

**The Dodd-Frank Act and the Creation of the CFPB:
Heightened Enforcement of New and Existing Laws
Affecting the Real Estate Industry**

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The Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act") created a new federal agency, the Consumer Financial Protection Bureau (CFPB). The Dodd-Frank Act transferred enforcement and rule-making authority to the CFPB from other federal agencies such as the Department of Housing and Urban Development ("HUD") and the Federal Reserve Board. The CFPB has significantly increased enforcement of various federal laws and rules including the Real Estate Settlement Procedures Act (RESPA) and its implementing regulation, Regulation X.

I. Enforcement Actions by the CFPB

A. Prohibition against Kickbacks and Unearned Fees

Section 8 of RESPA; 12 U.S.C § 2607; Regulation X ("Reg. X") § 1024.14

Section 8 of RESPA prohibits giving or receiving any fees, kickbacks or any "thing of value" for the referral of business in connection with real estate transactions involving certain residential mortgage loans. 12 U.S.C. § 2607(a). Section 8 also prohibits certain fee splitting unless the payment is for services actually performed. 12 U.S.C. § 2607(b).

B. Affiliated Business Arrangement Disclosures and Common Ownership of Settlement Service Providers - the Safe Harbor

Section 8 of RESPA; 12 U.S.C. § 2607(c)(4); Reg. X § 1024.15

When certain settlement service providers have the same owners and one refers business to the other, these providers must enter into an Affiliated Business Arrangement to avoid violating Section 8 of RESPA. In summary, there are three main requirements of this "safe harbor": (1) disclosure regarding the arrangement and an estimate of charges; (2) satisfying the provisions regarding choice of provider; and (3) satisfying the requirements regarding receipt of a "thing of value" and a "bona-fide return on an ownership interest."

1. Marketing Service Agreements - The Lighthouse Title Case

In 2014, the CFPB filed an administrative proceeding against Lighthouse Title, Inc., a title company in Holland, Michigan, involving Marketing Service Agreements or "MSAs." *In re: Lighthouse Title, Inc.*, Administrative Proceeding File No. 2014-CFPB-0015. The CFPB alleged that the title company was paying illegal fees for the referral of business through the MSAs. The CFPB alleged that the value of the fees paid were not reasonably related to the value of the services received. The proceeding resulted in a Consent Order in which Lighthouse Title, Inc. agreed to pay a civil money penalty of \$200,000, to document all exchanges of things of value worth more than \$5.00 with persons in a position to refer settlement service business, to terminate all MSAs and not to enter to any further MSAs.

2. Enforcement Action against Attorneys and Law Firm.

The CFPB filed a lawsuit against a law firm and its member attorneys in the United States District Court, Western District of Kentucky, *CFPB v. Borders & Borders, PLC, et al.*, Civil Action No. 3:10-CV-1047-JGH (2013) alleging that the defendants violated Section 8 of RESPA by creating a network of Affiliated Business Arrangements to pay illegal kickbacks for mortgage settlement referrals. By opinion dated February 12, 2015, the District Court denied Defendants' motion for judgment on the pleadings.

3. Enforcement Action against Homebuilder.

The CFPB commenced an enforcement action against a Texas homebuilder who co-owned one company with a bank and co-owned another company with mortgage company. The CFPB charged that the companies did not meet the requirements for an Affiliated Business Arrangement described in HUD's Statement of Policy 1996-2 Regarding Sham Controlled Business Arrangements and sought disgorgement pursuant to Section 1055 of the Dodd Frank Act. In the settlement, the homebuilder agreed not to engage in any settlement service provider business other than homebuilding for five years and to pay disgorgement of \$118,194.20. In the Matter of: Paul Taylor, Paul Taylor Homes Limited and Paul Taylor Corp., File No. 2013-CFPB-0001.

4. Enforcement Action against Real Estate Brokerage.

The CFPB commenced an administrative proceeding against a real estate company and a title insurance and closing services company in Alabama because it found their Affiliated Business Arrangement Disclosure (ABA) did not meet the requirements of RESPA. In particular, their ABA did not highlight that the consumer was free to use providers other than the real estate brokerage's affiliates for title insurance and closing services. Instead, the ABA touted the benefits of using the real estate brokerage's affiliates.

In the Consent Order, the respondents agreed to pay a civil money penalty of \$500,000. *In the Matter of JRHBW Realty, Inc., doing business as RealtySouth; Title South, LLC.*, File No 2014-CFPB-0005

C. "Service Providers" to Covered Financial Institutions

The CFPB has stated in a Regulatory Bulletin that it intends to hold covered banks and mortgage lenders, brokers and servicers liable for the actions of their "service providers." Who is a "service provider" under of the Dodd-Frank Act and what steps should covered banks and mortgage lenders take to manage the activities of their service providers? What costs and burdens will this place on service providers? How do title companies fit within this regulatory scheme?

Sections 1002(26), 1024(e) and 1027(f) of the Dodd-Frank Act; CFPB Regulatory Bulletin 2012-03.

See In the Matter of: Capital One Bank, (USA) N.A., File No. 2012-CFPB-0001.

D. UDAPPs

Sections 1031 and 1036 of the Dodd-Frank Act give the CFPB the authority to take enforcement action against "covered persons" or "service providers" for engaging in "unfair or deceptive acts or practices" or "UDAPPs." The Dodd-Frank Act gives the CFPB authority to determine what is a UDAPP.

In the Matter of: RMK Financial Corporation, File No. 2015-CFPB-0007 (mortgage company accused of UDAPP because its advertising misled the consumer that it was affiliated with VA and FHA.)

In the Matter of: New Day Financial, LLC, File No. 2015-CFPB-0004 (mortgage company accused of UDAPP because it failed to disclose payments it made to veteran's group and suggested veteran's group's endorsement of it was for other reasons)

II. The CFPB's Reach into Commercial Loans

A. Enforcement Authority for the Equal Credit Opportunity Act

The Dodd-Frank Act gave the CFPB enforcement authority for the Equal Credit Opportunity Act ("ECOA") and its implementing regulation, Regulation B. ECOA extends to the regulation of business credit.

The United States Supreme Court granted *certiorari* in *Hawkins v. Community Bank of Raymore*, 761 F.3d 937 (Ct. App. 8th Cir.) *cert. granted* March 2, 2015, 135 S.Ct. 1492.

The United States Supreme Court is to decide if the ECOA applies to loan guarantors and to resolve a split between the circuits.