 at *12 (quoting *Huckabay v. Moore*, 142 F.3d 233, 239 (5th Cir. 1998)). Thus, the continuing violation doctrine is not properly applicable to the statutory violations at issue here.

F. PHH's other arguments about liability

1. The Bureau has authority over Atrium and Atrium Re

PHH argues that the Bureau lacks authority to enforce RESPA against either Atrium or Atrium Re in an administrative proceeding. PHH Br. at 12. This turns on whether they are "covered persons" under the CFPA, 12 U.S.C. § 5563(b), a term comprising "any person that engages in offering or providing a consumer financial product or service," 12 U.S.C. § 5481(6)(A). PHH Mortgage Corp. and PHH Home Loans are "covered persons" because they offer mortgages to consumers. Doc. 16 at 2. That being so, the CFPA also provides that persons who are "related" to covered persons are deemed to be covered persons themselves. 12 U.S.C. § 5481(25)(B). And "related persons" include "any director, officer, or employee charged with managerial responsibility for, or controlling shareholder of, or agent for" a non-bank covered person. 12 U.S.C. § 5481(25)(A), (C)(i).

PHH Corp. is a "related person," and, thus, a "covered person," because it is the controlling shareholder of both PHH Mortgage Corp. and PHH Home Loans. Doc. 16 at 2. Since PHH Corp. is a "covered person," the Bureau may enforce RESPA against Atrium and Atrium Re in an administrative proceeding if they are "related" to PHH Corp. The ALJ held that they were. Doc. 152 at 8-9. PHH offers three reasons why the ALJ was wrong, but those reasons are unconvincing.

An agent of a "covered person" is a "related person." 12 U.S.C. § 5481(25)(C)(i). Here abundant evidence shows that Atrium and Atrium Re were agents of PHH. The record showed that PHH established Atrium in 1994 as a wholly-owned subsidiary, ECX 153 at 57; Tr. at 123, with no employees, and that PHH employees performed all of its functions throughout its existence, ECX 153 at 24. PHH established Atrium Re in 2009, which took over all the functions of Atrium and operated in the same manner. ECX 653 at 11. It is also clear that PHH operated Atrium for its own benefit. In fact, in a submission to the Bureau, PHH stated that "[t]he fact of the matter is that PHH entered into the [captive reinsurance] agreements with the expectation that if it could originate higher quality loans, then it could benefit financially from a lower-than-industry [mortgage insurance] claim rate and, thus, a correspondingly lower claim rate on *its* reinsurance obligations." ECX 654 at 8 (emphasis added). These facts show that Atrium and Atrium Re were agents of PHH and therefore "related persons" under the statute.

PHH contends nonetheless that some agents of a covered person should not be considered "related persons." PHH Br. at 12. Except for "agents," the definition of "related person" lists only entities that are in positions of control with respect to a covered person: a "director," an "officer," an "employee charged with managerial responsibility," and a "controlling shareholder." Thus, PHH argues that the only "agents" who should be included within the definition of "related person" are those agents who have control over a covered person. But this argument is refuted by the definition of agency: "Agency is the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act." *Restatement (Third) of Agency* § 1.01 (2006). An agent is always a person that is controlled by a principal, not the other way around. PHH urges a result that would be more to its liking on the basis of interpretive canons such as *noscitur a sociis* and *ejusdem generis*, which may be helpful if a word is ambiguous, but the term "agent" is not ambiguous here.

PHH also notes that, if Atrium and Atrium Re are related persons, they are related to PHH Corp., which, in turn, is "deemed" to be a covered person because it is related to PHH Mortgage Corp. and PHH Home Loans. That is, Atrium and Atrium Re are "related persons" of "related persons." According to PHH, this relationship is "too attenuated" to permit the Bureau to assert authority over Atrium and Atrium Re. PHH Br. at 12. But the statute deems "related persons" to be "covered persons" for all purposes, so entities related to a "related person" are related to a "covered person," as the statute both explicitly provides and implicitly contemplates. In the end, PHH offers no good reason why the CFPA would allow entities to escape its coverage and circumvent RESPA by creating such labyrinthine corporate structures.

2. PHH was not denied due process

PHH also argues that it has been denied due process in this proceeding. First, it contends that the ALJ denied it due process by settling certain issues in the Order on Dispositive Motions, in which he ruled that Enforcement had established all the elements of a section 8(b) violation and all but one of the elements of a section 8(a) violation. PHH Br. at 16; Doc. 152. PHH complains that it would have liked to have presented evidence on these issues, but the ALJ's order did not just come out of the blue. Instead, Enforcement filed a Motion for Summary Disposition as to Liability, Doc. 102, and the Bureau's rules provided PHH with an opportunity to respond and present evidence in support of its response. 12 C.F.R. § 1081.212(d). PHH has not indicated that it was precluded from presenting any pertinent evidence. Indeed, the ALJ's summary disposition proceedings were really no different than the summary proceedings that routinely occur before any tribunal.

PHH also claims that the ALJ took actions that rendered Enforcement's notice of charges irrelevant. PHH Br. at 16-17. In particular, PHH contends that it never received notice that it might be held liable if Enforcement could show that it charged more for reinsurance than the reinsurance was worth because Enforcement only pled that Atrium's reinsurance had no value at all. In fact, PHH did receive notice on this point. *See* Doc. 1 at 17 (alleging that the premiums received by Atrium "(a) were not for services actually furnished or performed, or *(b) grossly exceeded the value of any such service*" (emphasis added)). Moreover, this argument is disingenuous since PHH actually discussed the issue at the time – within a week of filing the notice of charges, PHH complained to the ALJ that he should not permit Enforcement to allege both that it overcharged for reinsurance and that its reinsurance had no value. *See* Doc. 18 at 26. In any event, PHH received ample notice of the theory on which I have resolved this matter, which it has vigorously disputed throughout these proceedings – that PHH violated section 8(a) regardless of whether the reinsurance had value or was fairly priced, because the business opportunity to sell reinsurance for a profit was itself a "thing of value" within the clear meaning of RESPA. *See* Doc. 121 at 5-9 (contesting this theory).

Finally, PHH argues that the ALJ should not have relied on exhibits that he admitted into evidence but that were not testified to at trial. PHH Br. at 17-18. PHH does not cite any such exhibit, or explain how the ALJ's actions caused it any harm. In any event, it was not inappropriate for the ALJ to rely on evidence duly admitted into the record just because the evidence was not the subject of explicit testimony. Accordingly, I reject PHH's claim that it was denied due process.

3. The McCarran-Ferguson Act does not preempt this proceeding

PHH also contends that the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015, preempts this proceeding. PHH Br. at 13-14. That statute provides in relevant part that "[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance ... unless such Act specifically relates to the business of insurance." 15 U.S.C. § 1012(b). It thus stands as "a form of inverse preemption, letting state laws that regulate the business of insurance prevail over general federal laws, unless the federal law 'specifically relates to the business of insurance.'" *NAACP v. American Family Mut. Ins. Co.*, 978 F.2d 287, 293 (7th Cir.1992) (quoting 15 U.S.C. § 1012(b)).

PHH claims that the Bureau is violating McCarran-Ferguson by "attempting to use RESPA to retrospectively regulate reinsurance that was subject to the jurisdiction of state insurance regulators." PHH Br. at 13-14. Yet PHH has not shown that McCarran-Ferguson even applies here. First, it does not show how applying section 8(a) to its captive reinsurance agreements would "invalidate, impair, or supersede any law enacted by any State," resting on the bare but irrelevant assertion that insurance pricing "belong[s] to the state insurance commissioners." *Id.* at 14. This decision does not affect the pricing of insurance, nor has PHH shown how any *specific* state law is "invalidate[d], impair[ed], or supersede[d]." *See Mullinax,* 199 F. Supp. 2d at 316-23 (holding that McCarran-Ferguson did not prevent application of section 8(a) to a captive reinsurance agreement because defendant could not show that the agreement would "invalidate, impair, or supersede" any state law).

