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BACKGROUNDER

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RESPA Section 8—the CFPB and the President Should Act Now to Restore the Rule of Law

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KEY TAKEAWAYS

The CFPB's aggressive departure from settled law and long-standing agency guidance in RESPA enforcement actions violated due process and upended the rule of law.

The DC Circuit Court of Appeals repudiated the CFPB's misinterpretation of RESPA, but more must be done to restore the rule of law at the CFPB.

The CFPB Director and the President can take concrete steps to repair the damage done, such as issuing interpretive rules to clarify the meaning of RESPA Section 8.

In the wake of the financial crisis of 2007–2009, Congress enacted sweeping legislation creating a powerful new federal agency, the Consumer Financial Protection Bureau (CFPB), and granted it broad authority and discretion to regulate the U.S. financial system. By design, the agency was extraordinarily independent from the elected branches of government. For example, the agency was funded by the Federal Reserve rather than Congress, and the President could only remove its sole Director from office for inefficiency, neglect of duty, or malfeasance.

Proponents of the CFPB argued that such independence was necessary to keep it out of "politics" and prevent regulatory capture by special interests. Critics, to the contrary, argued that an agency lacking fundamental checks and balances on the exercise of its authority invited an abuse of power. To be sure, the CFPB has secured billions of dollars in fines and restitution through consent orders with financial firms. At the same time, it has displayed an alarming propensity to undermine the rule of law.

For instance, the DC Circuit Court of Appeals ruled that the CFPB violated fundamental principles of due process when, after ignoring years of established regulatory guidance for Section 8 of the Real Estate Settlement Practices Act (RESPA), the CFPB tried to retroactively enforce its own interpretation of the law. Current CFPB Director Kathleen Kraninger has committed the bureau to restoring the rule of law, but much unfinished work remains. This *Backgrounder* explains several concrete actions that the CFPB, Congress, and the President can take to restore the plain meaning of RESPA Section 8 and to restore the rule of law at the CFPB.

Background

Congress enacted the RESPA in 1974 to protect mortgage borrowers from unnecessarily high settlement charges.[1] One of RESPA's statutory purposes is to "eliminat[e]...kickbacks or referral fees that tend to increase unnecessarily the costs of settlement services."[2] To further this purpose, Section 8(a) of RESPA prohibits the giving and accepting of "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."[3] Similarly, Section 8(b) of RESPA prohibits giving or accepting "any portion, split, or percentage of any charge made or received for the rendering of a real estate settlement service...other than for services actually performed."[4] In other words, RESPA generally prohibits payments for referrals or unearned fees.

However, RESPA provides exceptions to these general prohibitions. For instance, Section 8(c)(2) states 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."[5] Regulation X, RESPA's implementing regulation, affirms that "Section 8 of RESPA permits...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."[6]

In other words, even though payments for referrals, or receiving unearned fees, are forbidden, payments for services performed are permitted, so long as the payments reflect reasonable market value. This statutory scheme seems simple. Yet because RESPA provides for private right of action, hefty civil and criminal penalties, and treble damages (multiples of the awarded damage), business arrangements involving lenders, brokers, and other settlement services providers proved attractive targets to plaintiffs' attorneys, who brought scores of class actions challenging such arrangements as illegally disguised kickbacks.[7] Congress expressed alarm about the legal uncertainty created by the litigation, and reiterated that it "never intended payments by lenders to mortgage brokers for goods or facilities actually furnished or for services actually performed to be violations...of RESPA."[8]

Between 1992 and 2004, the U.S. Department of Housing and Urban Development (HUD) (which at the time was responsible for implementing RESPA and Regulation X) issued a series of guidance documents to clarify its position on the application of RESPA Section 8 to various types of business arrangements involving settlement services providers. For instance, with respect to lender payments to mortgage brokers, including yield-spread premiums, HUD advised that the legality of a payment to a mortgage broker does not depend on the name of the particular fee, but instead on whether the total compensation to a mortgage broker is reasonably related to the total value of the goods or facilities actually furnished or services actually performed.[9] Accordingly, HUD declared that it "does not consider such payments...to be illegal per se."[10]

Instead, HUD established a two-part test to determine the legality of lender payments to mortgage brokers under RESPA: first, whether goods or facilities were actually furnished or services were actually performed for the compensation paid; and second, whether the payments are reasonably related to the value of the goods or facilities that were actually furnished or services that were actually performed.[11] In applying this test, HUD stated that total compensation should be scrutinized to ensure that it is reasonably related to goods, facilities, or services furnished or performed, in order to determine whether it is legal under RESPA.[12] As another example, in 1997, HUD also clarified the application of RESPA Section 8 to captive reinsurance arrangements (1997 RESPA Reinsurance Guidance).[13] HUD analyzed the relationship between Sections 8(a) and 8(c), and concluded that "the arrangements are permissible under RESPA if the payments to the reinsurer: (1) are for reinsurance services 'actually furnished or for services performed' and (2) are *bona fide* compensation that does not exceed the value of such services" (emphasis in original).[14]

