



June 25, 2018

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The Honorable Mick Mulvaney
Acting Director
Bureau of Consumer Financial Protection
1700 G Street, NW
Washington, D.C. 20552

Re: Request for Information Regarding the Bureau's Inherited Regulations and Inherited Rulemaking Authorities; Docket No. CFPB-2018-0012 submitted electronically via: <https://www.regulations.gov/docket?D=CFPB-2018-0012>.

Dear Acting Director Mulvaney,

On behalf of over 1.3 million members of the National Association of REALTORS®, I appreciate the opportunity to comment on the Request for Information (RFI) Regarding the Bureau's Inherited Regulations and Inherited Rulemaking Authorities. In accordance with the Dodd-Frank Act, the Bureau of Consumer Financial Protection (the Bureau) obtained jurisdiction over consumer financial protection functions previously vested in certain Federal agencies, including responsibilities over various regulations and rulemaking authorities. This collective streamlining has placed a tremendous amount of oversight over consumer financial products and services, and as a result, has greatly impacted a variety of industry operations by real estate professionals and settlement service providers.

The National Association of REALTORS® (NAR) is America's largest trade association, including NAR's five commercial real estate institutes and its societies and councils. REALTORS® are involved in all aspects of residential and commercial real estate transactions and belong to one or more of the approximately 1,200 local associations and boards, and 54 state and territory associations. REALTOR® members also include affiliated title, escrow, and mortgage brokerage services, all of which have a vested stake in the regulatory operations of the Bureau.

One of the primary inherited regulations of interest to NAR's membership is the *Real Estate Settlement Procedures Act* (RESPA) that provides consumers with improved disclosures of settlement charges and reduces the costs of closing by the elimination of referral fees and kickbacks. RESPA was signed into law in December 1974, and became effective in June 1975. The law has gone through a number of changes and amendments since then, all with the intent of informing consumers of their settlement charges and prohibiting kickbacks that can increase the cost of obtaining a mortgage.

Originally enforced by the U.S. Department of Housing and Urban Development (HUD), RESPA enforcement responsibilities were assumed by the Bureau when it was created by the Dodd-Frank Act. Since this time, there have been a number of enforcement actions and interpretations issued by the Bureau that have not delivered the compliance clarity needed by industry but rather have resulted in ongoing confusion and uncertainty. NAR is hopeful the insight provided through the comments offered on the RFI will illustrate needed action by the Bureau to remedy such ongoing RESPA concerns.

In a broad effort to prohibit the use of marketing service agreements (MSAs), which are permissible under RESPA, on October 8, 2015, the Bureau issued Compliance Bulletin



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2015-05, “RESPA Compliance and Marketing Services Agreements.” The compliance bulletin offered “guidance” that contradicted previous longstanding interpretations of the law offered by HUD. In the Bulletin, the Bureau took the position that an “agreement that entails exchanging a thing of value for referrals of settlement service business involving a federally related mortgage loan likely violates RESPA,” meaning that even a marketing contract itself could be viewed as a RESPA violation. While the bulletin was problematic in its inconsistent interpretation of RESPA, it provided formal insight into the Bureau’s new perspective on a law that industry had been following for decades, serving as an important warning for actions moving forward. Before the Bulletin however, the Bureau offered a preview of this unfounded interpretation and began the troublesome streak of providing regulatory insight through enforcement.

In June 2015, the Bureau issued a decision against PHH Corporation and a number of other defendants for violating Section 8 of RESPA by paying for referrals when there is a federally related mortgage. RESPA Section 8(a) prohibits payments for the referral of settlement services and Section 8(c)(2) provides a safe harbor, stating 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 services actually performed.” In a prior interpretation by HUD on a captive insurance structure, the Department stated that section 8(c)(2) can be an affirmative defense if the service is actually provided and the price reflects the actual cost of the service; however, if what is being given is a thing of value in an effort to obtain more referrals, RESPA is violated.

In the PHH case however, former Director Richard Cordray held that section 8(c)(2) of RESPA does not automatically shield fair market value payments to other settlement service providers because if the payments are seeking future referrals, the payments are not “bona fide.” Thus, the decision called into question a number of practices relating to reinsurance arrangements and also attempted to expand the agency’s statute of limitations authority. As a result of the Bureau’s action, Wells Fargo and Prospect Mortgage joined a growing number of lending institutions to discontinue participation in MSAs with real estate agents and brokers – a practice key to growing real estate business operations.