Nor does PHH mount any argument to disprove that section 8 specifically relates to the business of insurance, when in fact it does. Section 8 prohibits kickbacks in connection with referrals of settlement services, and RESPA defines settlement services to include "any service provided in connection with … the underwriting … of loans," such as the provision of mortgage insurance. 12 U.S.C. § 2602(3). Indeed, as the Eleventh Circuit has explained, "the most plausible meaning of the term 'underwriting … of loans' is mortgage insurance." *Patton v. Triad Guar. Ins. Corp.*, 277 F.3d 1294, 1298 (11th Cir. 2002). The court further noted that "underwriting" is principally defined as "'[t]he act of assuming a risk by insuring it.'" *Id.* (quoting *Black's Law Dictionary* (7th ed. 1999)). For these reasons, section 8 specifically relates to the business of insurance. PHH refers to this holding as a "misconception," PHH Br. at 13, but it never manages to explain why. McCarran-Ferguson simply does not apply here.

4. Judicial estoppel does not apply

Finally, PHH argues that judicial estoppel precludes it from violating RESPA when it received payments from the mortgage insurers. PHH Br. at 14-15. That too is incorrect.

In 2013, the Bureau resolved five cases with mortgage insurers, including several that did business with PHH. *CFPB v. Genworth Mortg. Ins. Co.*, No. 1:13-cv-21183 (S.D. Fla. Apr. 4, 2013); *CFPB v. Mortg. Guar. Ins.*, No. 1:13-cv-21187 (S.D. Fla. Apr. 4, 2013); *CFPB v. Radian Guar. Inc.*, No. 1:13-cv-21188 (S.D. Fla. Apr. 4, 2013); *CFPB v. United Guar. Co.*, No. 1:13-cv-21189 (S.D. Fla. Apr. 4, 2013); *CFPB v. Republic Mortg. Ins. Co.*, No. 1:13-cv-24146 (S.D. Fla. Nov. 15, 2013). All of these cases involved the other side of captive reinsurance agreements – the Bureau alleged that the mortgage insurers violated sections 8(a) and 8(b) when they paid reinsurance premiums in exchange for referrals. Each settlement provided that there was no admission of liability, that the consent was not "an adjudication of any fact or legal conclusion," and that the consent would "not have any preclusive effect in any other action or proceeding." The relief was similar in all five cases – each mortgage insurer agreed to pay a civil money penalty and to the entry of injunctive relief that prohibited it from entering into new captive insurance agreements or obtaining reinsurance from a captive reinsurer for any new business. Yet the order did allow the mortgage insurers to continue paying reinsurance premiums as to reinsurance policies already in existence.

Even though the Bureau and the mortgage insurers agreed the orders would not have preclusive effect in any other proceeding, PHH in effect urges that result by contending that no relief can be awarded for premium payments paid after entry of the settlements. That is not a proper use of judicial estoppel.

Judicial estoppel is a judge-made doctrine that exists to protect the integrity of the judicial process, but it should be applied only rarely and when necessary to avoid a miscarriage of justice. *MD Mall Assocs., LLC v. CSX Trans., Inc.*, 715 F.3d 479, 486 (3d Cir. 2013). For instance, the D.C. Circuit applies the following standard test to decide if judicial estoppel is appropriate:

> (1) Is a party's later position clearly inconsistent with its earlier position? (2) Has the party succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled? (3) Will the party seeking to assert an inconsistent position derive an unfair advantage or impose an unfair detriment on the opposing party is not estopped?

Moses v. Howard Univ. Hosp., 606 F.3d 789, 798 (D.C. Cir. 2010).

PHH fails all three parts of this test. As to the first part, in this proceeding Enforcement argues, and I have agreed, that PHH violated section 8(a) every time it accepted a reinsurance premium payment on or after July 21, 2008. This is not "clearly inconsistent" with any position taken by the Bureau in the consent orders because, at that time, the Bureau specifically took no position and the orders did not adjudicate any legal conclusion pertaining to premiums relating to preexisting reinsurance policies. Also, the consent orders were entered in April 2013, and all of the conduct challenged in this proceeding occurred prior to that date. As to the second part, because the orders did not reach legal conclusions, the district court that entered those orders was not misled, and I certainly have not been misled. Finally, as to the third part, PHH has not shown how the consent orders gave the Bureau any unfair advantage in this proceeding, or how PHH was in any way disadvantaged by them. In short, nothing about the consent orders creates any miscarriage of justice here.

III. SANCTIONS

A. Joint and several liability

The ALJ held all the respondents jointly and severally liable for the violations they committed, which is proper when defendants act as a common enterprise. PHH has not disputed this legal framework, whereby courts may consider factors such as these to indicate that corporations have acted as a common enterprise in connection with violations of law: (1) they maintain officers and employees in common; (2) they operate under common control; (3) they share offices; (4) they commingle funds; and (5) they share advertising and marketing. *See, e.g., FTC v. E.M.A. Nationwide, Inc.*, 767 F.3d 611, 636-37 (6th Cir. 2014); *FTC v. The Tax Club, Inc.*, 994 F. Supp. 2d 461, 469 (S.D.N.Y. 2014) (citing cases).

Applying these factors yields no real dispute on the facts established at trial here. PHH Corp., PHH Mortgage, PHH Home Loans, and Atrium/Atrium Reinsurance share employees. Atrium has no employees or office space of its own; all of its employees are employees of one of the PHH companies. ECX 153 at 24. The entities share directors and officers and operate under common control. *Id.* at 22-31, 69. The three PHH companies operated Atrium (and Atrium Reinsurance) so that they could enter into, and profit from, captive reinsurance agreements. Based on these factors, then, all of the Respondents acted as a common enterprise and are jointly and severally liable for the relief imposed in this proceeding.

B. Injunctive relief

The ALJ included three injunctive provisions in his proposed order: (1) PHH was ordered to cease and desist from violating section 8 of RESPA; (2) PHH was enjoined for 15 years from engaging in the business of captive insurance; and (3) PHH was "enjoined to disclose" to the Bureau all services provided to them by any mortgage insurer since 2004. Doc. 205 at 105. PHH contends that no injunctive relief is appropriate because it has discontinued its captive reinsurance agreements and that there is no basis for the disclosure provision. PHH Br. at 8-9.

PHH's arguments are unconvincing. First, it is commonplace that the need for injunctive relief "survives discontinuance of the illegal conduct." *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953); *see also, e.g., EEOC v. AutoZone, Inc.*, 707 F.3d 824, 841-44 (7th Cir. 2013). "The necessary determination is that there exists some cognizable danger of recurrent violation, something more than the mere possibility ...." *W.T. Grant*, 345 U.S. at 633; *see also, e.g., Borg-Warner Corp. v. FTC*, 746 F.2d 108, 110 (2d Cir. 1984) (articulating "cognizable danger" test). In deciding whether there is a cognizable danger that PHH's violations will recur, it is germane but not dispositive that there are no ongoing violations. *See, e.g., NLRB. v. Greensboro News & Record, Inc.*, 843 F.2d 795, 798 (4th Cir. 1988) ("[S]uch relief is inappropriate if the defendant can demonstrate that there is no reasonable expectation that the wrong will be repeated in the future.").