CFPB Enforcement Actions Push the Envelope

HUD's consistent interpretation of RESPA Section 8 was widely known and relied on in the mortgage lending industry, and approved by reviewing courts.[15] However, a sea change occurred after the financial crisis. In 2010, Congress enacted the Dodd–Frank Wall Street Reform and Consumer Protection Act, which created the Consumer Financial Protection Bureau (CFPB) and transferred responsibility for administering RESPA and Reg X from HUD to the new agency.[16] Almost as soon as it opened its doors, the CFPB began aggressively investigating potential RESPA Section 8 violations, resulting in a dozen enforcement actions in 2013 and 2014 alone.[17]

Two of the CFPB's cases stand out in particular. First, in 2014, the CFPB entered into a consent order with Lighthouse Title, Inc. The CFPB alleged that the company's marketing service agreements (MSAs) with several real estate brokers violated RESPA Section 8.[18] At the time, MSAs were a common alternative to the more expensive direct advertising through media channels, wherein lenders or title companies paid a monthly fee to a service provider in exchange for advertising services. As alleged by the CFPB, the brokers actually were paid, in part, based on the number of referrals generated for Lighthouse.[19] The legal position asserted by the CFPB was that "[e]ntering a contract is a 'thing of value' within the meaning of Section 8, *even if the fees paid under that contract are fair market value for the goods or services provided*" (emphasis added).[20] In other words, the CFPB took the position that the 8(c)(2) exemption does not apply even if market rate compensation is paid for services actually performed if there is a referral in a transaction, because the payments could be a pretext to provide compensation for a referral. This novel position was an arresting departure from the plain language of RESPA, Reg X and HUD guidance, all of which made clear that making a payment at reasonable market value for services actually provided is, by definition, not a *payment for a referral*. However, the CFPB's legal position in the matter was not evaluated by a federal court, since Lighthouse Title elected to settle the action without admitting any fact or conclusion of law.

The fallout from the Lighthouse Title consent order was immediate and consequential, with many market participants abandoning the use of MSAs altogether. In 2015, the CFPB doubled down on its legal position by issuing a compliance bulletin titled *RESPA Compliance and Marketing Services Agreements*).[21] The bulletin declared that "any agreement that entails exchanging a thing of value for referrals of settlement service business involving a federally related mortgage loan likely violates RESPA, whether or not an MSA or some related arrangement is part of the transaction."[22] Accordingly, the CFPB asserted its view that "many MSAs are designed to evade RESPA's prohibition on the payment and acceptance of kickbacks and referral fees."[23] The bulletin also conspicuously noted the effect that Lighthouse Title had on market behavior, observing:

> In recent months, various mortgage industry participants have publicly announced their determination that the risks and complexity of designing and monitoring MSAs for RESPA compliance outweigh the benefits of entering the agreements. Accordingly, certain lenders have dissolved existing agreements and decided that they will no longer enter into MSAs.[24]

The CFPB expressed "grave concerns about the use of MSAs" and further warned that "MSAs *necessarily* involve substantial legal and regulatory risk for the parties to the agreement" (emphasis added).[25] Notably, the CFPB did not provide guidance for structuring compliant MSAs. Instead, it "encourage[d] all mortgage industry participants to consider carefully RESPA's requirements and restrictions and the adverse consequences that can follow from non-compliance."[26]

The second case that stands out is a 2014 administrative proceeding initiated by the CFPB against PHH Corporation and its affiliates alleging that PHH's captive mortgage reinsurance arrangements violated RESPA Section 8.[27] In particular, the CFPB's notice of charges alleged that between 1995 and 2013, PHH used its arrangements to solicit and collect illegal kickback payments and unearned fees, disguised as reinsurance premiums, through its affiliates, in exchange for the referral of private mortgage insurance business.[28] As a remedy, the CFPB sought a permanent injunction, disgorgement, restitution, and a civil penalty.[29] In its defense, PHH argued that its actions conformed to HUD's 1997 RESPA Reinsurance Guidance, that the CFPB's own position in prior enforcement actions was contrary to the position it was now taking, and that most of the CFPB's claim was barred by RESPA's three-year statute of limitations.[30]

Following an in-house trial, the Administrative Law Judge (ALJ) hired by the CFPB issued a recommended decision holding that PHH did not qualify for RESPA Section 8(c)(2)'s safe harbor since it had not satisfied its requirements.[31] The ALJ therefore held that PHH had violated RESPA Section 8(a).[32] Critically, the ALJ held that the statutes of limitations under RESPA and the Dodd–Frank Act did not apply to the CFPB's administrative enforcement action, essentially construing the word "action" to mean federal court actions, not administrative proceedings.[33] However, the ALJ held that the CFPB could not revive claims which had become time-barred prior to the creation of the CFPB, so he established July 21, 2008, as the applicable start date for the CFPB's RESPA claim accrual look-back period.[34] Accordingly, the ALJ ordered disgorgement in the amount of $6.4 million.[35]

