

LENDERS UPDATE™

ALT & ASSOCIATES NEWSLETTER

A COMPLIMENTARY SERVICE TO THE MORTGAGE LENDING INDUSTRY

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CFPB ADDRESSES MARKETING SERVICES AGREEMENTS

For some years now, lenders and other settlement service providers have been entering into Marketing Services Agreements (MSAs) knowing that they may be dangerous and with little formal guidance to keep them on the straight and narrow. There was limited guidance from HUD, when MSAs were HUD's responsibility. After the CFPB took on the responsibility, no additional guidance was provided except for some informal conversations and then a string of enforcement actions which, through the misfortune of others (in some cases richly deserved and avoidable in our opinion), at least gave us some parameters for designing marketing agreements that we hoped would be compliant with applicable law.

Yesterday that changed a bit with the publication of the CFPB's guidance on MSAs. It can be found at http://files.consumerfinance.gov/f/201510_cfpb_compliance-bulletin-2015-05-RESPA-compliance-and-marketing-services-agreements.pdf.

The Bulletin sets out the general policy stemming from RESPA to eliminate kickbacks and referral fees for the referral of settlement services. This is balanced with the stated RESPA policy that payments for goods, facilities or services actually provided or performed, are permissible. The result is that MSAs have flourished in which referred fees have masqueraded as payments for marketing services. An issue that, as the CFPB

frequently points out, has been brought to their attention through whistle blowers. This has resulted in enforcement actions based on scenarios such as the following:

- Title companies entering into MSAs as quid pro quo for the referral of business with fees paid in part based on the referral of title insurance business and the number of referrals.
- The failure to effectively disclose that the customer could shop for business or that they could shop for services before they were referred to an affiliate.
- A company's failure to provide some or all the services required under the agreements.
- Title companies paying single loan officers for the referral of business by defraying marketing expenses.

This list is far from complete.

It is doubtful that the CFPB could just outlaw MSAs. It also seems likely that it would if it could. Therefore, we think we can expect extreme scrutiny of any MSA. To the extent you are daring and wish to use them, make sure that, at a minimum, the services contracted for are being performed and compensated for at the market rate and these services do not constitute a referral of business.

Finally, you may have a great, compliant MSA but if you do not comply with its terms, it means nothing.

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ALT & ASSOCIATES provides regulatory, compliance, operational advice and transactional assistance, as well as litigation representation, to the financial services industry. Over the past three decades, members of the firm have represented Institutional Lenders and Mortgage Bankers and Brokers in all aspects of their operations.

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