

REFERRALS TO AFFILIATED TITLE COMPANIES: TAKE GREAT CARE

REALTORS® with affiliated companies such as title companies or mortgage brokerages need to know about a recent Consumer Finance Protection Bureau (“CFPB”) investigation that ultimately resulted in a “Consent” Order under which a large Alabama brokerage firm agreed to pay \$500,000 as a penalty for violating Section 8 of RESPA. Why would any real estate brokerage firm agree to an Order requiring them to pay \$500,000?

The Players

The CFPB is the new sheriff for RESPA. Unlike HUD, it has the ability to conduct its own enforcement activities. It would appear from its actions to date that any company, however small or large, will receive the CFPB’s attention if it believes there is a possibility of violations of RESPA.

JRHBW Realty, Inc. does business as Realty South, Inc. (“Realty South”). It is a real estate brokerage company that does transactions which involve federally related mortgage loans in Alabama.

TitleSouth, LLC (“TitleSouth”) examines title and provides title insurance in Alabama. RealtySouth and TitleSouth are wholly owned by the same parent company.

TitleSouth Closing Center is an operating division of TitleSouth which provides closing services.

What Happened?

All of the “facts” contained in this article are derived solely from the Consent Order signed by the Director of the CFPB on May 24, 2014. Since the Order was with the consent of RealtySouth, the facts are assumed to be true.

RealtySouth strongly encouraged their agents to use the affiliated companies of RealtySouth, including, particularly, TitleSouth. In certain instances, RealtySouth's agents were told that they were required to use TitleSouth.

Beginning in March, 2011, until May, 2012, RealtySouth used a preprinted form of purchase agreement that expressly directed the title and closing services to TitleSouth for which a fee would be paid to TitleSouth. Paragraph 5 of the 2011 Purchase Agreement provided:

Title Insurance. Seller agrees to furnish Buyer a standard form owner's title insurance policy issued by TitleSouth, LLC in the amount of the purchase price. . .

Paragraph 18 of the 2011 Purchase Agreement was entitled "Selection of Closing Agent" and provided:

Buyer and Seller hereby agree that the closing of this transaction shall be conducted by the TitleSouth Real Estate Closing Center and agree to share equally the closing fees for this transaction.

After being contacted by the CFPB, RealtySouth changed the terms regarding title insurance and closing services in its preprinted purchase agreements. The 2012 Purchase Agreement allowed consumers to select either TitleSouth or "Other." Paragraph 5 of the 2012 Purchase Agreement provided:

The title insurance policies specified herein shall be obtained from (check one) TitleSouth; Other.

Paragraph 17 of the 2012 Purchase Agreement also provided:

The closing of the transaction contemplated by this contract shall be performed by (check one) TitleSouth Closing Center; Other.

As required by RESPA, RealtySouth provided consumers with an "Affiliated Business Arrangement Disclosure Statement" ("ABA Disclosure") with the 2011 and 2012

Purchase Agreements used by its clients. Unfortunately, the CFPB found that RealtySouth's ABA Disclosure was not in the format prescribed by the regulations and therefore did not comply with RESPA. The CFPB found that RealtySouth's ABA Disclosure did not use capital letters or any other way of highlighting the message that consumers were free to obtain their settlement services from other providers by shopping around. RealtySouth's ABA Disclosure did not set apart the disclosure to consumers that they could shop around for services, but, instead, incorporated that message into the end of a list of descriptions of seven affiliated businesses and was "hidden" in a description of RealtySouth.

The CFPB also took issue with marketing statements contained in the ABA Disclosure which proclaimed the benefits and value of RealtySouth's affiliated businesses. Examples cited in the Consent Order were:

[We] at RealtySouth believe our affiliates provide superior service, value, and convenience; we believe that our affiliates' charges are reasonable and are competitive with the amounts charged by others for the same services; and [w]ith competitive, reasonable rates, coupled with the smooth and efficient manner in which the transaction will be handled, the affiliates of RealtySouth are in a unique position to provide you with exceptional value and service in handling your transaction.

When RealtySouth became aware of CFPB's concerns with its ABA Disclosure, it immediately changed its ABA Disclosure to address the concerns raised by the CFPB.

