

## SPECIAL ALERT: CFPB CONSENT ORDERS ADDRESS WIDE RANGE OF REAL ESTATE REFERRAL PRACTICES UNDER SECTION 8(A) OF RESPA

On January 31, the CFPB [announced](#) consent orders against mortgage lender [Prospect Mortgage, LCC](#) ("Prospect"), real estate brokers [Willamette Legacy, LLC d/b/a Keller Williams Mid-Willamette](#), and [RGC Services, Inc. d/b/a Re/Max Gold Coast Realtors](#) (together, "the Brokers"), and mortgage servicer [Planet Home Lending, LCC](#) ("Planet"), based on allegations that a wide range of business arrangements between the parties violated the prohibition on "kickbacks" in Section 8(a) of RESPA.

In a press release accompanying the settlements, CFPB Director Richard Cordray stated that the Bureau "will hold both sides of these improper arrangements accountable for breaking the law, which skews the real estate market to the disadvantage of consumers and honest businesses." The consent orders address a number of practices that have long been the source of uncertainty within the industry. Unfortunately, despite acknowledging in the orders that referrals are an inherent part of real estate transactions, the Bureau provided little constructive guidance as to how lenders, real estate brokers, title agents, servicers, and other industry participants should structure referral arrangements to comply with RESPA.

### RESPA SECTION 8(A)

Section 8(a) of RESPA provides that "[n]o person shall give and no person shall accept any fee, kickback, or thing of value pursuant to any agreement or understanding, oral or otherwise, that business incident to or a part of a real estate settlement service involving a federally related mortgage loan shall be referred to any person."

Notably, the CFPB's consent orders make no reference to Section 8(c)(2), which provides that "[n]othing in this section shall be construed as prohibiting ... the payment to any person of a bona fide salary or compensation or other payment for goods or facilities actually furnished or for services actually performed." In a much discussed decision, a panel of the U.S. Court of Appeals for the D.C. Circuit [reversed](#) the CFPB's \$109 million penalty against PHH Corporation in October 2015 based on, among other things, the CFPB's failure to establish that payments for the service at issue (reinsurance) exceeded the fair market value of the service. The CFPB is currently seeking rehearing of this decision from the full D.C. Circuit, as discussed in our summaries of the [Bureau's petition for en banc reconsideration](#), [responses from PHH and the Solicitor General](#), a [motion to intervene filed by several State Attorneys General](#), and, most recently, [PHH's reply to both the Solicitor General and the motions to intervene](#).

## BUSINESS ARRANGEMENTS AND PRACTICES

The CFPB alleged that the following arrangements between Prospect, the Brokers, and Planet were, in fact, disguised referral agreements that violated Section 8(a). Although Prospect allegedly entered into hundreds of agreements with real estate brokers, only the two Brokers were required to enter into consent orders.

### Marketing Services Agreements (MSAs)

Despite being one of the first lenders to publicly announce its exit from MSAs based on regulatory concerns, Prospect was cited by the CFPB for operating MSAs in violation of RESPA. Specifically, the Bureau alleged that Prospect entered into MSAs with real estate brokers under which payments were based initially on the anticipated number of referrals and then adjusted over time based on Prospect's "capture rate" – in other words, the percentage of the broker's customers who obtained a loan or a preapproval from Prospect.

### Lead Agreements

As alleged by the CFPB, Prospect's lead agreements with real estate brokers "paid the [broker] for each lead [Prospect] received," which "generally consisted of a prospective buyer's name, address, email address, and phone number." While the agreements provided that Prospect would use this information to "reach out to the prospective buyer to market its loan products," the Bureau alleges that the brokers "went well beyond simply transferring information" and instead "actively referred prospective borrowers to [Prospect's] loan officers," in some cases paying individual agents for each referral and agreeing to exclusivity provisions that prohibited agents from sharing information with other lenders.

The CFPB also alleged that Prospect's lead agreements violated Section 8(a) by providing that a broker listing a property for sale would require any prospective buyer seeking to submit an offer to first obtain a preapproval for a loan from Prospect, even if the consumer was not required to pay Prospect for the preapproval or to actually obtain a loan from Prospect. In some cases, compensation under the lead agreements was allegedly based on the number of the broker's clients who were preapproved for a Prospect loan. Although the preapproval provision was eventually removed from the agreements, the CFPB alleged that the practice continued.

### Desk Rentals

The CFPB alleged that Prospect's desk rental agreements, under which Prospect paid real estate brokers to locate its loan officers in the brokers' offices, violated Section 8(a) because the brokers promised to promote Prospect as a "preferred lender" and endorse the use of Prospect's services "to its employees, agents, and the visiting public." The Bureau further alleged that Prospect assessed the value of the desk rental agreements based on the number of referrals generated, "rather than whether [Prospect was] paying market rates for the cost of renting office space in a particular area."