In this case, there is a cognizable danger that PHH's violations will recur. Although PHH is not currently providing reinsurance, it could easily resume the business at any time, and there is good reason why it might, as the business was very profitable for many years. PHH entered the captive reinsurance business in 1995, and it continued to accept reinsurance premiums until 2013. PHH has given no indication that it ceased its captive reinsurance agreements because they were illegal, rather than merely unprofitable. Nor is there any sign that PHH has taken affirmative steps, such as changing or retraining personnel, to make future RESPA violations less likely. Although PHH faults Enforcement for failing to show that PHH *intends* to resume captive reinsurance, the test for showing a cognizable danger of recurrence does not turn on that subjective point.

The cognizable danger that PHH will resume violating section 8 of RESPA supports an injunctive provision that prohibits PHH from violating section 8 in connection with the referral of borrowers to mortgage insurers. This provision, which applies whenever PHH refers borrowers to mortgage insurers, is appropriate because lenders routinely refer borrowers to mortgage insurers, and it would be easy for PHH to solicit some other form of payment (*i.e.*, not just reinsurance premiums) in exchange for any referrals it makes. Although the ALJ apparently believed that a cease-and-desist order is somehow different from an order providing for injunctive relief, *see* Doc. 205 at 94-95, administrative agencies often style their injunctive orders as orders to cease and desist, even though the effect of those orders is no different from injunctions. The CFPA happens to refer to this proceeding as a cease-and-desist proceeding, 12 U.S.C. § 5563, and accordingly, I will enter injunctive provisions requiring respondents to cease and desist from the prohibited conduct, while tailoring the provisions of the order to the particulars of PHH's conduct.

In addition to the first injunctive provision prohibiting PHH from violating section 8 of RESPA in connection with referrals of mortgage insurance business, the ALJ recommended a second injunctive provision prohibiting PHH, for 15 years, from entering into any captive reinsurance agreements. There is latitude for such remedial provisions, because once a violation is found, the Bureau "is not limited to prohibiting the illegal practice in the precise form in which it is found to have existed in the past." *FTC v. Ruberoid Co.*, 343 U.S. 470, 473 (1952). This provision appears to be reasonably tailored to PHH's conduct, since such agreements provide an easy mechanism for actions that violate section 8. This provision, like the third and fourth injunctive provisions, fences in PHH to help prevent the commission of further legal violations. *See FTC v. Nat'l Lead Co.*, 352 U.S. 419, 431 (1957) ("[T]hose caught violating the Act must expect some fencing in."). "Fencing in" is important because, if the Bureau "'is to attain the objectives Congress envisioned, it cannot be required to confine its road block to the narrow lane the transgressor has traveled; it must be allowed effectively to close all roads to the prohibited goal, so that its order may not be by-passed with impunity.'" *American Home Prod. Corp. v. FTC*, 695 F.2d 681, 704 (3d Cir. 1982) (quoting *Ruberoid*, 343 U.S. at 473). Given the nature and breadth of PHH's violations of section 8 in this case, as well as the time frame over which they extended, it is appropriate to enjoin PHH from entering into such agreements, and to do so for 15 years from the date the order becomes effective.

In fashioning relief in this proceeding, I have included another injunctive provision that is similar to the second, but applies somewhat more broadly. It prohibits PHH from referring borrowers to any provider of a settlement service if that provider has agreed to purchase a service from PHH, and if payment for that service is triggered by the referrals. This provision seeks to prevent PHH from entering into illegal referral agreements with respect to any settlement service, and it also applies for 15 years from the date the order becomes effective, as a further means of fencing in PHH against the commission of similar violations of RESPA.

The final injunctive provision recommended by the ALJ requires PHH to maintain certain records and make them available to the Bureau on request. The ALJ proposed a requirement that PHH must disclose to the Bureau, within 30 days, "all services provided to any of them by any mortgage insurance company since January 1, 2004." Doc. 205 at 102. I have narrowed that provision to conform it to the operative dates in this matter, such that it would apply only to such services provided on or after July 21, 2008, and for 15 years from the date the order becomes effective. The purpose of this modified provision is to make it easier for the Bureau to detect any violations of section 8 that PHH may have committed during the period in which the Bureau has the authority to pursue those violations and for the foreseeable future within the terms of PHH's prohibition order. So, in lieu of the provision recommended by the ALJ, PHH must maintain records of any "thing of value" that it receives from any real estate settlement service provider to which it has referred borrowers over the specified period, if it receives that thing of value within 24 months of the referral. PHH must maintain these records for five years from the date it receives the "thing of value," which will give the Bureau sufficient time to identify possible violations. PHH must also make these records available to the Bureau upon request.

PHH argues that no disclosure requirement is supported by the facts. PHH Br. at 9 n.7. But the purpose of this provision is to permit the Bureau to monitor PHH's conduct, especially given that referral agreements that violate section 8(a) can be difficult to detect. Because PHH violated section 8(a) of RESPA, and did so for such a long time, the monitoring imposed here is reasonable and appropriate fencing-in relief.

C. Disgorgement

The ALJ held that disgorgement is an appropriate remedy, and the CFPA specifically authorizes disgorgement to be imposed where it is justified on the facts. 12 U.S.C. § 5565(a)(2)(D). Disgorgement evolved as a form of monetary equitable relief that is "designed to deprive a wrongdoer of its unjust enrichment" and to deter others from violating the law. *SEC v. First City Fin. Corp.*, 890 F.2d 1215, 1230 (D.C. Cir. 1989); *FTC v. Bronson Partners, LLC*, 654 F.3d 359, 372 (2d Cir. 2011). The amount of disgorgement is based on "a reasonable approximation" of the amounts that PHH received. *First City Fin.*, 890 F.2d at 1232. "Any risk of uncertainty in calculating disgorgement should fall on the wrongdoer[s] whose illegal conduct created that uncertainty." *SEC v. Levine*, 517 F. Supp. 2d 121, 128 (D.D.C. 2007), *aff'd*, 279 F. App'x 6 (D.C. Cir. 2008).

Although courts sometimes say that disgorgement requires wrongdoers to disgorge illegally obtained *profits*, the proper measure is ill-gotten *gains*. That is, the wrongdoer must disgorge the "total billings that [it] received ..., without deducting monies paid by [it] to other parties." *Bronson Partners,* 654 F.3d at 375 (quotation marks omitted); *see SEC v. Banner Fund Int'l*, 211 F.3d 602, 617 (D.C. Cir. 2000); *FTC v. Direct Mktg. Concepts, Inc.*, 624 F.3d 1, 14–16 (1st Cir. 2010); *FTC v. Kuykendall,* 371 F.3d 745, 765–67 (10th Cir. 2004). Further, there is no requirement that I apply "tracing" rules. *See Bronson Partners*, 654 F.3d at 373 ("[W]hen a public entity seeks disgorgement it does not claim any entitlement to particular property."). PHH's captive reinsurance agreements violated RESPA, so it cannot offset the expenses of those agreements against its disgorgement obligation.

The ALJ held that "[i]ll-gotten gains refunded to the person from whom they were obtained are still ill-gotten, but they cannot be disgorged because they have already been given up." Doc. 205 at 89-90. He thus recognized that a disgorgement award should not be reduced by pay-offs to co-conspirators, but he went on to find that "claim payments were not payoffs, because they were intended to cover actual insurance claims." *Id.* at 90. Accordingly, the ALJ concluded that PHH's disgorgement obligation could be offset by payments that PHH made to mortgage insurers. I disagree with this analysis.

Offsets for payments PHH made are appropriate only if PHH made those payments to borrowers – *i.e.*, those whom RESPA seeks to protect. But here the offsets that the ALJ allowed were for payments PHH made to mortgage insurers, not to borrowers. RESPA prohibits not only "accept[ing]" kickbacks, but also "giv[ing]" kickbacks. 12 U.S.C. § 2607(a). Here, the kickbacks were given by the mortgage insurers, and it is not appropriate to credit PHH for payments it made to those who were involved in the very RESPA violations that are at the heart of this case.