Both PHH and the CFPB's Office of Enforcement appealed the ALJ's recommended decision.[36] According to the CFPB's rules of practice for administrative proceedings, appeals from ALJ decisions must be made to the CFPB Director, which meant that Director Richard Cordray effectively sat as both prosecutor and judge in the case.[37] The Office of Enforcement reiterated the legal position it took in Lighthouse Title (and would also take in its 2015 RESPA bulletin), asserting that "where the evidence shows that a thing of value was given or accepted for referrals, the Section 8(c)(2) safe harbor is unavailable as a matter of law," arguing that "[m]andating the purchase of ancillary, purported goods or services—at any price—as consideration for making referrals to a real estate settlement service provider is a violation of Section 8(a) that cannot be saved by Section 8(c)(2). Holding otherwise would restrict the scope of Section 8(a) defined by the plain language of the statute."[38] The CFPB claimed that the opportunity to engage in reinsurance transactions provided value to PHH regardless of whether the reinsurance was real or reasonably priced, and the fact that excessively priced services are not protected by Section 8(c)(2) "does not mean that the inverse—that reasonably priced services are automatically protected by Section 8(c)(2)—is true."[39] The Office of Enforcement thus urged Director Cordray to hold that Section 8(c)(2) does not protect payments at any price when the transaction is itself consideration for referrals of settlement service business.[40]

On appeal, Director Cordray reviewed *de novo* the enforcement action he had initially either authorized or condoned, and issued a decision and final order that, not surprisingly, sided almost entirely with the bureau that he ran. First, the Director agreed that no statute of limitations applies when the bureau challenges a RESPA violation.[41] The Director also interpreted RESPA 8(c)(2) as "clarify[ing] the application of section 8(a), not as a substantive exemption to liability," and stated that "[t]o the extent that the [1997 RESPA Reinsurance Guidance] is inconsistent with my textual and structural interpretation of section 8(c)(2), I reject it."[42] Then, for purposes of calculating the amount of disgorgement, the Director disagreed with the ALJ, finding that "PHH violated RESPA every time it accepted a reinsurance payment," not simply each time an individual loan transaction closed and mortgage insurance business was referred.[43] Additionally, the Director declined to offset the size of the disgorgement penalty by any amounts that PHH's affiliate paid on mortgage reinsurance claims. In other words, he based the disgorgement amount on gross revenue from premiums ceded, not profits.[44] The combination of these two changes to the disgorgement calculation resulted in a 17-fold increase in the amount of disgorgement ordered by Director Cordray, to $109.1 million.

The Reckoning

PHH appealed Director Cordray's order to the DC Circuit Court of Appeals, arguing that the CFPB was unconstitutionally structured, that the CFPB misinterpreted RESPA Section 8(c), and that the CFPB violated bedrock due-process principles by retroactively applying its new interpretation of the statute against it.[45] In a panel decision issued on October 11, 2016, the court considered each of PHH's arguments in turn.[46]

First, the court concluded that the CFPB is unconstitutionally structured because it is an independent agency headed by a single Director, and it remedied the constitutional violation by severing the for-cause removal provision from the statute.[47] As a result, in the court's view, the CFPB would operate as an executive agency answerable to the President.[48] However, the court reasoned that because its constitutional ruling would not halt the CFPB's ongoing operations or its ability to uphold Director Cordray's $109 million order against PHH, it must also consider PHH's statutory objections to the CFPB's enforcement action in this case.[49] There, the court stated:

> The basic statutory question in this case is not a close call.... Section 8(a) prohibits, in this context, payment by a mortgage insurer to a lender for the lender's referral of a customer to the mortgage insurer. But Section 8(a) and 8(c) do not prohibit bona fide payments by the mortgage insurer to the lender for other services that the lender (or the lender's subsidiary or affiliate) actually provides to the mortgage insurer.... Section 8(a) proscribes payments for referrals. Period. It does not proscribe other transactions between the lender and mortgage insurer. Nor does it proscribe a tying arrangement, so long as the only payments exchanged are bona fide payments for services and not payments for referral. The CFPB says, however, that the mortgage insurer's payment for the reinsurance is not "bona fide" if it was part of a tying arrangement. That makes little sense. Tying arrangements are ubiquitous in the U.S. economy.... A payment for a service pursuant to a tying arrangement does not make the payment any less bona fide, so long as the payment for the service reflects reasonable market value....
>
> Recognizing, however, that an aggressive government enforcement agency or court might interpret other transactions between businesses in the real estate market as connected to, conditioned on, or tied to referrals, and might try to sweep such transactions within the scope of Section 8(a)'s prohibition, Congress explicitly made clear in Section 8(c) that those other transactions were lawful so long as reasonable market value was paid and the services were

> actually performed. In other words, Section 8(c) specifically bars the aggressive interpretation of Section 8(a) advanced by the CFPB in this case. Section 8(c) was designed to provide certainty to businesses in the mortgage lending process. The CFPB's interpretation flouts that statutory goal and upends the entire system of unpaid referrals that has been part of the market for real estate settlement services....
>
> The CFPB obviously believes that captive reinsurance arrangements are harmful and should be illegal. But the decision whether to adopt a new prohibition on captive reinsurance arrangements is for Congress and the President when exercising the legislative authority. It is not a decision for the CFPB to make unilaterally.[50]

Second, the court further found that the CFPB's unilateral reinterpretation of RESPA "flouts not only the text of the statute but also decades of carefully and repeatedly considered official government interpretations."[51] The court stated that an agency's change in position "is not a fatal flaw in and of itself, so long as the change is reasonably explained and so long as the new interpretation is consistent with the statute."[52] However, the court warned that "change becomes a problem—a fatal one—when the Government decides to turn around and retroactively apply that new interpretation to proscribe conduct that occurred before the new interpretation was issued."[53] The court described this fundamental anti-retroactivity principle as "Rule of Law 101."[54] Concluding that the "Due Process Clause does not countenance the CFPB's gamesmanship," the court held that the CFPB's retroactive application of its new interpretation of RESPA Section 8 to PHH's conduct, which occurred before the date of the CFPB's new interpretation, violated due process.[55]

Finally, the court concluded that the CFPB's attempt to distinguish between administrative proceedings and court actions for purposes of applying RESPA's statute of limitations was "flatly wrong" and a "nonsensical dichotomy" that is directly contradicted by the Dodd–Frank Act itself.[56] The court found that "there is good reason Congress did not say that the CFPB need not comply with any statutes of limitations when enforcing the Real Estate Settlement Procedures Act administratively. That would be absurd.... The CFPB has articulated no remotely plausible reason why Congress would have done so."

