

Case Study

Valuation of Marketing Services for Partnership Agreement and RESPA Compliance

By Jon P. Klerowski, Principal

A large, publicly traded financial services company (the Company) was in negotiations with a mortgage lender to provide marketing services to its cardmembers on behalf of the lender. Since the contemplated marketing services were a new and unique service offering, and the real estate industry is highly regulated, the Company wanted to ascertain the fair market value of the services to ensure compliance with Section 8(a) of the Real Estate Settlement Procedures Act's (RESPA) prohibition on referral fees.

Challenge

The Company had two significant requirements:

- 1) to utilize an independent third-party analysis to assist in negotiating a mutually agreed upon price structure for the marketing services agreement (MSA) with the mortgage lender, and
- 2) comply with RESPA Section 8's prohibition of kickbacks and referral fees.

Section 8(a) of RESPA prohibits referral fees by making it illegal to give or receive any "thing of value" pursuant to an agreement or understanding to refer real estate settlement service business involving a RESPA-covered mortgage loan. The Company's outside counsel contacted PKF O'Connor Davies (PKFOD) to determine the fair market value of the contemplated marketing services to ensure compliance with RESPA.

Solution

MSAs have inherent legal and compliance risk due to RESPA's restrictions on mortgage and real estate industry participants providing or accepting kickbacks and referral fees. PKFOD relied on its experience analyzing and valuing complex transactions, including MSAs, for companies within the real estate settlement services industry.

For this matter, we prepared a fair value analysis using both a market and cost approach, documented our assumptions and issued a comprehensive report to the Company's outside counsel. We collaborated with counsel throughout the process to ensure that the payment for services rendered was reasonably related to the value of those services. We clearly organized the supporting documentation and described the methodology for the fair value of the marketing services to avoid risk of non-compliance. PKFOD also advised the client on the appropriate accounting and valuation treatment under Generally Accepted Accounting Principles (GAAP) for financial reporting purposes.

Result

PKFOD provided a thorough and auditable fair value analysis (conducted contemporaneously with the execution of the MSA) which is a critical aspect of RESPA Section 8 compliance. The parties used the analysis to ensure that the mortgage lender did not pay more than fair value for the marketing services, thus avoiding the inference of referral fees.

Additionally, the Company and mortgage lender utilized the independently established market-rate compensation to govern the MSA's pricing structure. Our client successfully negotiated the agreement with

the lender and had confidence that the analysis clearly supported and documented the fair value determinations to mitigate the risk of non-compliance in this highly scrutinized arena.

Contact Us

For additional information regarding compliance with RESPA's prohibitions against referral fees and recommendations on how to support fair value determinations to avoid risk of non-compliance, click [here](#) for an article previously authored by Jon Klerowski and published by the American Land Title Association.

PKF O'Connor Davies offers business valuation services. Our credentialed professionals specialize in providing objective, credible, and insightful business valuations and fair value analyses, customized to the facts and circumstances of each specific situation. To learn more, please contact:

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