PHH's only argument about offsets is that, during the relevant period, *i.e.*, on or after July 21, 2008, it paid out as much in claims as it received in reinsurance premiums. *See* PHH Opp. Br. at 12-16. PHH paid some of these claims in connection with the commutation of its captive reinsurance agreements, and it argues that, because those were "arms-length transactions," the payments it made should offset its disgorgement obligation. *Id.* at 15. But claims payments are nothing more than expenses of the illegal agreements, and therefore they do not justify any offset. Further, in calculating disgorgement, it is irrelevant whether PHH's expenses may have exceeded the premiums it received. *See Bronson Partners*, 654 F.3d at 375.

The ALJ concluded that he had authority to require PHH to disgorge premiums that it received for loans that closed on or after July 21, 2008. Both the Genworth 2008-B book year and the UGI 2009 book year included such loans, and the ALJ required PHH to disgorge premiums connected to those loans. CMG's 2008 book year also included loans that closed on or after July 21, 2008. But the ALJ declined to award any disgorgement for premiums connected to those loans because PHH repaid them to CMG as part of a commutation agreement. Doc. 205 at 89.

I agree that PHH should disgorge premiums it received for loans that closed on or after July 21, 2008, but that does not capture the full extent of its RESPA violations. As discussed previously, PHH violated RESPA every time it received a reinsurance premium from a mortgage insurer to which it had referred a borrower, regardless of when the loan closed. Thus, I order PHH to disgorge all premiums that it accepted on or after July 21, 2008, not just those associated with loans that closed on or after July 21, 2008. Further, as just explained, PHH's commutation of its agreement with CMG, or with any of the other mortgage insurers, does not offset its obligation to disgorge premiums connected with loans insured by those mortgage insurers.

The record on these issues is quite complete, and it provides the basis to calculate a reasonable estimate of the amounts that PHH received from each mortgage insurer.

1. UGI

The record shows, quarter-by-quarter (or, for certain years, month-by-month), the amount of the premiums that Atrium received from UGI and deposited in a trust account. *See* ECX 198 (Trust Deposits tab). In 2008, Atrium made four quarterly deposits of premiums that it received from UGI, totaling [redacted]. But under the interpretations of the CFPA and RESPA adopted earlier that govern timing, I have authority to award disgorgement only for the last 164 days of that year (from July 21 through the end of the year). Multiplying the total that Atrium received in 2008, which was a leap year, by 164/366 gives a fair approximation of the payments PHH accepted from July 21 to the end of the year because PHH collected premiums at a steady rate during 2008. Accordingly, PHH must disgorge [redacted] of the premiums that it received from UGI in 2008. In 2009, PHH received [redacted] from UGI; in 2010, PHH received [redacted] from UGI; and in 2011, PHH received [redacted] from UGI. For 2012, the record shows that, through the end of August, PHH received [redacted] of premiums from UGI. *See* ECX 198. A chart provided by PHH's vice president shows that, from the beginning of its relationship with UGI through March 31, 2013, PHH received a total of [redacted] in premiums. *See* ECX 653, Ex. C. The record shows that through September 30, 2012, PHH had received premiums from UGI totaling [redacted]. *See* ECX 198. Thus, from September 30, 2012 to March 31, 2013, PHH received [redacted] more from UGI. As a result of its captive reinsurance agreement with UGI, PHH must disgorge:

2008 (7/21 – 12/31)	[redacted]
2009	
2010	
2011	
2012 (1/1 – 9/31)	
10/1/2012 – 3/31/2013	
Total	$72,848,494

2. Genworth

The record shows the reinsurance premiums that Atrium received, year by year, from Genworth. *See* ECX 257 (Settlement tab). It is necessary to deduct from the total of premiums the amounts attributed to commissions, since Atrium never received those amounts because Genworth deducted them before paying premiums to Atrium. *See* RCX 44 (reinsurance agreement between Genworth and Atrium, providing for deduction of commissions); *FTC v. Verity Int'l, Ltd.*, 443 F.3d 48, 67-68 (2d Cir. 2006) (holding that a party may not be required to disgorge money it never received). Nonetheless, as explained above, the amounts received will not be offset for any claims paid by PHH to the mortgage insurers. The record shows that in 2008, Atrium received [redacted] from Genworth. *See* RCX 44. Again, as this amount must be pro-rated from July 21 through the end of the year, I will multiply it by 164/366, leaving [redacted] that PHH must disgorge for 2008. For 2009, PHH must disgorge [redacted]; for 2010, PHH must disgorge [redacted]; for 2011, PHH must disgorge [redacted]. PHH terminated its agreement with Genworth via commutation as of April 1, 2012. For that year, it must disgorge [redacted]. So as a result of its captive reinsurance agreement with Genworth, PHH must disgorge:

2008 (7/21 – 12/31)	[redacted]
2009	
2010	
2011	
2012 (1st quarter)	
Total	$34,236,016

3. Radian

The record shows the premiums that Atrium received, quarter by quarter, from Radian. *See* ECX 159 (Column F tab). Atrium received [redacted] from Radian in the third quarter of 2008, which again must be pro-rated against the operative date of July 21, leaving (after multiplying by 72/92) [redacted] as the disgorgement amount for the third quarter of 2008. PHH must disgorge [redacted] for the final quarter of 2008, and [redacted] for the first quarter of 2009, at which point Radian and Atrium terminated the agreement via commutation. So PHH's total amount of disgorgement as a result of its agreement with Radian is $957,704.

4. CMG

The record also shows the premiums that Atrium received, quarter by quarter, from CMG. *See* ECX 159. Atrium received [redacted] from CMG in the third quarter of 2008, which again must be pro-rated by multiplying that amount by 72/92, leaving [redacted] that PHH must disgorge for that quarter. PHH must disgorge [redacted] for the final quarter of 2008; [redacted] for the first quarter of 2009; and [redacted] for the second quarter of 2009, after which PHH commuted its agreement with CMG. PHH's disgorgement as a result of its agreement with Radian totals $1,146,404.

5. Total disgorgement

Summing the amounts above, PHH must disgorge $109,188,618:

UGI	$72,848,494
Genworth	$34,236,016
Radian	$ 957,704

CMG	$ 1,146,404
Total	$109,188,618[4]

Finally, Enforcement also suggests that, in addition to the payments that PHH accepted on or after July 21, 2008, PHH should be ordered to disgorge amounts that it withdrew from reinsurance trust accounts on or after this date. *See* Enf. Br. at 17. Yet that remedy simply does not follow from the conduct that violated the statute. PHH violated RESPA when it accepted reinsurance premiums, not when it made withdrawals from the trust accounts, and the latter provides no grounds for relief here.

6. Escrow option

If PHH appeals this decision pursuant to 12 U.S.C. § 5563(b)(4), it may, within 30 days after service of the order accompanying this decision, pay the disgorgement into an escrow account in lieu of making payment to the Bureau. The escrow account shall be held by an entity that is chosen by Respondents and acceptable to the Bureau. If all or any portion of the disgorgement award is upheld on appeal, that amount shall be released to the Bureau within 30 days after that court decision becomes final. Once the appeal has concluded and the Bureau has received the portion of the disgorgement award to which it is entitled, any funds remaining in escrow shall be released to Respondents.

D. Civil Money Penalty

At the time when HUD was the agency charged with enforcing RESPA, HUD did not have authority to obtain a civil money penalty for violations of the statute. Under the CFPA, however, the Bureau does have such authority, at least as to violations that occurred on or after July 21, 2011. As explained above, every time PHH accepted a reinsurance premium from a mortgage insurer that was linked to a referral, PHH violated RESPA. As part of its captive reinsurance agreements with UGI and Genworth, PHH received premiums on or after July 21, 2011. *See* ECX 198, ECX 257. Thus, PHH committed RESPA violations that could expose it to liability for civil money penalties.

