

## SPECIAL ALERT: CFPB CONSENT ORDER APPLIES LOAN ORIGINATOR COMPENSATION RULE TO MARKETING SERVICES AGREEMENTS

June 8, 2015

On Friday, the CFPB announced a consent order against [Guarantee Mortgage Corporation](#),<sup>1</sup> resolving allegations that the company paid loan originators based on the terms of their mortgage loans in violation of the Loan Originator Compensation Rule (the "LO Comp Rule").<sup>2</sup> Since inheriting responsibility for the LO Comp Rule in 2011, the CFPB has devoted substantial resources to revising the rule and enforcing its provisions.<sup>3</sup> During that same period, the CFPB brought several actions enforcing the prohibition on referral fees in the Real Estate Settlement Procedures Act, including an action against [Lighthouse Title, Inc.](#) that created considerable uncertainty about the Bureau's view of marketing services agreements ("MSAs").<sup>4</sup>

The Guarantee Mortgage consent order applies the LO Comp Rule to MSAs. Specifically, it addresses payments made by the lender to marketing-services entities associated with its branch offices that were owned, in whole or in part, by producing branch managers and other branch originators. The CFPB alleged that during the period April 1, 2011 through August 31, 2012:

- [Guarantee Mortgage] paid monthly fees to marketing-services entities that were associated with each of its branch offices. [Guarantee Mortgage] set the fees based on the profitability of the associated branch. The owners of the marketing-services entities then drew the monthly fees as additional compensation. Marketing-services-entity owners included Producing Branch Managers as well as, in some instances, one or more other Loan Originators within the branch.
- \*\*\* Under agreements with the marketing-services entities, the fees were not supposed to include income from loans originated by the owners of the marketing-services entities. But as a result of [Guarantee Mortgage]'s accounting methods during the Relevant Period – specifically, [Guarantee Mortgage]'s improper allocation of expenses in branch income statements – those

---

<sup>1</sup> *In the Matter of Guarantee Mortgage Corp.*, Admin. Proceeding File No. 2015-CFPB-0011 (filed June 5, 2015) ("Guarantee Consent Order").

<sup>2</sup> 12 C.F.R. § 1026.36(d)(1)(i). Because the conduct at issue occurred during the period of April 1, 2011 through August 31, 2012, the Bureau's allegations are based on the version of the Loan Originator Compensation Rule adopted by the Federal Reserve Board. See 75 Fed. Reg. 58509 (Sept. 24, 2010).

<sup>3</sup> The CFPB amended the LO Comp Rule effective January 1, 2014. See 78 Fed. Reg. 11280 (Feb. 15, 2013). In addition, the CFPB brought enforcement actions against [Castle & Cooke Mortgage, LLC](#), [Franklin Loan Corporation](#), and [RPM Mortgage, Inc.](#)

<sup>4</sup> In particular, the Lighthouse consent order stated, at paragraph 20, that "[e]ntering into a contract is a 'thing of value' within the meaning of Section 8 [of RESPA], even if the fees paid under that contract are fair market value for the goods or services provided."

fees did include income from originations by marketing-services-entity owners, including their originations of Retail Loans. Retail Loans typically generated more revenue the greater the rate of interest above par. Consequently, owners of marketing-services entities received compensation based on the terms of loans they had originated.<sup>5</sup>

According to the consent order, Guarantee Mortgage is no longer a going concern. The order imposes a civil money penalty of \$228,000 and states that, “[t]o the extent that [Guarantee Mortgage] lacks the financial resources to pay the full civil money penalty, [it] must obtain contributions from [its] individual owners sufficient to pay the full penalty.”<sup>6</sup>

The Guarantee Mortgage consent order follows statements made by the Bureau in its [Winter 2015 Supervisory Highlights](#) regarding similar arrangements:

In one or more examinations, examiners found that branch managers were loan originators and owners of related marketing services entities. Supervision found instances of improperly allocated expenses on branch income statements which resulted in marketing services entities receiving income based on the profitability of retail loans originated by branch managers. Consequently, branch managers, as owners of the marketing services entities, received compensation based on the terms of transactions originated by the branch managers themselves. Supervision directed that compensation to loan originators based on a term of a transaction, including branch managers, cease.<sup>7</sup>

\* \* \*

Questions regarding the matters discussed in this Alert may be directed to any of our lawyers listed below or to any other BuckleySandler attorney with whom you have consulted in the past.

- [John P. Kromer](#), (202) 349-8040
- [Jeffrey P. Naimon](#), (202) 349-8030
- [Clinton R. Rockwell](#), (310) 424-3901
- [Benjamin K. Olson](#), (202) 349-7924
- [Joseph J. Reilly](#), (202) 349-7965
- [Jonathan W. Cannon](#), (310) 424-3903

---

<sup>5</sup> Guarantee Consent Order ¶¶ 7-8.

<sup>6</sup> *Id.* ¶¶ 4, 12-13.

<sup>7</sup> CFPB Winter Supervisory Highlights at p. 10.