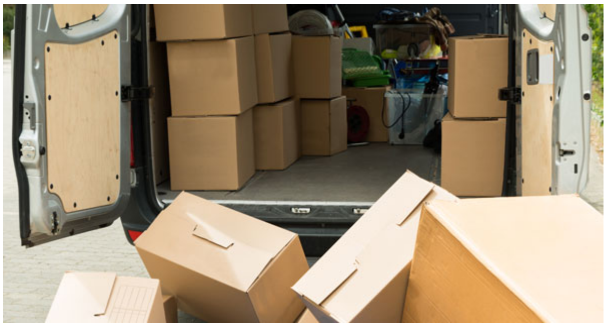
# A Truckload of Trouble for the CFPB

October 13, 2016



Within days after the Consumer Financial Protection Bureau started operations, a truckload of boxes from the Department of Housing and Urban Development arrived at the CFPB Office of Enforcement. Those boxes held evidence from HUD investigators and the Minnesota Department of Insurance that cast doubt on the legitimacy of mortgage lenders steering consumer loans only to mortgage insurers who bought reinsurance from that mortgage lender's affiliate. Those facts looked like a Real Estate Settlement Procedures Act Section 8 violation, a law that prohibits kickbacks in the home loan industry. With the country still fired-up about the financial crises, Enforcement attorneys dove into the files. No one suspected in 2011 that HUD had just delivered to the CFPB a truckload of trouble that would, five years later, cause the D.C. Circuit to strip the agency of the Dodd-Frank Act provision that kept the CFPB's single director safe from the President's whims. On October 11, 2016, the D.C. Circuit, in *PHH Corp. v. CFPB*, held that the single-director agency was unconstitutionally structured. The court's order crossed-out with a red pen the provision that limited the President's authority to remove the Director only "for cause," leaving the financial watchdog otherwise intact. The court also ruled that the CFPB must work within a three-year statute of limitations for most of the laws it enforces. The 110-page court decision, however, missed the chance to answer the troublesome questions contained in those boxes from HUD. The DC Circuit vacated the Director's decision entirely, including over a dozen points of appeal that CFPB enforcement counsel and PHH raised to the Bureau Director. Furthermore, the order left the residential mortgage industry with a rather simplistic interpretation that RESPA Section 8 allows captive reinsurance arrangements so long as the amount paid by the mortgage insurer for the reinsurance does not exceed the reasonable market value of the reinsurance. The pronouncement restored the law of the land for the last 40 years. Yet other than a discussion of retroactivity and "just kidding" agency actions, the order did not shed light on how, exactly, one should go about assessing reasonable market value of products like reinsurance - or what *bona fide* payments look like in an era of internet pop-up ads, lead generators, fee-shifting, Zillow, and marketing service agreements. It left open other issues, as well. In particular, the D.C. Circuit court decision leaves unanswered:

- when a RESPA Section 8 violation actually accrues (*i.e.,* at loan origination or when the kickback is paid);
- whether the CFPB and private parties should evaluate the market value of payments under a referral agreement for the term of each agreement, for each single loan, or over the entire course of the parties' dealings; and
- whether the CFPB can impose Civil Money Penalties for violations that occurred after the agency's July 21, 2011 birthdate, and within the three-year statute of limitations.

Finally, there's the new question of whether the tolling agreement between the CFPB and PHH that suspended the statute of limitations beginning on January 25, 2012 remains in effect in light of the D.C. Circuit's order. For now, mortgage lenders, title insurers, and others in residential real estate can return to business as usual with regard to monitoring for illegal RESPA kickbacks. The CFPB will probably seek review from the entire appellate court, perhaps going up to the Supreme Court. And it will likely revisit its RESPA Section 8 determinations in-house to come out with a similar, yet differently justified result for PHH. That's the typical approach. Finally, it's almost certain that after the D.C. Circuit decision, the CFPB will amend RESPA's implementing regulation, Regulation X, to answer the above questions and to prevent the kind of pay-to-play arrangements that appeared in the captive mortgage reinsurance matters. After all, there was a lot more in those boxes from HUD than just evidence about PHH.

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