The CFPA specifically provides that any person who violates any provision of a federal consumer financial law shall pay a civil money penalty, 12 U.S.C. § 5565(c)(1), and for violations that occur "knowingly," the amount of penalties could easily run into many millions of dollars in accordance with the statutory framework, 12 U.S.C. § 5565(c)(2)(C). Yet the statute confers discretion as to the amount of any civil money penalty that may be imposed (including zero) because, in determining the amount of any penalty, a variety of mitigating factors may be considered. *See* 12 U.S.C. § 5565(c)(3). Some of those factors do not favor mitigation in the circumstances here – for example, PHH's size, lack of good faith, and the gravity of the violations. Nonetheless, I find it most appropriate to exercise my statutory discretion not to impose a civil money penalty in this matter, based on "such other matters as justice may

[4] Enforcement calculated that PHH received a slightly larger amount of reinsurance premiums on or after July 21, 2008, Enf. Br. at 17 & n.23, but failed to take account of the leap year. Also, Enforcement relied on different portions of the record to calculate premiums received from Radian and CMG, but the exhibits used here more accurately reflect the amounts that PHH actually received from them.

require." 12 U.S.C. § 5565(c)(3)(E). From that perspective, it is relevant that no civil money penalties could have been imposed under RESPA's framework for the vast majority of PHH's conduct over the period encompassed by its captive reinsurance agreements. Moreover, I have discretion to conclude that the award of disgorgement discussed above, which under RESPA includes disgorgement of all the reinsurance premiums PHH received on or after July 21, 2008 from mortgage insurers to which it had referred borrowers, is a just and sufficient remedy to fulfill the Bureau's goals in this matter to enforce the provisions of the CFPA and RESPA.

Conclusion

For these reasons, I AFFIRM the Recommended Decision in part, and REVERSE it in part.

Richard Cordray
Richard Cordray
Director
Consumer Financial Protection Bureau

June 4, 2015

CONSENT ORDER:
IN THE MATTER OF LIGHTHOUSE TITLE

UNITED STATES OF AMERICA
CONSUMER FINANCIAL PROTECTION BUREAU

ADMINISTRATIVE PROCEEDING
File No. 2014-CFPB-0015

In the Matter of: **Lighthouse Title, Inc.,** **Respondent.**	**CONSENT ORDER**

The Consumer Financial Protection Bureau ("Bureau") has reviewed the practices of Lighthouse Title, Inc. ("Respondent") regarding the use of marketing services agreements, and has identified violations of Section 8(a) of the Real Estate Settlement Procedures Act, 12 U.S.C. § 2607, and its implementing regulation, Regulation X, 12 C.F.R. Part 1024 (formerly codified at 24 C.F.R. Part 3500) (collectively, "RESPA"): Respondent entered the marketing services agreements as quid pro quos for the referral of business, and Respondent paid fees under the agreements that were set based on the amount of business that the other party had referred or that Respondent anticipated would be referred in the future. The Bureau issues this Consent Order ("Order") under Sections 1053 and 1055 of the Consumer Financial Protection Act of 2010 ("CFPA"), 12 U.S.C. §§ 5563, 5565.

I

JURISDICTION

1. The Bureau has jurisdiction over this matter under Sections 1053 and 1055 of the CFPA, 12 U.S.C. §§ 5563, 5565.

II

STIPULATION

2. Respondent has executed a "Stipulation and Consent to the Issuance of a Consent Order," dated September 24, 2014 ("Stipulation"), which is incorporated by reference and is accepted by the Bureau. By this Stipulation, Respondent has consented to the issuance of this Order by the Bureau under Sections 1053 and 1055 of the CFPA, 12 U.S.C. §§ 5563 and 5565, without admitting or denying any findings of fact or conclusions of law, except that Respondent admits the facts necessary to establish the Bureau's jurisdiction over Respondent and the subject matter of this action.

III

DEFINITIONS

3. The following definitions shall apply to this Order:
    a. "Effective Date" means the date on which the Consent Order is issued.
    b. "Enforcement Director" means the Assistant Director of the Office of Enforcement for the Consumer Financial Protection Bureau, or his/her delegee.
    c. For purposes of paragraphs 27 and 28, "Marketing Services Agreement" and "MSA" mean an agreement pursuant to which Respondent is to provide any

Thing of Value to a person in a position to refer business incident to or a part of a real estate settlement service involving a federally related mortgage loan in exchange for marketing or advertising services. This includes agreements that allow Respondent to market or promote Respondent's services to such a person or its employees or agents, agreements that require a person or its employees or agents to endorse Respondent or Respondent's services, agreements pursuant to which such a person is to market Respondent's services to others, and agreements to include references to Respondent in any advertising placed by such a person. An agreement for mass advertising for consumer consumption pursuant to which Respondent is to pay a person who does not provide real estate settlement services to place an advertisement to the public (*e.g.*, an agreement to place an advertisement in a newspaper or magazine or on a television or radio station) is not a marketing services agreement unless the person endorses Respondent as part of the advertisement.

d. "Related Consumer Action" means a private action by or on behalf of one or more consumers, or an enforcement action by another governmental entity, brought against Respondent based on substantially the same facts as described in Section IV of this Order.

e. "Respondent" means Lighthouse Title, Inc., and its successors and assigns.

f. "Thing of Value" means any payment, advance, funds, loan, service, or other consideration, including, without limitation, monies, things, discounts, salaries, commissions, fees, duplicate payments of a charge, stock, dividends, distribution of partnership profits, franchise royalties, credits representing monies that may be paid at a future date, the opportunity to participate in a money-making program, retained or increased earnings, increased equity in a parent or subsidiary entity, special bank deposits or accounts, special or unusual banking terms, services of all types at special or free rates, sales or rentals at special prices or rates, lease or rental payments based in whole or in part on the amount of business referred, trips and payments of another person's expenses, or reduction in credit against an existing obligation.

IV

BUREAU FINDINGS AND CONCLUSIONS

The Bureau finds the following:

4. Respondent is a title insurance agency located in Holland, Michigan, that, among other activities, provides settlement services for federally related mortgage loans in Michigan.
5. RESPA Section 8(a) provides, "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." 12 U.S.C. § 2607(a).
6. Repeated payments "connected in any way with the volume or value of the business referred . . . [are] evidence that [the payments are] made pursuant to an agreement or understanding for the referral of business." 12 C.F.R. § 1024.14(e).
7. "If the payment of a thing of value bears no reasonable relationship to the market value of the goods or services provided, then the excess is not for services or goods

actually performed or provided. These facts may be used as evidence of a violation of Section 8 . . . ." 12 C.F.R. § 1024.14(g)(2).

8. A fair market value for goods or services is based only on the value of the goods or services in and of themselves and cannot include any consideration of the value of any referrals of business incident to or a part of real estate settlement services related to federally related mortgage loans. *Id.*

9. RESPA Section 8(c)(2) provides an exemption for "payment[s] to any person of a bona fide salary or compensation or other payment for goods or facilities actually furnished or for services actually performed." 12 U.S.C. § 2607(c)(2); *see also* 12 C.F.R. § 1024.14(g)(1)(iv).

10. Payments to non-employees for referrals are prohibited by Section 8(a) and cannot be bona fide payments for goods actually furnished or services actually performed. 12 U.S.C. § 2607(a); 12 C.F.R. § 1024.14(b) ("A company may not pay any other company or the employees of any other company for the referral of settlement service business.").

Findings and Conclusions Related to Respondent's Use of Marketing Services Agreements

11. Since May 2009, Respondent entered a series of Marketing Services Agreements ("MSAs") with various counterparties for the provision of marketing and advertising services.

12. Respondent entered and renewed these MSAs with the agreement or understanding that in return the counterparties would refer closings and title insurance business related to federally related mortgage loans to Respondent.