The court found for PHH on the merits in all respects, vacated the CFPB's order against PHH, and remanded the case to the CFPB to determine among other things whether, within the applicable three-year statute of limitations, the relevant mortgage insurers paid more than reasonable market value to the PHH-affiliated reinsurer.[57]

The Aftermath

Following the court's decision, Director Cordray sought and was granted *en banc* review before the entire DC Circuit.[58] However, he resigned from office to run for governor of Ohio before the court rendered its decision. On January 31, 2018, the court reversed the decision of the panel with respect to the constitutionality of the CFPB, holding that the for-cause conditions shielding the CFPB Director from removal without cause are consistent with Article II.[59] However, on the merits, the court reinstated the panel opinion insofar as it related to the interpretation of RESPA and its application to PHH.[60] On remand to the CFPB, then-Acting CFPB Director Mick Mulvaney ordered the parties to file a joint statement addressing whether further proceedings in the matter were necessary.[61] PHH and the CFPB's Office of Enforcement jointly recommended dismissal.[62] Concluding that, in light of the *PHH* decision, "it is now the law of this case that PHH did not violate RESPA if it charged no more than the reasonable market value for the reinsurance it required the mortgage insurers to purchase, even if the reinsurance was a quid pro quo for referrals." Acting Director Mulvaney ordered the notice of charges against PHH dismissed and the matter terminated.[63]

Thus ended the PHH saga. It is hard to conceive of a more thorough repudiation of both the CFPB's interpretation of RESPA Section 8 and the way it sought to impose its misinterpretation retroactively. But what consequence did CFPB face for so egregiously violating due process and undermining the rule of law? To be sure, the CFPB lost its case against PHH, but only because PHH earned its victory at the cost of a half-decade of toil, reputational damage, and litigation expense. In a memo to CFPB staff dated January 23, 2018, Acting Director Mulvaney reflected upon this type of injustice, stating:

> It is not appropriate for any government entity to "push the envelope" when it comes into conflict with our citizens. The damage that we can do to people could linger for years and cost them their jobs, their savings, and their homes. If the CFPB loses a court case because we "pushed too hard," we simply move on to the next matter. But where do those that we have charged go to get their time, their money, or their good names back? If a company closes its doors under the weight of a multi-year Civil Investigative Demand, you and I will still

> have jobs at CFPB. But what about the workers who are laid off as a result? Where do they go the next morning?[64]

There is no just answer to these questions. However, the CFPB can atone for its actions by credibly dedicating itself to preventing such abuses in the future. Furthermore, due to a recent Supreme Court decision,[65] the President can also act to help restore the rule of law at the CFPB.

Restoring the Rule of Law

CFPB Director Kathleen Kraninger has admirably committed the agency to ensuring that there are "clear rules of the road" for financial institutions.[66] However, even two years after the end of *PHH* and nearly four years since the DC Circuit's decision, much unfinished work remains. To restore the rule of law, the CFPB should take seven concrete actions:

1. **Rescind** its 2015 RESPA Bulletin on MSAs and any other bulletin that is premised on the CFPB's repudiated misinterpretation of RESPA Section 8;

2. **Issue** an interpretive rule that officially restores its interpretation of law to one that is consistent with the plain text of RESPA Section 8, Regulation X, long-standing HUD guidance, and the *PHH* opinion;[67]

3. **Issue** an interpretive rule clarifying the statutes of limitations that are applicable to its administrative proceedings;

4. **Issue** an interpretive rule clarifying the way the CFPB will calculate disgorgement for purposes of seeking equitable relief in light of the Supreme Court's recent opinion in *Liu et al. v. SEC*;[68]

5. **Amend** its remaining guidance documents to conform to these interpretive rules;

6. **Issue** a policy statement repudiating the "regulation by enforcement" doctrine espoused by Director Cordray, of which the CFPB's RESPA Section 8 enforcement actions are a quintessential example;[69] and

7. **Refrain** from ratifying, and immediately **terminate**, any portion of an existing supervisory or enforcement matter (including any

> supervisory matter requiring attention, any supervisory memorandum of understanding, any civil investigative demand, and any enforcement action) that is premised on the CFPB's repudiated misinterpretation of RESPA Section 8.[70]

The CFPB can take each of these seven actions on its own. However, Congress can also help to restore the rule of law. The Congressional Review Act (CRA) establishes a process for congressional review of agency rules and establishes special expedited procedures under which Congress may pass a joint resolution of disapproval that, if enacted into law, overturns the rule.[71] The CRA defines an agency rule broadly to include a "statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency."[72] This definition very likely encompasses the CFPB's 2015 RESPA bulletin. In fact, the Government Accountability Office (GAO) previously concluded that another CFPB enforcement bulletin (regarding indirect auto lending) was a rule under the CRA,[73] and Congress overturned it.[74] If necessary to prompt the CFPB to taking action regarding the 2015 RESPA bulletin, a Member of Congress could write to the GAO requesting an opinion on whether the bulletin is a rule for the purposes of the CRA. Such an opinion rendered by the GAO could prompt potential consideration of a joint resolution of disapproval to overturn the bulletin.