The PHH case was litigated at the U.S. Court of Appeals for the District of Columbia and NAR filed two amicus briefs defending properly implemented MSAs. In October 2016, the D.C. Circuit Court held in favor of PHH and stated that payments for bona fide services provided and made at fair market value do not violate RESPA. The CFPB appealed the decision *en banc* to the D.C. Circuit, which granted the petition for rehearing wholly vacating the panel’s decision. In February of this year, the court sitting *en banc* reinstated the previous panel decision, holding the Bureau had incorrectly rejected the well-established RESPA interpretation that payments between settlement service providers are permissible so long as those payments are for goods or services actually provided and are made at fair market value. The decision was celebrated by industry as it restored clarity on RESPA Section 8, but actions by the Bureau are needed to support this ruling with special attention given to marketing on technology platforms.

More specifically, there is a need for additional clarity on acceptable ways in which settlement service providers can enter into agreements for marketing services online under RESPA. In 2014, NAR worked with leading RESPA experts to construct “Dos and Don’ts” for marketing services agreements that represent more than a decade’s worth of industry best practices. Last year, NAR issued best practices for online co-marketing as digital technology platforms develop unique advertising opportunities for the real estate industry. However, the Bureau has failed to ratify such guidance despite these best practices being shared by RESPA attorneys across the country to clients.

Instead of providing such guidance, the Bureau continued enforcement actions with respect to payments tied directly to referrals as a means to set an example for the industry. In January 2017, the Bureau issued multiple enforcement actions for RESPA violations against a mortgage lender, mortgage servicer, and two real estate brokers for accepting illegal payment for referrals related to lead agreements, marketing service agreements, desk-licensing agreements, and/or steering of consumers to pre-qualify for mortgages. Investigations into third party marketing platform regarding RESPA violations have also occurred, continuing the regulation through enforcement regime rather than issuing rulemakings or guidance.

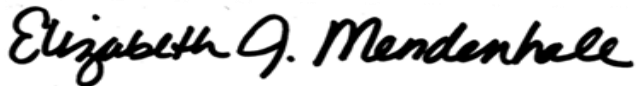
As online platforms continue to evolve, a lack of guidance and oversight of online co-marketing practices could harm consumers. The Bureau should rescind the 2015 Bulletin and ratify NAR's best practices to ensure that those who have complied with RESPA do not face unnecessary regulatory burdens and potential lawsuits. With the PHH decision settling the uncertainty that resulted under previous leadership, the Bureau should take this opportunity to establish clear guidance reflecting the letter of the law – in line with the Acting Director's goals. Additionally, as other litigation losses mount up, such as the Borders & Borders case where the Bureau misinterpreted the affiliated business arrangements exemption under RESPA Section 8(c)(4), the Bureau should offer supplementary guidance on this safe harbor so affiliated businesses can continue to operate while providing important disclosures for consumers.

NAR and its industry partners have also long disputed a 2010 HUD ruling that the sale of home warranty contracts by real estate agents for compensation was a per se violation of RESPA. In this case, HUD erroneously limited the ability of real estate professionals to market home warranty products to the detriment of consumers who benefit from such products. While legislation has been introduced over the years to exempt home warranty companies from RESPA, the Bureau has the power to remedy this problematic interpretation, which would provide much needed relief to an industry that acts in the best interest of and in support of homebuyers.

Conclusion

The Bureau's future actions on RESPA will dictate a successful future of closing transactions, marketing agreements, and affiliated arrangements for the real estate industry. NAR appreciates the Bureau's assessment of its inherited rulemakings and the impact on regulated entities. REALTORS® are hopeful that following the RFI, necessary attention will be given to maximize RESPA compliance and resulting consumer protections. NAR looks forward to working with the Bureau in regards to its rulemaking authorities so that REALTORS® can continue to help more consumers achieve homeownership.

Sincerely,

A handwritten signature in black ink that reads "Elizabeth G. Mendenhall". The signature is written in a cursive, flowing style.

Elizabeth Mendenhall
2018 President, National Association of REALTORS®