13. Respondent believed that if it did not enter MSAs with these counterparties that the counterparties would refer their business to other companies.
14. Respondent did not determine a fair market value for the services it allegedly received pursuant to the MSAs.
15. Respondent did not document how it determined the fair market value for the specific services allegedly received under the MSAs.
16. Respondent set the fees to be paid pursuant to the MSAs, in part, by considering how many referrals it had received from the counterparties and the revenue generated by those referrals.
17. In some cases, Respondent also set the fees, in part, by considering how much competing title insurance companies were willing to pay those same counterparties for marketing and advertising services.
18. Respondent did not diligently monitor its counterparties to ensure that it received the services for which it contracted.
19. The counterparties referred significantly more transactions to Respondent when they had MSAs with Respondent than when they did not. The differences are statistically significant and are not explained by seasonal or year-to-year fluctuations.
20. Entering a contract is a "thing of value" within the meaning of Section 8, even if the fees paid under that contract are fair market value for the goods or services provided.
21. Entering a contract with the agreement or understanding that in exchange the counterparty will refer settlement services related to federally related mortgage loans violates Section 8(a).

22. In addition, marketing fees set by considering the amount of business received from the counterparty are connected with the volume or value of the business referred, and therefore are evidence that the payments are made pursuant to an agreement or understanding for the referral of business.

23. The fees that Respondent paid were not a fair market value for the services for which Respondent contracted.

24. Thus, Respondent violated Section 8(a) by entering contracts—the Marketing Services Agreements—with the agreement or understanding that in exchange the counterparties would refer closings and title insurance business related to federally related mortgage loans to Respondent and by paying counterparties to those contracts fees with the agreement or understanding that in exchange the counterparties would refer closings and title insurance business related to federally related mortgage loans to Respondent.

V

Order to Cease and Desist and to Take Other Affirmative Action

IT IS ORDERED, under Sections 1053 and 1055 of the CFPA, that:

25. Respondent and its officers, agents, servants, and employees, who have actual notice of this Consent Order, whether acting directly or indirectly, must not violate Section 8 of RESPA.

26. Respondent must document all exchanges of things of value worth more than $5.00 with persons in a position to refer business incident to or part of a real estate settlement service involving a federally related mortgage loan, including a description of all things of value exchanged and the reasons for the exchange, must

maintain such documentation for five years after the exchange, and must produce such documentation to the Bureau promptly upon request.

27. Respondent must terminate immediately any and all Marketing Services Agreements currently in effect.

28. Respondent must not enter into Marketing Services Agreements.

VI

Order to Pay Civil Money Penalties

IT IS FURTHER ORDERED that:

29. Under Section 1055(c) of the CFPA, 12 U.S.C. § 5565(c), by reason of the violations of law described in Section IV of this Consent Order, and taking into account the factors in 12 U.S.C. § 5565(c)(3), Respondent must pay a civil money penalty of $200,000 to the Bureau.

30. Within 10 days of the Effective Date, Respondent must pay the civil money penalty by wire transfer to the Bureau or to the Bureau's agent in compliance with the Bureau's wiring instructions.

31. The civil money penalty paid under this Consent Order will be deposited in the Civil Penalty Fund of the Bureau as required by Section 1017(d) of the CFPA, 12 U.S.C. § 5497(d).

32. Respondent must treat the civil money penalty paid under this Consent Order as a penalty paid to the government for all purposes. Regardless of how the Bureau ultimately uses those funds, Respondent may not:

    a. Claim, assert, or apply for a tax deduction, tax credit, or any other tax benefit for any civil money penalty paid under this Consent Order; or

b. Seek or accept, directly or indirectly, reimbursement or indemnification from any source, including but not limited to payment made under any insurance policy, with regard to any civil money penalty paid under this Consent Order.

33. To preserve the deterrent effect of the civil money penalty in any Related Consumer Action, Respondent may not argue that Respondent is entitled to, nor may Respondent benefit by, any offset or reduction of any monetary remedies imposed in the Related Consumer Action because of the civil money penalty paid in this action (Penalty Offset). If the court in any Related Consumer Action grants such a Penalty Offset, Respondent must, within 30 days after entry of a final order granting the Penalty Offset, notify the Bureau, and pay the amount of the Penalty Offset to the U.S. Treasury. Such a payment will not be considered an additional civil money penalty and will not change the amount of the civil money penalty imposed in this action.

VII

Order Related to Additional Monetary Provisions

IT IS FURTHER ORDERED that:

34. In the event of any default on Respondent's obligations to make payment under this Consent Order, interest, computed under 28 U.S.C. § 1961, as amended, will accrue on any outstanding amounts not paid from the date of default to the date of payment, and will immediately become due and payable.

35. Respondent must relinquish all dominion, control, and title to the funds paid to the fullest extent permitted by law and no part of the funds may be returned to Respondent.

36. Under 31 U.S.C. § 7701, Respondent, unless it already has done so, must furnish to the Bureau its taxpayer identifying numbers, which may be used for purposes of collecting and reporting on any delinquent amount arising out of this Consent Order.

37. Within 30 days of the entry of a final judgment, consent order, or settlement in a Related Consumer Action, Respondent must notify the Enforcement Director of the final judgment, consent order, or settlement in writing. That notification must indicate the amount of redress, if any, that Respondent paid or is required to pay to consumers and describe the consumers or classes of consumers to whom that redress has been or will be paid.

VIII

Order Related to Reporting Requirements

IT IS FURTHER ORDERED that:

38. Respondent must notify the Bureau of any development that may affect compliance obligations arising under this Consent Order, including but not limited to, a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor company; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this Consent Order; the filing of any bankruptcy or insolvency proceeding by or against Respondent; or a change in Respondent's name or address. Respondent must provide this notice at least 30 days before the development or as soon as practicable after the learning about the development, whichever is sooner.

IX

Order Related to Order Distribution and Acknowledgment

IT IS FURTHER ORDERED that:

39. Within 30 days of the Effective Date, Respondent must deliver a copy of this Consent Order to each of its board members and executive officers, as well as to any managers, employees, service providers, or other agents and representatives who have responsibilities directly related to the subject matter of the Consent Order.

40. For five (5) years from the Effective Date, Respondent must deliver a copy of this Consent Order to any business entity resulting from any change in structure referred to in Section VIII, and future board members and executive officers, as well as to any managers, employees, service providers, or other agents and representatives who will have responsibilities directly related to the subject matter of the Consent Order before they assume their responsibilities.

41. Respondent must secure a signed and dated statement acknowledging receipt of a copy of this Consent Order, ensuring that any electronic signatures comply with the requirements of the E-Sign Act, 15 U.S.C. § 7001 *et seq.*, within 30 days of delivery, from all board members, executive officers, managers, employees, or other agents or representatives of Respondent who receive a copy of this Consent Order under this Section. Respondent must request and must make diligent efforts to receive a signed and dated statement acknowledging receipt of a copy of this Consent Order, ensuring that any electronic signatures comply with the requirements of the E-Sign Act, 15 U.S.C. § 7001 *et seq.*, within 30 days of delivery, from any third parties who receive a copy of this Consent Order under this Section.

X

Order Related to Recordkeeping

IT IS FURTHER ORDERED that:

42. Respondent must create, for at least five (5) years from the Effective Date, the following business records: All documents and records necessary to demonstrate full compliance with each provision of this Consent Order, including all submissions to the Bureau.