Without acknowledging the limited exemption in RESPA's implementing regulation for "[n]ormal promotional and educational activities," the CFPB cited as evidence that the desk rental agreements violated RESPA the fact that Prospect "provided a series of training classes for ... new agents," which included "a presentation by a Prospect loan officer about Prospect's services," and that Prospect loan officers were permitted to attend and present at broker's meetings, whereas "competing lenders did not have similar access to [the brokers'] agents." The Bureau alleged that this "preferential access"

constituted a referral because it “affirmatively influenced consumers – both directly and through [the brokers’] agents – to use Prospect to finance their real estate transactions.”

### **Co-Marketing Agreements**

The CFPB alleges that, in late 2015, Prospect replaced its MSAs and lead agreements with co-marketing agreements that also violated Section 8(a). Although these agreements apparently took multiple forms, Prospect’s consent order only discusses an agreement in which Prospect paid for a portion of the real estate agent’s advertisements on a third-party website displaying real estate listings. In exchange, the agent agreed to “exclusively promote [Prospect] on all of the agent’s advertisements on that third-party website.” Furthermore, if a prospective purchaser clicked on the agent’s advertisement for additional information and then checked a box labeled “I want financing information,” the purchaser’s information was sent to Prospect as well as the agent.

### **Borrower Incentives & Penalties**

The Bureau describes the common practice of providing incentives to borrowers that offset closing costs as coercion. Specifically, the CFPB alleges that real estate agents listing a property for sale “sometimes took steps to economically coerce consumers into using [Prospect]” by conditioning the provision of seller credits on obtaining a loan from Prospect. The Bureau also alleges that listing agents coerced purchasers by imposing daily penalties for closing delays if the purchaser did not use Prospect as the lender.

### **Refinancings and Sales of Mortgage Servicing Rights (MSRs)**

The CFPB alleged that, under a “Master Origination Services and Sale Agreement,” Planet was required to identify, and market Prospect’s loans to, borrowers who were potentially eligible for a HARP refinance. Under the arrangement, Planet was required to describe Prospect as the servicer’s “preferred refinance partner,” send letters to borrowers showing the servicer’s logo alongside Prospect’s logo, and perform “warm transfers” of borrowers to Prospect if the borrower responded favorably to the servicer’s telephone solicitations. In exchange for these services, Prospect paid Planet 50% of the proceeds from the sale of the new loans on the secondary market and sent the resulting MSRs to Planet.

### **Trigger Leads**

The CFPB alleged that, in order to identify borrowers in its servicing portfolio who were potentially interested in refinancing, Planet ordered “trigger leads” from one of the consumer reporting agencies that identified borrowers whose consumer reports reflected a hard credit inquiry resulting from a mortgage application. Agreeing with a FTC interpretation, the CFPB concluded that the trigger leads constituted “consumer reports” under the Fair Credit Reporting Act and that Planet’s use of those reports violated the act because marketing is not a “permissible purpose” and Planet did not make a firm offer of credit.

## **RELIEF**

### **The Lender**

Prospect was required to pay a civil money penalty of \$3.5 million (but no consumer redress) and is enjoined from, among other things:

- “agree[ing] to purchase or pay for any service that is connected or related in any way to receiving referrals of real estate settlement service business”
- “enter[ing] into marketing service agreements, lead agreements, or co-marketing arrangements with any real estate broker, agent, or servicer”
- “enter[ing] into any desk license agreement with any broker, agent, or servicer that includes any requirement or understanding that the counterparty will endorse the use of [Prospect’s] mortgage settlement services, or do anything else to affirmatively influence prospective home buyers to use [Prospect’s] mortgage settlement services”

The order notes that the CFPB “anticipate[s] that [Prospect] will take steps to commence the voluntary surrender of all its mortgage lending licenses and substantially complete an orderly wind down of its lending operations within 90 days....”

### **The Brokers**

Willamette Legacy, LLC allegedly received “more than \$140,000” in payments from Prospect and was required to disgorge \$145,000. RGC Services, Inc. allegedly received more than \$500,000 in payments from Prospect but was required to pay a civil money penalty of \$50,000. Both Brokers were also enjoined from, among other things:

- “refer[ring] any consumer to any provider of a real estate settlement service if that provider has agreed to purchase or pay for any servicer from [the Broker], and the provider’s purchase of or payment for that service is connected or related in any way to those referrals”
- “enter[ing] into lead agreements, marketing service agreements, or desk license agreements with settlement service providers that include any requirement or understanding that [the Broker] will endorse the use of the settlement service provider’s services, or do anything else to affirmatively influence prospective home buyers to use the settlement service provider”

### **The Servicer**

Planet was required to pay \$265,000 for consumer redress. Planet was also enjoined from, among other things:

- “refer[ring] any consumer to any provider of a real estate settlement service if that provider has agreed to purchase or pay for any servicer from [Planet], and the provider’s purchase of or payment for that service is connected or related in any way to those referrals”
- “enter[ing] into agreements with settlement service providers that include any requirement or understanding that [Planet] will endorse the use of the settlement service provider’s services, or do anything else to affirmatively influence prospective home buyers to use the settlement service provider.”

If you have questions about the order or other related issues, visit our [Consumer Financial Protection Bureau practice](#) for more information, or contact a BuckleySandler attorney with whom you have worked in the past.