Congress can also require the CFPB to engage in a notice-and-comment process before issuing guidance documents.[75] Such a requirement, if enacted, could serve as an effective early warning signal whenever the CFPB seeks to change the requirements of the law through guidance rather than through a legislative rulemaking.[76]

President Donald Trump can also act to help restore the rule of law at the CFPB. Because of the Supreme Court's June 2020 decision in *Seila Law v. CFPB,* the President can now remove the CFPB Director from office for any reason, not just for cause. This means that President Trump can direct Director Kraninger to take affirmative actions to carry out his administrative priorities, including by ordering the CFPB to take each of the seven concrete actions enumerated above.

The fact that the President can now control the agency also means that the President can require the CFPB to comply with his executive orders. In October 2019, President Trump issued an "Executive Order on Promoting the Rule of Law Through Improved Agency Guidance Documents," the purpose of which is to prevent executive departments and agencies from issuing non-binding guidance documents that unlawfully provide new interpretations of law outside the Administrative Procedures Act.[77] The requirements of this executive order would clearly address the CFPB's prior abuses of the guidance process, as represented by the 2015 RESPA bulletin. For that reason, the White House should specifically direct the CFPB to comply with this executive order.

Finally, the *Seila Law* decision also means that the President now effectively controls the CFPB's budget, since he can specify the amount of funds the Director may request from the Federal Reserve each fiscal quarter. This means that he can also affirmatively prohibit the CFPB from using funds for any particular purpose. For that reason, the Office of Management and Budget should actively manage the CFPB's budget in order to bring it into line with the Administration's budget priorities and should also forbid the CFPB from using funds in furtherance of its repudiated misinterpretation of RESPA.

Conclusion

Through these collective actions, the CFPB, Congress, and the President can continue the work started by the DC Circuit Court of Appeals in *PHH* to restore the plain meaning of RESPA Section 8. However, even if all of these actions are taken, it should not be forgotten that the CFPB's RESPA enforcement actions were just one of many manifestations of the "regulation by enforcement" doctrine espoused by former Director Cordray. Other examples exist, and the CFPB would be wise to identify them quickly and pull each of them out by the root.

But unless or until Congress enacts legislation ensuring that the CFPB is accountable to Congress through the appropriations process, the only guarantee that the "regulation by enforcement" doctrine does not return is the personal commitment and vigilance of the CFPB Director. One additional accountability mechanism that the Director could institute to help her police the CFPB's actions would be to require the Associate Director for Supervision, Enforcement, and Fair Lending to inform her any time that the CFPB proposes to send a Notice and Opportunity to Respond and Advise (NORA) letter or a Potential Action and Request for Response (PARR) letter to a company containing a preliminary conclusion of law that (in the Associate Director's judgment) is not clearly and unambiguously supported by controlling case law or a legislative rule, interpretive rule, or guidance document issued or adopted by the CFPB. Such a notification would be a red flag warning that the CFPB may be attempting once more to "push the envelope" in its interpretation and application of the law, and a sign that the CFPB should first pause and announce its new legal position publicly before taking any supervisory or enforcement action. Direct oversight by the Director at this stage of the CFPB's supervisory and enforcement process would help to reinforce the rule of law, prevent violations of due process, minimize the risk of losing another case like *PHH*, ensure that the CFPB provides clear rules of the road for market participants, and avoid the type of injustice observed by former Acting Director Mulvaney.

