CFPB Overreaches in Handling Alleged RESPA ABA Exemption Issues in Meridian

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On September 27, 2017, the Consumer Financial Protection Bureau (CFPB) announced the settlement of its Real Estate Settlement Procedures Act (RESPA) enforcement action against Meridian Title Corp. (Meridian), an Indiana-based title insurance agency, based on alleged title insurance referrals made to an underwriter partially owned by three of Meridian's executives. The CFPB faulted Meridian for allegedly failing to provide a RESPA disclosure explaining the affiliation with the underwriter, Arsenal Insurance Corporation (Arsenal), and for receiving impermissible money under the business arrangement.

Accepting the Bureau's allegations as true, it is unremarkable that the CFPB found some fault with Meridian's practices. Yet the CFPB did not simply focus on discrete alleged compliance issues. Instead, the agency crafted a press release that appears unnecessarily critical of the underlying "affiliated business arrangement" (so-called ABA) business model. Additionally, the CFPB's assertion that Meridian was a "covered person" under the Dodd-Frank Wall Street Reform Act (Dodd-Frank Act) is disquieting, and its allegations about the money received by Meridian are so vague that they raise further unresolved questions for title insurance providers.

The CFPB's allegation that Meridian was a "covered person" does not appear to be well-founded.

The CFPB's consent order expressly alleged that Meridian was a "covered person" as that term is defined by U.S.C. § 5481(6). But the sole law at issue in *Meridian* was RESPA, and "covered person" is not a RESPA concept. Instead, it is a defined term under Title X of the Dodd-Frank Act, which sets forth the supervisory authority of the CFPB and also subjects "covered persons" to the CFPB's authority to enforce a federal prohibition against unfair, deceptive, or abusive acts or practices (so-called UDAAP).

However, the term "covered person"—and the reach of the CFPB's UDAAP authority—typically do not to extend to providers engaged in the title insurance business, absent particular circumstances. Specifically, while the term "covered person" means any person that engages in offering or providing a consumer financial product or service,[1] and that generally includes real estate settlement services,[2] there is an express carve-out for the "business of insurance."[3] The "business of insurance" is defined in the Dodd-Frank Act to mean

the writing of insurance or the reinsuring of risks by an insurer, including all acts necessary to such writing or reinsuring and the activities relating to the writing of insurance or the reinsuring of risks conducted by persons who act as, or are, officers, directors, agents, or employees of insurers or who are other persons authorized to act on behalf of such persons.[4]

Further, the Dodd-Frank Act also limits the CFPB from enforcing Title X with respect to a person regulated by a state insurance regulator.[5] Taken together, these provisions generally place state regulated insurance providers and activities that constitute the "business of insurance" beyond the CFPB's Title X jurisdiction, absent specific facts indicating that the person engaged in other conduct or acted in another capacity that *would* fall within such jurisdiction.[6]

Yet no such allegations are evident in the *Meridian* case. Was the "covered person" allegation just hastily included language that Meridian was not in a position to challenge? Or did the CFPB intend to suggest (wrongly) that it has Title X authority over a title agency that is merely alleged to have acted as an issuing agent for an underwriter?

We have seen the CFPB overreach against a title agency in a similar manner before. In 2015, the CFPB and the Maryland Attorney General (AG) filed a complaint and settlement consent orders against a title insurance agency, Genuine Title LLC (Genuine Title), and others for allegedly violating RESPA's anti-kickback provision. In that complaint, the CFPB and the Maryland AG alleged that Genuine Title—which by that time was defunct—was a "covered person" under Title X of the Dodd-Frank Act on the basis that Genuine Title had offered real estate settlement services, such as title searches and exams. However, the CFPB and state AG seemingly ignored the carve-out for the "business of insurance," as well as the Title X limitation for state-regulated insurance providers (which, in Maryland, includes title agencies[7]). Thus, the CFPB and state AG proceed to allege that Genuine Title not only violated RESPA but also, as a "covered person," violated Title X of the Dodd-Frank Act as well.[8]

The CFPB has not been consistent on this, however. In settling RESPA claims against title agencies in *Stonebridge* and *Lighthouse*, the CFPB appropriately did not include "covered provider" allegations in its consent orders. Likewise, in settling the *Prospect Mortgage* matter, although the CFPB alleged that Prospect Mortgage, LLC was a "covered person" by virtue of its mortgage lending activity, the CFPB properly made no such allegation with respect to either of the separate real estate brokers who settled RESPA claims in that matter.[9]

Careful and consistent pleading by the CFPB would alleviate unnecessary uncertainty about whether and under what circumstances the CFPB might be willing to contend that providers normally excluded from the CFPB's UDAAP and other authority under Title X—namely, title agencies and real estate brokers—are "covered persons."

In its previous RESPA enforcement, the CFPB has been gratuitously hostile to ABAs.

