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Client Alert: Is Your Marketing Services Agreement Really About Marketing? CFPB Takes Action Against Mortgage Lender, Mortgage Broker, And Mortgage Servicer For Illegal Kickback Scheme

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On January 31, 2017, the Consumer Financial Protection Bureau (CFPB) announced that it took action against a California mortgage lender, two real estate brokers and a mortgage servicer for violations of the anti-kickback provision of the Real Estate Settlement Procedures Act (RESPA). RESPA serves to eliminate kickbacks or referral fees that increase the cost of settlement services for consumers. Section 8(a) of RESPA prohibits the transfer of a thing of value by one person to another person pursuant to an understanding that business related to a federal mortgage loan will be referred to that person. 12 U.S.C. § 2607 (a).

This week's action by the CFPB is noteworthy as an example of the CFPB's enforcement action based on guidance issued outside of the formal rulemaking process. The CFPB issued a [bulletin in October 2015](#) about RESPA's anti-referral and kickback provisions and cautioned individuals in the mortgage industry about the risks associated with marketing services agreements (MSAs). In a typical MSA, a settlement service provider, like a mortgage company, engages another entity to provide marketing services in exchange for periodic fixed fees that are not based on the volume of business. A true MSA charges fees that are structured to compensate the service provider only for those marketing and advertising services actually performed. According to the CFPB, MSAs are "usually framed as payments for advertising or promotional services, but in some cases the payments are actually disguised compensation for referrals." If there is any agreement that entails exchanging a thing of value for referrals of settlement service business involving a federally related mortgage loan, it likely violates RESPA, whether or not an MSA or some related arrangement is part of the transaction.

The CFPB's [Consent Order](#) specifically found that the MSA between Prospect Mortgage, LLC and the real estate brokers, ReMax Gold Coast and Keller Williams Mid-Willamette, encouraged payments to settlement service providers based on referral levels not on marketing efforts. The CFPB imposed a \$3.5 million dollar civil penalty against

Prospect. The CFPB also found that the real estate brokers that partnered with Prospect signed MSAs that served no purpose other than to obtain illegal payments for referrals. The CFPB fined ReMax Gold Coast \$50,000 and ordered Keller Williams Mid-Willamette to pay a \$35,000 fine and disgorge \$145,000 in unlawfully collected fees. Parties considering entering into a marketing services agreement should exercise caution to ensure that the party responsible for advertising is compensated for services actually performed and not referrals.

Please contact your Vorys attorney if you have questions about RESPA or related issues.