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Endnotes

1. Public Law No. 93–533, § 2, December 22, 1974, 88 Stat. 1724, now codified at 12 U.S. Code 2601, et seq. Regulation X, which implements RESPA, is codified at 12 CFR Part 1024.
2. 12 U.S. Code 2601(b)(2).
3. 12 U.S. Code 2607(a); see also 12 CFR 1024.14(b). The Senate Report accompanying RESPA stated that Section 8 "is intended to prohibit all kickback or referral fee arrangements whereby any payment is made or 'thing of value' furnished *for the referral* of real estate settlement business." (Emphasis added.) See Senate Report No. 866, 93th Cong., 2nd Sess., 1974, 1974 U.S. Code, Congressional & Administrative News, pp. 6546 and 6551, 1974 WL 11646 (Leg.Hist.). RESPA defines the term "thing of value" to include "any payment, advance, funds, loan, service, or other consideration." 12 U.S. Code 2602(2). Reg X further defines "thing of value" broadly to include, without limitation, "monies, things, discounts, salaries, commissions, fees, duplicate payments of a charge, stock, dividends, distributions of partnership profits, franchise royalties, credits representing monies that may be paid at a future date, the opportunity to participate in a money-making program, retained or increased earnings, increased equity in a parent or subsidiary entity, special bank deposits or accounts, special or unusual banking terms, services of all types at special or free rates, sales or rentals at special prices or rates, lease or rental payments based in whole or in part on the amount of business referred, trips and payment of another person's expenses, or reduction in credit against an existing obligation." 12 CFR 1024.14(d).
4. 12 U.S. Code 2607(b). The Senate Report accompanying RESPA stated that "[t]o the extent the payment is in excess of the reasonable value of the goods provided or services performed, the excess may be considered a kickback or referral fee proscribed by Section [8]." See Senate Report No. 866, 93th Cong., 2nd Sess. 1974.
5. 12 U.S. Code 2607(c)(2). The Senate Report accompanying RESPA stated that "reasonable payments in return for services actually performed or goods actually furnished are not intended to be prohibited." See Senate Rep. No. 866, 93th Cong., 2nd Sess. 1974.
6. 12 CFR 1024.14(g)(1)(iv).
7. In a 2002 proposed rule, HUD stated: "Over the last decade, there has been persistent litigation concerning the legality of indirect fees to mortgage brokers. More than 150 lawsuits have been brought since the mid-1990s seeking class action certification, based in whole or in part on the theory that the indirect fees paid by lenders to mortgage brokers are fees for the referral of business in violation of section 8 of RESPA." See U.S. Department of Housing and Urban Development," Proposed Rule: Real Estate Settlement Procedures Act (RESPA); Simplifying and Improving the Process of Obtaining Mortgages to Reduce Settlement Costs to Consumers," *Federal Register*, Vol. 67, No. 145 (July 29, 2002), pp. 49134 and 49141, https://www.govinfo.gov/content/pkg/FR-2002-07-29/pdf/02-18960.pdf (accessed July 23, 2020).
8. H.R. Conference Report No. 105-769, 105th Cong., 2nd Sess. 260 (1998), https://www.congress.gov/105/crpt/hrpt769/CRPT-105hrpt769.pdf (accessed July 23, 2020).
9. U.S Department of Housing and Urban Development, "Statement of Policy 1999-1: Regarding Lender Payments to Mortgage Brokers," 24 CFR Part 3500, February 22, 1999, https://archives.hud.gov/news/1999/rspntce.html (accessed July 23, 2020).
10. Ibid. According to the policy statement, "The fact that goods or facilities have been actually furnished or that services have been actually performed by the mortgage broker does not by itself make the payment legal."
11. Ibid*.* In 2001, HUD further clarified that "where compensable services are performed, the 1999 Statement of Policy requires application of both parts of the HUD test before a determination can be made regarding the legality of a lender payment to a mortgage broker." See U.S. Department of Housing and Urban Development, "Statement of Policy 2001–1: Clarification of Statement of Policy 1999-1 Regarding Lender Payments to Mortgage Brokers, and Guidance Concerning Unearned Fees Under Section 8(b)," October 18, 2001, https://archives.hud.gov/news/2001/respafinal.pdf (accessed July 23, 2020). This policy also specifically stated that "Section 8(c)(2) only allows 'the payment to any person of a *bona fide* salary or compensation or other payment for goods or facilities actually furnished or services actually performed,' i.e., permitting only that compensation which is reasonably related to the goods or facilities provided or services performed. Compensation that is unreasonable is unearned under Section 8(b) and is not bona fide under Section 8(c)(2)."
12. Ibid.
13. Letter from Nicolas P. Retsinas, Assistant Secretary for Housing, Department of Housing and Urban Development, to Countrywide Funding Corporation 3, August 6, 1997, (Exhibit E), https://files.consumerfinance.gov/f/201506_cfpb_addendum_public_version_228_01.pdf (accessed July 23, 2020).
14. Ibid. HUD reiterated its interpretation in 2004, stating that captive reinsurance agreements are permissible if the payments made to the reinsurer (1) are "for reinsurance services actually furnished or for services performed" and (2) are "bona fide compensation that does not exceed the value of such services." See Letter from John P. Kennedy, Associate General Counsel for Finance and Regulatory Compliance, Department of Housing and Urban Development, to American Land Title Association 1, August 12, 2004.
15. See, for example, *Glover v. Standard Federal Bank*, 283 F.3d 953, 964 (8th Cir. 2002). The "permissive language of Section 8(c)...clearly states that reasonable payments for goods, facilities or services actually furnished are *not prohibited* by RESPA, even when done in connection with the referral of a particular loan to a particular lender." Compare to *Carter v. Welles-Bowen Realty, Inc.*, 736 F.3d 722, 728 (6th Cir. 2013) (RESPA "establishes other safe harbors from its ban on referral fees, distinct from the safe harbor for affiliated business arrangements," one of which is Section 8(c)(2)), and *Geraci v. Homestreet Bank*, 347 F.3d 749, 751 (9th Cir. 2003) (Stating that "Section 8(c) provides a safe harbor" and noting that HUD's two-part test established under Statement of Policy 1999–1 "has been adopted by the majority of courts in applying Section 8 to [yield spread premiums], including this court.").