Section 8(a) of RESPA prohibits giving or accepting money or any other "thing of value" for the referral of real estate settlement service business that involves a RESPA-covered mortgage loan. At the same time, however, Congress provided a statutory safe harbor for ABAs, an arrangement in which one party may make referrals to a real estate settlement services provider in which that party (or its “associate”[10]) has an ownership interest or with which it has a corporate affiliation.

ABAs are common throughout the country, with providers taking advantage of the model to offer one-stop shopping to customers in need of financing, title, or other settlement services as part of the home-buying process. Participants in an ABA cite the benefits of having greater accountability from affiliated providers, more control over service quality, and cost efficiencies achieved from the sharing of facilities, technology, and other expenditures. Various economic studies have shown that ABAs are cost competitive and offer customers a satisfactory home-buying experience. Under RESPA, the ABA exemption is available so long as:

- the party making the referral timely provides to each person whose business is referred a disclosure (*i.e.*, an ABA Disclosure form) explaining the business arrangement and stating the charge or range of charges generally made by the provider being referred (additionally, the Regulation X model form includes language advising that the consumer is not required to use the listed provider and should shop around);
- the referring party does not require the use of the provider;[11] and
- the only thing of value obtained under the arrangement is a return on the ownership/franchise interest (or payment otherwise permitted by RESPA).

In enforcing RESPA, the CFPB not only has been aggressive about alleged deficiencies with ABA exemption criteria, but the agency also has publicly employed broad language that appears inherently (and unnecessarily) critical of ABAs generally.

Notably, the CFPB in 2014 settled a RESPA claim against an Alabama real estate broker and its title affiliate. In that case, the CFPB advanced a particularly aggressive theory that the broker’s ABA Disclosure form was inadequate because it differed in typography and language from the RESPA regulation’s model form and also contained some language marketing the affiliates. Additionally, while such conduct itself does not violate RESPA, the CFPB expressly alleged that the broker “strongly encouraged” its real estate agents to use the title affiliate and that such referrals resulted in “increased distributions to the entities’ shared parent company.” However, there was no indication that such distributions were based on anything other than the parent company’s ownership share, as permitted under the ABA rules. Nevertheless, the CFPB declared that “[t]he practices identified by the CFPB’s investigation illegally benefited” the title affiliate and imposed a fine of $500,000. However, in a subsequent copycat class action complaint against those respondents, a federal court dismissed a substantially identical RESPA claim, holding that the ABA Disclosure form at issue ***had*** been legally sufficient and the ABA exemption was available as a matter of law.[12]Nonetheless, the CFPB publicly touted its enforcement action as an instance of providers who “hinder” and “thwart” consumers’ ability to shop for settlement services.

The CFPB echoed the anti-ABA tone in the way it chose to announce the *Meridian* settlement.

In *Meridian*, the CFPB alleged that Meridian was in an ABA with Arsenal but failed to provide an ABA Disclosure during the entire relevant period (2014 through 2016), and that Meridian “in some cases” was able to receive extra monies through its use of Arsenal as an underwriter. Accepting the allegations as true, it is not surprising that the CFPB found some fault with the title agency.

Troublingly, however, in announcing its settlement with *Meridian*, the CFPB did not frame the issue in terms of alleged noncompliance with the RESPA ABA exemption, but instead appeared to criticize the underlying business model, with CFPB Director Richard Cordray declaring that “Meridian Title illegally steered consumers into purchasing a product from an affiliated company to add to its bottom line.”

The CFPB’s allegations about Meridian keeping “money beyond the commission allowance” are surprisingly vague and, thus, poor guidance to industry.

The CFPB’s RESPA theory in *Meridian* appears to have rested, in part, on the agency’s factual allegation that Meridian “in some cases” received money “beyond Arsenal’s contractual commission allowance.” The CFPB’s consent order does not identify this alleged “money beyond the commission allowance” or the frequency with which this occurred. Thus, it remains unclear whether, for example, the CFPB determined that when Arsenal was used, Meridian sometimes charged an additional fee or sometimes received a higher percent of the premium than was earmarked in its agency contract with Arsenal. Instead, the CFPB simply concluded that these monies sometimes received by Meridian were “not reasonable compensation for services actually performed in the issuance of Arsenal’s title insurance policies, nor were they a return on an ownership or franchise relationship.” The CFPB further concluded that Meridian violated RESPA, in part, because it “routinely selected Arsenal” as the title underwriter and “received things of value—money beyond Arsenal’s contractual commission allowance.” Yet this characterization is in conflict with the allegation statement that it was only “in some cases”—*i.e.*, *not* “routinely”—that Meridian received additional money. Under the terms of the consent order, Meridian (among other things) is prohibited from receiving “any amount of money, as commission or for any other reason, beyond reasonable compensation that is specifically permitted under its contracts with underwriters in exchange for services actually performed . . . ” Yet, more broadly, Meridian also must earmark $1.25 million as redress for all “Affected Consumers,” which is defined as any consumer who did not receive a RESPA-compliant ABA Disclosure in relation to a title policy issued by Meridian as an issuing agent for Arsenal.