The Lessons

The first lesson from this story is contained in part in the Order of the CFPB in this case. First, the CFPB ordered RealtySouth to use an ABA Disclosure Form which complies with RESPA, *i.e.*, in the format of Appendix D of 12 C.F.R. § 1024, a copy of which is attached to this article. The CFPB further ordered that the ABA Disclosure ". . . shall contain no

additional marketing statements or any other statement or content that materially interferes with, detracts from, contradicts, or otherwise obscures the required disclosures.”

Second, RealtySouth was ordered to insure that all of its “training materials, manuals, continuing education materials, and any other documents that provide guidance to RealtySouth agents, emphasize that agents cannot require the use of any affiliate in real estate transactions. . .” Obviously, any REALTOR® with affiliated businesses should review all of their materials to make certain that no claim can be made that they require consumers to use their affiliated businesses. If REALTORS® with affiliated businesses have engaged in these types of activities, they should cease immediately.

The Order entered by the CFPB does not specifically address use of a preprinted form which requires a seller and buyer to use a specific title company. This suggests that RealtySouth’s modification of its purchase agreement to permit a consumer to select either TitleSouth or “Other” is acceptable to the CFPB. REALTORS® using purchase agreement forms with a preprinted reference to their affiliated businesses are well advised to modify the form to add “Other” as an option. However, before making that decision, these REALTORS® should be aware of the press release issued by the CFPB when it publicized the Consent Order.

This press release stated:

RealtySouth’s preprinted form purchase contracts, which its agents provided to homebuyers preparing to make an offer on a home, either explicitly directed or suggested that title and closing services be conducted by its affiliate, TitleSouth.

Of course, the safest course is to remove any reference to an affiliated title company in a preprinted form of purchase agreement.

Michigan REALTORS®
June, 2014

There is every indication that the CFPB will be relentless in enforcing its interpretation of RESPA. If the facts described in this article seem familiar to REALTORS® with affiliated businesses, they should consult with their lawyer immediately to make any necessary changes. Otherwise, it could get very expensive.

Affiliated Business Arrangement Disclosure Statement Format

Notice

To: _____ Property: _____

From: _____ Date: _____

(Entity Making Statement)

This is to give you notice that (referring party) has a business relationship with [settlement services provider(s)]. [Describe the nature of the relationship between the referring party and the provider(s), including percentage of ownership interest, if applicable.] Because of this relationship, this referral may provide [referring party] a financial or other benefit.

[A.] Set forth below is the estimated charge or range of charges for the settlement services listed. You are NOT required to use the listed provider(s) as a condition for [settlement of you loan on] [or] [purchase, sale, or refinance of] the subject property. THERE ARE FREQUENTLY OTHER SETTLEMENT SERVICE PROVIDERS AVAILABLE WITH SIMILAR SERVICES. YOU ARE FREE TO SHOP AROUND TO DETERMINE THAT YOU ARE RECEIVING THE BEST SERVICES AND THE BEST RATE FOR THES SERVICES.

[provider and settlement service]	[charge or range of charges]
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[B.] Set forth below is the estimated charge or range of charges for the settlement services of an attorney, credit reporting agency, or real estate appraiser that we, as you lender, will require you to use, as a condition of your loan on this property, to represent our interests in the transaction.

[provider and settlement service]	[charge or range of charges]
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ACKNOWLEDGMENT

I/we have read this disclosure form, and understand that [referring part] is referring me/us to purchase the above-described settlement service(s) and may receive a financial or other benefit as the result of this referral.

Signature

[INSTRUCTIONS TO PREPARER:] [Use paragraph A for referrals other than those by a lender to an attorney, a credit reporting agency, or a real estate appraiser that a lender is requiring a borrower to use to represent the lender's interests in the transaction. Use paragraph B for those referrals to an attorney, credit reporting agency, or real estate appraiser that a lender is requiring a borrower to use to represent the lender's interests in the transaction. When applicable, use both paragraphs. Specific timing rules for delivery of the affiliated business disclosure statement are set forth in [24 CFR 3500.15\(b\) \(1\)](#) of Regulation x). These INSTRUCTIONS TO PREPARER should not appear on the statement.]