

THE REVIEW OF
**BANKING & FINANCIAL
SERVICES**
A PERIODIC REVIEW OF SPECIAL LEGAL DEVELOPMENTS
AFFECTING LENDING AND OTHER FINANCIAL INSTITUTIONS

Vol. 34 No. 10 October 2018

AFFILIATED BUSINESS ARRANGEMENTS ARE ON THE RISE — WITH THEM COME STATUTORY AND REGULATORY HURDLES

An exception to RESPA's anti-kickback and fee-splitting rules allows settlement service providers to use affiliated entities without violating the statute, subject to extensive statutory and regulatory conditions. The authors outline RESPA's general prohibition on kick-backs and the splitting of unearned fees, and the penalties for noncompliance. They then discuss the affiliated business arrangement exception, including its history, HUD's initial implementing rules, and the conflicting court decisions applying them. They then turn to the statutory definitions and safe harbor, and the HUD 10-factor criteria for a bona fide provider of settlement services. They close by describing recent enforcement proceedings and provide a takeaway.

By Phillip L. Schulman and Emily J. Booth-Dornfeld *

Enforcement of the Real Estate Settlement Procedures Act of 1974 (“RESPA” or “Act”)¹ was a top priority for the U.S. Department of Housing and Urban Development (“HUD”). In July 2011, under the Dodd-Frank Act,² the Consumer Financial Protection Bureau (“CFPB”) took over authority for RESPA. Since that time, the CFPB has brought RESPA-related enforcement actions against dozens of respondents, including a number involving affiliated business arrangements (“AfBAs”). However, most recently, the settlement service industry has been somewhat distracted by the

CFPB’s 2015 action against PHH Corporation.³ Although that case focused on Section 8(c)(2), which concerns payments for services rendered and goods and facilities provided, the case itself had a chilling effect on settlement service providers’ willingness to engage in various RESPA-related activities, including AfBAs. However, after the U.S. Court of Appeals for the D.C. Circuit settled the PHH matter earlier this year, rejecting the CFPB’s novel construction of RESPA and reinstating traditional regulatory and judicial

¹ 12 U.S.C. §§ 2601-2617.

² Pub. L. 111-203, H.R. 4173, §§ 1002(12)(M), 1024(b)-(c), 1025(B)-(c).

³ *In the Matter of PHH Corporation, PHH Mortgage Corporation, PHH Home Loans LLC, Atrium Insurance Corporation, and Atrium Reinsurance Corporation*, File No. 2015-CFPB-0002, Decision of the Director (June 4, 2015).

** PHILLIP SCHULMAN is a partner and EMILY BOOTH-DORNFELD is counsel in Mayer Brown’s Washington, DC office. They are members of the Consumer Financial Services Group and concentrate on issues of federal and state regulatory compliance and enforcement. Their e-mail addresses are pschulman@mayerbrown.com and ebdornfeld@mayerbrown.com.*
