

CFPB Cracks Down on Sham Affiliated Business Arrangements Under Section 8 of RESPA

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On May 17, 2013, the Consumer Financial Protection Bureau (CFPB) barred a Texas homebuilding company and its affiliate (Respondents) from engaging in real estate settlement business, including mortgage origination, for five years. Respondents were also ordered to disgorge all kickbacks that Respondents received from a bank and a mortgage company to whom Respondents referred the loan origination business. The CFPB's order, to which Respondents consented (Consent Order), resolves allegations that Respondents violated Section 8 of the Real Estate Settlement Procedures Act (RESPA), which prohibits kickbacks for services involving federally related mortgages. The CFPB became aware of the Respondents' conduct through a referral from the Federal Deposit Insurance Corporation (FDIC). The FDIC separately fined a bank for its role in the RESPA violations.

Respondents referred home buyers to a joint venture they formed with a mortgage company wholly owned by the lending bank. The joint venture was a sham entity through which the kickbacks were passed back to Respondents in the form of profit distributions and payments through a "service agreement." In determining whether the Affiliated Business Arrangement (ABA) at issue was bona fide, the CFPB applied the factors listed in the HUD 1996 Statement of Policy (Statement of Policy) that was issued as guidance on RESPA's application to ABAs. Specifically, the CFPB considered the fact that the joint venture had a shared management with Respondents and the lending bank, conducted no origination business outside of the referrals from Respondents, did not advertise itself to public, did not have its own office space, and conducted all its operations through an employee of the lending bank. Based on these facts, the CFPB concluded that the joint venture was a sham. Instead of imposing a statutory penalty pursuant to the RESPA, the CFPB elected to seek disgorgement of the kickbacks—remedy available to the CFPB under the Dodd-Frank Act. In addition, the Respondents were barred from participating in the mortgage settlement business.

The CFPB's probing inquiry into the inner workings of the ABA in this case serves as a reminder that compliance with the RESPA and the Statement of Policy *on paper* is not sufficient to create a bona fide ABA that can survive regulatory scrutiny.

Please do not hesitate to contact David Anthony, John Lynch, or Maryia Jones if you have questions or would like additional information on compliance with the RESPA or the Statement of Policy.

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