43. Respondent must retain the documents identified in Paragraph 42 for at least five (5) years.

44. Respondent must make the documents identified in Paragraph 42 available to the Bureau upon the Bureau's request.

XI

Order Related to Notices

IT IS FURTHER ORDERED that:

45. Unless otherwise directed in writing by the Bureau, Respondent must provide all submissions, requests, communications, or other documents relating to this Consent Order in writing, with the subject line, "*In re* Lighthouse Title, Inc., File No. 2014-CFPB-0015 " and send them either:

    a. By overnight courier (not the U.S. Postal Service), as follows:

        Assistant Director for Enforcement
        Consumer Financial Protection Bureau
        ATTENTION: Office of Enforcement
        1625 Eye Street, N.W.
        Washington D.C. 20006; or

b. By first-class mail to:

Assistant Director for Enforcement
Consumer Financial Protection Bureau
ATTENTION: Office of Enforcement
1700 G Street, N.W.
Washington D.C. 20552

and contemporaneously by email to Enforcement_Compliance@cfpb.gov.

XII

Order Related to Compliance Monitoring

IT IS FURTHER ORDERED that:

46. Within 30 days of receipt of a written request from the Bureau, Respondent must submit additional compliance reports or other requested information, which must be made under penalty of perjury; provide sworn testimony; or produce documents.

47. Respondent must permit Bureau representatives to interview any employee or other person affiliated with Respondent who has agreed to such an interview. The person interviewed may have counsel present.

48. Nothing in this Consent Order will limit the Bureau's lawful use of compulsory process, under 12 C.F.R. § 1080.6.

XIII

Order Related to Modifications to Non-Material Requirements

IT IS FURTHER ORDERED that:

49. Respondent may seek a modification to non-material requirements of this Consent Order (*e.g.*, reasonable extensions of time and changes to reporting requirements) by submitting a written request to the Enforcement Director.

50. The Enforcement Director may, in his/her discretion, modify any non-material requirements of this Consent Order (*e.g.*, reasonable extensions of time and changes to reporting requirements) if he/she determines good cause justifies the modification. Any such modification by the Enforcement Director must be in writing.

XIV

Order Related to Administrative Provisions

IT IS FURTHER ORDERED that:

51. The provisions of this Consent Order do not bar, estop, or otherwise prevent the Bureau, or any other governmental agency, from taking any other action against Respondent, except as described in Paragraph 52.

52. The Bureau releases and discharges Respondent from all potential liability for law violations that the Bureau has or might have asserted based on the practices described in Section IV of this Consent Order, to the extent such practices occurred before the Effective Date and the Bureau knows about them as of the Effective Date. The Bureau may use the practices described in this Consent Order in future enforcement actions against Respondent and its affiliates, including, without limitation, to establish a pattern or practice of violations or the continuation of a pattern or practice of violations or to calculate the amount of any penalty. This release does not preclude or affect any right of the Bureau to determine and ensure compliance with the Consent Order, or to seek penalties for any violations of the Consent Order.

53. This Consent Order is intended to be, and will be construed as, a final Consent Order issued under Section 1053 of the CFPA, 12 U.S.C. § 5563, and expressly does not

form, and may not be construed to form, a contract binding the Bureau or the United States.

54. This Consent Order will terminate five (5) years from the Effective Date or five (5) years from the most recent date that the Bureau initiates an action alleging any violation of the Consent Order by Respondent. If such action is dismissed or the relevant adjudicative body rules that Respondent did not violate any provision of the Consent Order, and the dismissal or ruling is either not appealed or upheld on appeal, then the Consent Order will terminate as though the action had never been filed. The Consent Order will remain effective and enforceable until such time, except to the extent that any provisions of this Consent Order have been amended, suspended, waived, or terminated in writing by the Bureau or its designated agent.

55. Calculation of time limitations will run from the Effective Date and be based on calendar days, unless otherwise noted.

56. The provisions of this Consent Order will be enforceable by the Bureau. For any violation of this Consent Order, the Bureau may impose the maximum amount of civil money penalties allowed under section 1055(c) of the CFP Act, 12 U.S.C. § 5565(c). In connection with any attempt by the Bureau to enforce this Consent Order in federal district court, the Bureau may serve Respondent wherever Respondent may be found and Respondent may not contest that court's personal jurisdiction over Respondent.

57. This Consent Order and the accompanying Stipulation contain the complete agreement between the parties. The parties have made no promises, representations, or warranties other than what is contained in this Consent Order and the

accompanying Stipulation. This Consent Order and the accompanying Stipulation supersede any prior oral or written communications, discussions, or understandings.

58. Nothing in this Consent Order or the accompanying Stipulation may be construed as allowing the Respondent, its officers, or its employees to violate any law, rule, or regulation.

IT IS SO ORDERED, this 25th day of September, 2014.

Richard Cordray
Richard Cordray
Director
Consumer Financial Protection Bureau

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT: INTERPRETIVE RULE, 2010

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Part 3500

[Docket No. FR–5425–IA–02]

Real Estate Settlement Procedures Act (RESPA): Home Warranty Companies' Payments to Real Estate Brokers and Agents Interpretive Rule: Response to Public Comments

AGENCY: Office of General Counsel, HUD.

ACTION: Interpretive Rule; Response to Public Comments.

SUMMARY: On June 25, 2010, HUD issued a rule interpreting certain provisions of RESPA as applied to the payment of fees to real estate brokers and agents by home warranty companies. The public was invited to comment on the interpretive rule. After reviewing and considering the comments, HUD determined that changes are not needed to the interpretive rule. Through this document, HUD responds to certain questions raised in the comments. HUD believes that its response to these questions serves to provide additional guidance relating to matters covered in the interpretive rule and the comments.

FOR FURTHER INFORMATION CONTACT: For legal questions, contact Paul S. Ceja, Assistant General Counsel for RESPA/SAFE, telephone number 202-708-3137; or Peter S. Race, Assistant General Counsel for Compliance, telephone number 202-708-2350; Department of Housing and Urban Development, 451 7th Street, SW, Room 9262, Washington, DC 20410. For other questions, contact Barton Shapiro, Director, or Mary Jo Sullivan, Deputy Director, Office of RESPA and Interstate Land Sales, Office of Housing, Department of Housing and Urban Development, 451 7th Street, SW, Room 9158, Washington, DC 20410; telephone number 202–708–0502. These telephone numbers are not toll-free. Persons with hearing or speech impairments may access these numbers via TTY by calling the toll-free Federal Information Relay Service at 1-800-877-8339.

SUPPLEMENTARY INFORMATION:

I. Background

The requirements and prohibitions under RESPA apply to residential real estate transactions that include a federally related mortgage loan. Section 8 of RESPA prohibits giving and receiving "kickbacks" for the referral of real estate settlement services, and unearned fees, involving real estate transactions. Since 1992, HUD's RESPA regulations have defined "settlement service" to include "homeowner's warranties". 24 CFR 3500.2(11). While a referral of settlement services is not compensable under RESPA, a real estate broker or agent (or other person in a position to refer settlement service business) may be compensated for services that are actual, necessary and distinct from the primary services provided by the real estate broker or agent, if the services are not nominal, and the payment is not a duplicative charge. (See 24 CFR 3500.14(b), (c), (g)(1), and (g)(3)).

On June 25, 2010 (75 FR 36271), HUD issued an interpretive rule on the propriety under Section 8 of RESPA (12 U.S.C. § 2607) of payments to real estate brokers and agents from home warranty companies (HWCs). The interpretive rule concluded:

(1) A payment by an HWC for marketing services performed by real estate brokers or agents on behalf of the HWC that are directed to particular homebuyers or sellers is an illegal kickback for a referral under section 8;

(2) Depending upon the facts of a particular case, an HWC may compensate a real estate broker or agent for services when those services are actual, necessary and distinct from the primary services provided by the real estate broker or agent, and when those

additional services are not nominal and are not services for which there is a duplicative charge; and

(3) The amount of compensation from the HWC that is permitted under section 8 for such additional services must be reasonably related to the value of those services and not include compensation for referrals of business.