16. Public Law No. 111–203, 124 Stat. 1376 (July 21, 2010). Once it inherited HUD's former authority, the CFPB codified HUD's Reg X provisions governing RESPA Section 8. See 12 CFR § 1024.14 (2012).
17. See, for example, *Consumer Fin. Prot. Bureau v. Borders & Borders*, Complaint, 3:13-MC-99999 (W.D. Ky. October 24, 2013); *Consumer Fin. Prot. Bureau v. Radian Guaranty Inc.*, Consent Judgment, 1:13-CV-21188 (S.D. Fl. April 4, 2013); *Consumer Fin. Prot. Bureau v. United Guaranty Corp.*, Complaint, 1:13-CV21189 (S.D. Fl. April 4, 2013); *Consumer Fin. Prot. Bureau v. Genworth Mortg. Ins. Corp.*, Consent Judgment, 1:13-CV-21183 (S.D. Fl. April 5, 2013); *Consumer Fin. Prot. Bureau v. Mortg. Guaranty Ins. Corp*., Consent Judgment, 1:13-CV-21187 (S.D. Fl. April 5, 2013); In the Matter of: Paul Taylor, Paul Taylor Homes Limited, and Paul Taylor Corp., Consent Order, 2013-CFPB-0001 (May 17, 2013); *Consumer Fin. Prot. Bureau v. Republic Mortg. Ins. Co.*, 1:13-CV-24146 (S.D. Fl. November 15, 2013); In the Matter of: Fidelity Mortg. Corp. et al., Consent Order, 2014-CFPB-0001 (January 16, 2014); In the Matter of: 1st Alliance Lending, LLC, Consent Order, 2014-CFPB-0003 (February 24, 2014); In the Matter of: JRHBW Realty, Inc., d/b/a RealtySouth; TitleSouth, LLC, Consent Order, 2014-CFPB-0005 (May 28, 2014); In the Matter of: Stonebridge Title Serv., Inc., Consent Order, 2014-CFPB-0006 (June 12, 2014); In the Matter of: Amerisave Mortgage Corporation et al., Consent Order, 2014-CFPB-0010 (August 12, 2014); and In the Matter of: Lighthouse Title, Inc., Consent Order, 2014-CFPB-0015 (September 30, 2014).
18. In the Matter of: Lighthouse Title, Inc., Consent Order, 2014-CFPB-0015 (September 30, 2014), https://files.consumerfinance.gov/f/201409_cfpb_consent-order_lighthouse-title.pdf (accessed July 26, 2020).
19. Ibid., para. 16.
20. Ibid., para. 20. The CFPB also took this position in an amicus brief filed in a private action pending before the Ninth Circuit. See *Edwards v. First American Corp*., 798 F.3d 1172 (9th Cir. 2015).
21. Consumer Financial Protection Bureau, *Compliance Bulletin* 2015-05, October 8, 2015, https://files.consumerfinance.gov/f/201510_cfpb_compliance-bulletin-2015-05-respa-compliance-and-marketing-services-agreements.pdf (accessed July 23, 2020).
22. Ibid., p. 2.
23. Ibid., p. 1.
24. Ibid., p. 4.
25. Ibid. pp. 4 and 5.
26. Ibid., p. 4.
27. PHH Corp., CFPB Notice of Charges, January 29, 2014, https://files.consumerfinance.gov/f/documents/201402_cfpb_0002_notice-of-charges.pdf (accessed July 23, 2020).
28. Ibid.
29. Ibid.
30. PHH Corp., PHH Brief in Support of Motion to Dismiss, January 31, 2014, https://files.consumerfinance.gov/f/documents/201402_cfpb_0002_support-of-motion-to-dismiss.pdf (accessed July 23, 2020).
31. PHH Corp., ALJ Recommended Decision, November 25, 2014, https://files.consumerfinance.gov/f/documents/201411_cfpb_recommend-decision-final_205.pdf (accessed July 23, 2020).
32. Ibid.
33. PHH Corp., ALJ Order on Dispositive Motions, May 22, 2014, https://files.consumerfinance.gov/f/documents/201405_cfpb_order_order-on-dispositive-motions_152.pdf (accessed July 23, 2020).
34. Ibid.
35. PHH Corp., ALJ Recommended Decision.
36. PHH Corp., PHH Notice of Appeal, December 4, 2014, https://files.consumerfinance.gov/f/documents/201412_cfpb_notice-of-appeal-by-phh_206.pdf (accessed July 23, 2020), and Consumer Financial Protection Bureau, Enforcement Council's Notice of Appeal, December 10, 2014, https://files.consumerfinance.gov/f/documents/201412_cfpb_ec-notice-of-appeal_208.pdf (accessed July 23, 2020).
37. 12 CFR 1081.405(a).
38. PHH Corp., Enforcement Counsel's Opening Appeal Brief, January 9, 2015, https://files.consumerfinance.gov/f/documents/201501_cfpb_ecs-opening-appeal-brief_212.pdf (accessed July 23, 2020).
39. Ibid.
40. Ibid.
41. PHH Corp., Final Decision, June 4, 2015, https://files.consumerfinance.gov/f/documents/201506_cfpb_decision_by_director_cordray_redacted_226.pdf (accessed July 23, 2020).
42. Ibid.
43. Ibid. Compare to *Snow v. First American Title*, 332 F.2d 356 (5th Cir. 2003).