Especially given the CFPB’s belief that its consent orders operate as regulations which industry is expected review and follow—with the CFPB Director previously warning industry that it would be “compliance malpractice” for executives “not to take careful bearings from the contents of these orders”—greater specificity regarding the actual practices at issue in *Meridian* would have been helpful. This is particularly true given that title agents, who often perform functions such as ordering and reviewing title and preparing the commitment and final policy documents, routinely keep the majority of the title premium and routinely charge other fees for their services. Instead, industry is left with unanswered questions about Meridian’s objectionable compensation practices and what it means for other title providers generally.

What You Can Do.

Title agencies may wish to take this opportunity to consider their relationships with other settlement service providers to carefully assess potential RESPA risk. For RESPA-covered transactions, relevant areas potentially could include the following:

- For participants in an affiliated business arrangement, ABA exemption criteria under RESPA Section 8(c)(4), including adequate ABA Disclosure practices and procedures;

- Documentation of the title premium commission split paid to title agents, including appropriately documenting any changes to such commission;
- Valuation issues, including with respect to title agent compensation, under RESPA Section 8(c)(1)[13] or 8(c)(2).[14]

[1] 12 U.S.C. § 5481(6).

[2] *See* 12 U.S.C. § 5481(5) and (15)(A)(iii).

[3] 12 U.S.C. § 5481(15)(C)(i).

[4] 12 U.S.C. § 5481(3).

[5] 12 U.S.C. § 5517(f)(1).

[6] For example, the exclusion for persons regulated by a state insurance regulator would not reach other activities by such a person that constituted offering or providing a consumer financial product or service. 12 U.S.C. § 5517(f)(2). Likewise, a person regulated by a state insurance regulator is still potentially subject to other applicable enumerated consumer laws that the CFPB enforces, such as RESPA. *See id.* Additionally, the CFPB's UDAAP authority extends to "service providers," generally defined as entities that provide a material service to a covered person (*see* 12 U.S.C. § 5481(26)), and the CFPB also has authority over "any person" who knowingly or recklessly provides substantial assistance to a covered person or a service provider in violation of the Title X of the Dodd-Frank Act. *See* 12 U.S.C. §§ 5531(a) and 5536.

[7] The Maryland Insurance Administration requires an agent or a “title insurance producer,” defined as a person or entity that solicits, procures or negotiates title insurance contracts, to be licensed. Md. Ins. Code §§ 10-101(l)(1), 10-103(c).

[8] *See Consumer Financial Protection Bureau v. Genuine Title, LLC*, No. 15-cv-01235-JFM (D. Md), at ¶ 59 (alleging that “[t]he RESPA violations of the covered persons described in Count I constitute violations” of Title X of the Dodd-Frank Act, 12 U.S.C. § 5536(a)(1)(A))(in turn, that provision makes it unlawful for any “covered person” (or service provider) to offer or provide to a consumer any financial product or service not in conformity with federal consumer financial law, or otherwise commit any act or omission in violation of a federal consumer financial law).

[9] Real estate brokerage activities, like the business of insurance, are also generally excluded from the CFPB’s Title X jurisdiction, absent circumstances indicating that the person engaged in other conduct or acted in another capacity that is within the Title X realm. *See* 12 U.S.C. § 5517(b).

[10] Under RESPA, an “associate” includes a corporation or business entity that controls, is controlled by, or is under common control with the institution; an employer, officer, director, partner, franchisor, or franchisee of the institution; or anyone with an arrangement with the institution that enables the person to refer settlement business and benefit financially from the referrals. 12 U.S.C. 2602(8).

[11] Some exceptions apply. A lender may require a buyer, borrower, or seller to pay for the services of an attorney, credit reporting agency, or real estate appraiser chosen by the lender to represent its interest.

[12] *See White v. JRHBW Realty*, Inc., No. 2:14-cv-01436-RDP, 2015 U.S. Dist. LEXIS 123432, at *8-9 (N.D. Ala. Sept. 16, 2015) (concluding, with reference to the ABA Disclosure form, that the real estate broker “disclosed its affiliated business arrangement [with the affiliate], it set forth an estimate of range of charges by the affiliates, it allowed Plaintiff to reject the referrals to its affiliated businesses, and it disclosed that [the broker] and its parent may benefit financially if their affiliates are used for settlement services . . . Based on these facts, this court cannot say that the effectiveness of the disclosure was impaired in any way because it was not in the exact form of Appendix D to Regulation X. Therefore, [the defendant] qualifies for the Section 8(c)(4) safe harbor provision.”).

[13] Section 8(c)(1) of RESPA excludes from Section 8 scrutiny the payment of a fee by a title company to its duly appointed agent for services actually performed in the issuance of a policy of title insurance. 12 U.S.C. § 2607(c)(1)(B).

[14] Section 8(c)(2) of RESPA excludes from the definition of referral fair market value payment for goods and services actually rendered. *See* 12 U.S.C. § 2607(c)(2) ("Nothing 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 . . . .").

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