CFPB's Advisory Opinion on Application of RESPA Section 8

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If you and/or your business provides service(s) on the settlement of an approved residential home purchase, you are going to want to ensure that you are in conformity with the Real Estate Settlement Procedures Act (RESPA). Real estate service providers cover mortgage lending, brokerage, attorney counsel, appraisals, advertising, marketing, title searches, title insurance, et al.

Backdrop

RESPA, enforced by the Consumer Financial Protection Bureau (CFPB), was designed to provide consumers with improved disclosures of settlement costs in real estate transactions and to reduce closing costs by eliminating referral fees and kickbacks. Specifically, Section 8 of the Act prohibits companies and individuals from receiving kickbacks or referral fees in connection with any transaction involving a residential mortgage or other real estate settlement service.

As technology evolves, so have regulators' views on the types of activities and transactions that constitute kickbacks and referral fees under Section 8. With the recent rise in mortgage interest rates, mortgage consumers more often utilize digital mortgage comparison-shopping platforms which claim to offer neutrally ranked lists of providers suited to the individual consumer's needs. However, in practice, certain platforms have ranked mortgage providers based on the highest bidder or even companies for which the platform has a financial stake.

Advisory Opinion

To protect consumers, the CFPB recently released an advisory opinion (the "Advisory Opinion") which states that digital mortgage comparison-shopping platforms violate RESPA Section 8 if the platform provides enhanced placement or otherwise steers consumers to lenders based on compensation the platform operator receives from those participants rather than based on neutral criteria.

The Advisory Opinion explains that companies may violate RESPA, and potentially other laws, if they coerce payments from mortgage professionals, unlawfully steer consumers, or engage in other illegal referral activities, including:

- **Presenting one or more service providers in a biased way:** Lenders must be presented based on objective criteria and operators cannot present options based on which lender disburses the highest payments – this includes lenders paying to be rotated as the top presented option.

- **Biasing algorithms or internal formulas to favor preferred lenders:** Platforms cannot manipulate inputs or internal formulas to generate results which steer customers to the highest-paying lender or other preferred providers (such as a lender in which the platform has a financial interest).

CFPB Director Rohit Chopra stated in order for companies to not run afoul of RESPA, they may only charge providers for the service of including them on the platform, rather than preferencing lenders by using pay-to-play tactics such as manipulating internal algorithms.

Recent Litigation

The CFPB's recent Advisory Opinion is the latest in a string of recent actions and litigation matters involving RESPA Section 8. Three other cases making news include:

- Willamette Valley Bank was fined $425,000 in November of 2022 by the Federal Deposit Insurance Corporation (FDIC) for, among other items, violating Section 8(a) of RESPA by "entering into mortgage lead generation arrangements with the operator of a real estate website and the operator of an online loan marketplace that were used to facilitate and disguise referral payments for mortgage business."

- In *Jill Bezek, et al. v. First National Bank of Pennsylvania,* First Mariner Bank was found in violation of RESPA for kickbacks an employee personally received for referring customers to a title company. First Mariner Bank tried to avoid liability by arguing the employee, and not the bank itself, received the kickbacks. The Court did not agree, noting the employee's conduct fell within their general line of work and was undertaken, in part, for the bank's benefit.

- The FDIC found that a subsidiary of Fidelity Bank paid illegal referral fees through a lead generation service and kickbacks to a local real estate brokerage firm by charging artificially high rents for office space. This matter reminds us that Section 8's prohibition of referral fees relates to all types of transactions between real estate settlement service providers, not just marketing services.

Caution

As demonstrated above, RESPA Section 8 remains a priority for regulators and businesses alike. Recent litigation matters also show that the FDIC and CFPB are monitoring and enforcing RESPA compliance to protect settlement service consumers and ensure a robust and competitive mortgage market.

Settlement service providers that partake in transactions subject to Section 8's prohibition of referral fees need to remain vigilant in their compliance efforts. One way of accomplishing that is to seek the advice of an independent third party to assess transactions subject to recent scrutiny, such as marketing services, digital mortgage comparison services and transactions involving affiliated business arrangements (ABA). Notably, it is critical to conduct the analyses contemporaneously with the execution of an agreement or transaction.

Additional Resources

For more 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, please see a previously published article on alta.org.

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