44. The reasoning of the U.S. Supreme Court's recent opinion in *Liu et al. v. SEC*, 591 U.S. (2020), https://www.supremecourt.gov/opinions/19pdf/18-1501_8n5a.pdf (accessed July 23, 2020), suggests that the director's decision to base the CFPB's disgorgement calculation on gross revenue rather than net profits exceeded the CFPB's power to impose equitable remedies.
45. *PHH Corp. v. Consumer Fin. Prot. Bureau*, 839 F.3d 1, 7, 9, and 41 (DC Cir. 2016), https://www.cadc.uscourts.gov/internet/opinions.nsf/AAC6BFFC4C42614C852580490053C38B/$file/15-1177-1640101.pdf (accessed July 23, 2020).
46. Ibid., p. 1. Judge Kavanaugh filed the opinion for the court and was joined by Judge Randolph, who also filed a concurring opinion. Judge Henderson concurred with parts I, IV, and V of the opinion, but dissented with parts II and III.
47. Ibid., pp. 37 and 39.
48. Ibid., p. 39.
49. Ibid.
50. Ibid., pp. 41, 42, and 44.
51. Ibid., p. 42.
52. Ibid., p. 44.
53. Ibid.
54. Ibid., p. 48.
55. Ibid., p. 49.
56. Ibid., pp. 52 and 54.
57. Ibid., pp. 10 and 55.
58. *PHH Corp. v. CFPB*, 881 F.3d 75 (2018) (*en banc*), https://www.cadc.uscourts.gov/internet/opinions.nsf/B7623651686D60D585258226005405AC/$file/15-1177.pdf (accessed July 23, 2020).
59. Ibid., p. 77. On June 29, 2020, the U.S. Supreme Court in *Seila Law v. CFPB*, 591 U.S., https://www.supremecourt.gov/opinions/19pdf/19-7_n6io.pdf (accessed July 23, 2020), held that the CFPB is unconstitutionally structured, superseding the DC Circuit's *en banc* opinion in *PHH* with respect to the constitutionality of the CFPB.
60. Ibid., p. 83.
61. PHH Corp., Order Directing Parties to Respond, May 11, 2018, https://files.consumerfinance.gov/f/documents/2014-CFPB-0002_Document_234_05112018.pdf (accessed July 23, 2020).
62. PHH Corp., Joint Statement of the Parties, June 6, 2018, https://files.consumerfinance.gov/f/documents/2014-CFPB-0002_Document_235_06062018.pdf (accessed July 23, 2020).
63. PHH Corp., Order Dismissing the Notice of Charges, June 7, 2018, https://files.consumerfinance.gov/f/documents/2014-CFPB-0002_Document_236_06072018.pdf (accessed July 23, 2020).
64. Mick Mulvaney, "To Everybody from the Acting Director," January 23, 2018, https://assets.documentcloud.org/documents/4357880/Mulvaney-Memo.pdf (accessed July 23, 2020).
65. *Seila Law LLC v. Consumer Financial Protection Bureau*, 2020.
66. News release, "Speech at the Bipartisan Policy Center by Kathleen L. Kraninger, Director Consumer Financial Protection Bureau," Consumer Financial Protection Bureau, April 17, 2020, https://www.consumerfinance.gov/about-us/newsroom/kathleen-kraninger-director-consumer-financial-protection-bureau-bipartisan-policy-center-speech/ (accessed July 23, 2020). One manifestation of this commitment is the CFPB's recently announced Advisory Opinion Program. See Consumer Financial Protection Bureau, "Advisory Opinion Program," https://www.consumerfinance.gov/policy-compliance/guidance/advisory-opinion-program/ (accessed July 23, 2020).
67. Consideration of *Consumer Fin. Prot. Bureau v. Borders & Borders*, Case No. 13-cv-01047, 2018 U.S. Dist. LEXIS 46906 (W.D. Ky. March 21, 2018), another RESPA case that the CFPB lost, may also be relevant here.
68. 591 U.S. (2020), https://www.supremecourt.gov/opinions/19pdf/18-1501_8n5a.pdf (accessed July 23, 2020).
69. See, for example, Hannah Lutz, "CFPB's Corday Defends Regulation by Enforcement," *AutoNews*, April 7, 2016, https://www.autonews.com/article/20160407/RETAIL07/160409823/cfpb-s-cordray-defends-regulation-by-enforcement (accessed July 26, 2020).
70. Thereafter, if the bureau is able to resume any of these activities in whole or in part based on a legitimate theory of liability under RESPA or any other federal consumer financial law, it should make every effort to do so.
71. 5 U.S. Code 801 et seq.
72. Ibid.
73. See, for example, U.S Government Accountability Office, "Letter to Senator Toomey B-329129," December 5, 2017, https://www.gao.gov/assets/690/688763.pdf (accessed July 23, 2020).

74. Public Law No. 115–172, May 21, 2018.
75. An example of a bill that would implement such a policy is the Bureau Guidance Transparency Act, a bipartisan bill considered in the House of Representatives during prior Congresses. See, for example, H.R. 4811 (113th Congress) and H.R. 4684 (114th Congress).
76. Of course, some have argued that the CFPB's abuses are a natural and foreseeable consequence of its flawed structural design, with too much power, too much discretion in the exercise of that power, and too little accountability to the constitutional branches of government. Consequently, those who make those arguments have also argued in favor of additional statutory safeguards. See, for example, H.R. 10 (115th Congress).
77. The White House, "Executive Order on Promoting the Rule of Law Through Improved Agency Guideline Documents," October 9, 2019, https://www.whitehouse.gov/presidential-actions/executive-order-promoting-rule-law-improved-agency-guidance-documents/ (accessed July 23, 2020).