75 FR at 36273.

HUD received 72 comments in response to publication of the interpretive rule. HUD reviewed all of the comments, and appreciates the input and information provided by the commenters. Some commenters supported the interpretive rule and others did not. HUD found that the comments that were not supportive of its interpretation did not present concerns or information that warrant any changes to the interpretive rule. HUD, however, has identified and is responding to seven specific questions to provide additional guidance relating to matters covered in the interpretive rule and the comments.

II. Questions and Responses

1. Question: Is a home warranty company's flat fee payment (e.g., monthly or annual payment) to a real estate broker or agent for marketing a home warranty product directly to particular homebuyers or sellers a permissible payment under section 8 of RESPA?

HUD Response: No, as provided in the interpretive rule, payments for marketing services directed to particular homebuyers or sellers are considered to be payments for affirmatively influencing their choice of settlement service providers and would therefore violate section 8 of RESPA as an illegal kickback for a referral, regardless of whether the payment is made to the broker or agent on a "per transaction" or a "flat fee" basis.

2. Question: Is the list of items in footnote 2 of the interpretive rule an exhaustive list of the services that a real estate broker or agent can be legally compensated for by a home warranty company under section 8 of RESPA?

HUD Response: No, the footnote itself begins with the introduction, "For example". The list in the footnote is not exhaustive but exemplary of services that, in a particular case, may be compensable. However, as discussed in the interpretive rule, to be compensable the services must be services that are "actual, necessary and distinct from the primary services provided by the real estate broker or agent, that are not nominal, and for which duplicative fees are not charged" (see fn.1 of the interpretive rule). Referrals of settlement service business are not compensable services. Therefore, payments made for "services" that were fabricated to disguise a payment to a real estate broker or agent for referrals and are not, in fact, "necessary" would be illegal under section 8 of RESPA.

3. Question: What is meant by the statement in the interpretive rule that evidence in support of a determination that compensable services have been performed by a real estate broker or agent may include: "The real estate broker or agent is by contract the legal agent of the HWC, and the HWC assumes responsibility for any representations made by the broker or agent about the warranty product."

HUD Response: While not conclusive, the fact that a home warranty company is willing to be legally committed by the work and representations of a real estate broker or agent who is compensated by the HWC for performing services is one indicator that those services provided are "actual, necessary and distinct" and not nominal—i.e., that actual work is being performed by the real estate broker or agent for which the home warranty company is willing to assume liability. Specifically, such a legal relationship indicates that the HWC has worked with the real estate broker or agent closely enough to understand the value of the services performed by the broker or agent, and to be confident enough of the broker's or agent's services and representations, that the HWC is willing to take responsibility for those services and representations. Conversely however, if in a contract with a consumer, for example, the HWC disclaims liability for acts and representations of the real estate broker or agent in connection with the home warranty, this may indicate that no actual services of value have been performed by the real estate broker or agent.

4. Question: Why is it a relevant factor in analyzing a potential section 8 violation that a home warranty company's payment to a real estate broker or agent was made under an exclusive-representation arrangement?

HUD Response: Section 8 of RESPA prohibits payments for referrals and unearned fees. Stated another way, referrals are not compensable services under section 8. See 24 CFR 3500.14(b). HUD's interpretive rule states that, in initially evaluating whether a payment from an HWC to a real estate broker or agent is a violation of section 8, HUD may look at whether the payment is tied to an arrangement that prohibits the broker or agent from receiving from a competitor comparable payment for comparable actual services. In other words, such an exclusive-representation arrangement between the HWC and the real estate broker or agent is evidence of an unlawful-payment-for-referral arrangement whereby the real estate broker or agent is only being paid for steering customers exclusively to the HWC and its products. However, as it is further noted in the interpretive rule, if it is determined that the HWC's payment is only for compensable services, the existence of an exclusive-representation arrangement would be permissible under section 8.

5. Question: Does the interpretive rule prohibit payments from an HWC to real estate brokers or agents for general advertising services performed by the brokers or agents on behalf of the HWC?

HUD Response: No. The interpretive rule specifically prohibits compensation for marketing performed by a real estate broker or agent on behalf of an HWC when the marketing is directed to selling the HWC's home warranty product to particular homebuyers or sellers. HUD would evaluate the permissibility of compensation provided by an HWC to real estate brokers or agents for other advertising by applying the definition of "referral" in § 3500.14(f) of HUD's RESPA regulations. For example, a reasonable payment for an advertisement by an HWC in a real estate broker's or agent's publication or on the broker's or agent's website would not, in and of itself, be a payment for a referral under RESPA. If the marketing services for which the HWC is paying the real estate broker or agent are services directed to a homebuyer or seller that have the effect of "affirmatively influencing" the selection by the homebuyer or seller of the HWC's home warranty product in connection with the real estate settlement, then those marketing services would be subject to RESPA's prohibitions on referral payments.

6. Question: Is a home warranty always considered to be a "settlement service" for purposes of RESPA coverage?

HUD Response: No. RESPA's kickback and referral fee prohibitions are applicable in the context of "settlement services", a term that is defined broadly under RESPA and HUD's RESPA regulations. RESPA defines "settlement services" to include "any service provided in connection with a real estate settlement" and provides a nonexclusive listing of such services (12 U.S.C. § 2602(3)). In its regulations HUD has long defined "settlement service" to include "any service provided in connection with a prospective or actual settlement…" (24 CFR 3500.2). As noted above and in the interpretive rule, "homeowner's warranties" have been specifically included in HUD's definition of "settlement service" since 1992 (24 CFR 3500.2(11)). Therefore, when a home warranty is "provided in connection with a prospective or actual settlement", it is a "settlement service" under HUD's regulatory interpretation of RESPA.

In determining whether services involving a home warranty are provided in connection with a prospective or actual settlement, HUD would consider, among other things: (i) whether the charge for the home warranty is paid out of the proceeds at the settlement; and (ii) if the charge is not paid at settlement, whether the timing of the purchase of and payment for the home warranty indicates that the purchase is so removed from the settlement that it is not provided "in connection with" a settlement within the meaning of RESPA and HUD's regulations. Items paid in connection with a RESPA-covered transaction, of course, may be paid and disclosed on the HUD-1/1A settlement statement as paid outside of closing (P.O.C.) or through the accounting at settlement.

7. Question: Does the interpretive rule apply to situations beyond home warranty company payments to real estate brokers and agents, for example to payments by other settlement service providers to real estate brokers and agents?

HUD Response: The interpretive rule is specifically directed to home warranty company payments to real estate brokers and agents. However, the analysis in the interpretive rule is based on an interpretation of the RESPA statute and HUD's existing regulations, which analysis may be applicable to payments made by other settlement service providers to real estate brokers or agents.

III. Confirmation of June 25, 2010, Interpretive Rule

Again, HUD appreciates the input and information provided by the members of the public and representatives of industry who responded to HUD's solicitation of public comment on the June 25, 2010, interpretive rule. After consideration of the comments, HUD confirms its June 25, 2010, interpretation of certain provisions of RESPA as applied to the payment of fees to real estate brokers and agents by home warranty companies. The interpretive rule therefore stands without change.

Finally, some commenters asked whether the interpretive rule has prospective or retroactive effect. An interpretive rule does not change existing law. As noted in the concluding paragraph of the rule, the interpretive rule represents HUD's interpretation of its existing regulations. This interpretive rule, therefore, does not constitute a change in HUD's interpretation of RESPA or the RESPA regulations, but is an articulation of HUD's interpretation of RESPA and the implementing regulations that specifically applies to home warranty company payments to real estate brokers and agents.

Authority: 12 USC 2601-2617; 42 USC 3535(d).

Dated: November 23, 2010

Helen R. Kanovsky, General Counsel

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