



McGlinchey Stafford and
Youngblood & Associates PLLC

CLIENT ALERT

CFPB Consent Order with Prospect Mortgage Regarding Marketing Services Agreements

On January 31, 2017, the Consumer Financial Protection Bureau (CFPB) announced a consent order with Prospect Mortgage, LLC (Prospect) regarding a variety of arrangements that Prospect had with others that the CFPB determined to constitute kickbacks in violation of the Real Estate Settlement Procedures Act (RESPA).

Prospect maintained over one hundred agreements with realtors and real estate brokers called marketing services agreements, lead agreements, desk license agreements and co-marketing agreements. On examination of the details of how the agreements were worded and implemented, the CFPB found that they were used to compensate the realtors and brokers for actively steering mortgage business to Prospect.

In some 'lead agreements' realtors required borrowers to obtain a loan 'preapproval' from Prospect in order to make an offer on a property, or to close on a loan from Prospect in order to receive a discount, credit or a waiver of a realtor fee in the transaction. In some 'marketing services agreements' Prospect set the amount of the fee according to the referral levels (which Prospect referred to as the 'capture rate' of the counterparty's customer base), not the amount or value of the services rendered. In some 'co-marketing agreements' Prospect paid for a portion of realtor internet advertising in return for the realtor's efforts to convince the home buyer to use Prospect for the resulting mortgage.

Finally, Prospect maintained a relationship with a mortgage servicer to market Prospect's services to its servicing clients who were potentially eligible for a HARP refinance, with the servicer receiving some of the gain on sale of the loans and the resulting servicing rights for the new loan. The servicer marketed Prospect as its 'preferred refinance partner' and used both company logos in communications with its servicing clients.

Prospect did not admit liability, but did agree to implement a compliance plan with reporting obligations to the CFPB, and agreed to pay a penalty of \$3.5MM. For what appears to be the first time, the CFPB fined both parties to the RESPA kickback. Two realtors that were parties to these agreements and the mortgage servicer also signed consent orders related to the investigation, along with payment of somewhat smaller penalties.

The clear message is that the CFPB continues to scrutinize any relationship between parties where a referral of settlement business is likely. This consent order stops short of finding that simple purchase of advertising with no affirmative recommendation from the advertiser is a per se violation of RESPA. On the other hand, the consent order also has no positive guidance on how to structure and administer a more complicated relationship in a way that will pass muster. The details of how a more intricate structure is set up and administered will always be subject to the scrutiny that the CFPB gave to Prospect's agreements here.

No matter how they are set up or how they are run, one of the main risks of any of these arrangements remains how to ensure that all the individuals involved understand the limits of what they should and shouldn't do in order to comply with RESPA. The consent order has several examples of individual e-mails and actions that management of the parties may not have even been aware of, but that the CFPB used as evidence of violations. For example, Prospect changed the language in its lead agreements by removing the direct tie between paying lead fees and requiring the listing broker to have any buyer pre-qualify with Prospect. The CFPB quoted one member of Prospect senior management explaining the change to others at Prospect as really no change at all in practice, just that the requirement for pre-qualifications would have to be managed 'outside the contract.'

If you have any questions or comments concerning this Client Alert, please do not hesitate to contact:



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