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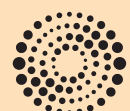
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Consumer Financial Protection Bureau Addresses Real Estate Settlement Procedures Act Compliance for Digital Comparison-Shopping Platforms

*By Holly Spencer Bunting and Kerri Elizabeth Webb**

In this article, the authors discuss long-awaited guidance issued recently by the Consumer Financial Protection Bureau in an advisory opinion addressing how it interprets the Real Estate Settlement Procedures Act and its implementing regulation, Regulation X.

Can online lead generation be done compliantly under Section 8 of the Real Estate Settlement Procedures Act (RESPA)? The answer is yes, but it is important to navigate the impermissible activities recently identified by the Consumer Financial Protection Bureau (CFPB).

BACKGROUND

The CFPB has issued long-awaited guidance in an advisory opinion addressing how it interprets RESPA and its implementing regulation, Regulation X, in the context of digital marketing and lead generation platforms for real estate settlement services.¹ These comparison platforms allow consumers to search for and compare options for settlement services. If consumers input contact information as part of their search, the platform operator may share or sell this information to settlement service providers. This guidance, the first

issued by the CFPB on online lead generation, highlights several key compliance considerations for participants engaging in digital marketing of settlement services.

Generally, Section 8 of RESPA and Regulation X prohibit giving or accepting any fee, kickback, or thing of value pursuant to an agreement or understanding in exchange for the referral of a real estate settlement service involving a federally related mortgage loan. The law, however, exempts fair market value payments for actual goods or services provided. As online lead generation activities have become a prominent customer acquisition tool over the past several years, industry participants have sought guidance on whether certain platforms and compensation structures constitute an impermissible referral under RESPA.

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Prior to this advisory opinion, the last guidance on which online lead generators could rely was a 1996 Statement of Policy by the U.S. Department of Housing and Urban Development (HUD)² on computer loan origination systems (CLOs).

However, given the advancement of technology and the capabilities of online lead generation platforms, applying this HUD guidance to today's activities has been a challenging endeavor. In addition, it has been unclear whether the CFPB would defer to HUD's 1996 interpretation, as well as to informal advisory opinions issued by HUD in the 1980s and 1990s related to lead generation.³

THE CFPB'S ADVISORY OPINION

With this recent advisory opinion, the CFPB confirms that the 1996 Statement of Policy applies to online/digital comparison-shopping platforms, as a type of CLO. In addition to stating that online comparison platforms should follow the guidance outlined in the 1996 Statement of Policy, the advisory opinion makes two major points about the CFPB's interpretation of RESPA.

First, the CFPB interprets RESPA as prohibiting the use or presentation of information about one or more settlement service providers participating in an online comparison platform in a non-neutral way if (i) that non-neutral use or presentation has the effect of steering the consumer to use, or otherwise affirmatively influencing the consumer to select, a settlement service provider, thus constituting referral activity, and (ii) the platform operator receives a payment or other thing of value that is, at least in part, for that referral activity.

Second, if the operator of a comparison

platform receives a higher fee for including one settlement service provider compared to the fee received from another provider, the higher payment can be evidence of an illegal referral fee arrangement in the absence of other facts indicating the payment is not for enhanced placement or another form of steering. Importantly, through this advisory opinion, the CFPB affirms that online lead generation that neutrally uses and presents information is a service or facility that settlement service providers can legally pay for under RESPA.

The advisory opinion focuses on the conduct the CFPB believes is a violation of RESPA. The CFPB finds that by presenting or using information in a non-neutral way, a platform operator refers a consumer by steering or affirmatively influencing the consumer to use a particular provider. If a settlement service provider receives enhanced, non-neutral placement on a platform, the CFPB presumes there is an agreement or understanding for the referral. If the platform is compensated for this activity, the CFPB says the payment is not for compensable services permitted under RESPA but, rather, for impermissible referrals.

EXAMPLES

The CFPB provides several examples of online lead generation conduct that may violate RESPA:

- Boosting the rankings of providers that pay more to participate on the platform by skewing the results of consumer-generated comparison functions,⁴ such as by excluding or placing low weight on purportedly objective comparison criteria that would otherwise favor a lower-paying provider.

- Manipulating rankings to place affiliates of the platform operator higher than non-affiliated providers in exchange for payment.
- Manipulating formulas that purport to take consumer preferences into account but instead failing to honor the consumer's preferences or placing weight on inaccurate information about a particular provider(s).
- Presenting providers in a biased way, such as by only providing weblinks for higher-paying providers or listing only higher-paying providers by interest rate on the first page of results (making it appear that all providers have been listed by interest rate) and only listing lower-paying providers that may have interest rates equal to or lower than higher-paying providers on subsequent pages.
- Allowing a consumer to generate ranked options and then segregating and highlighting a top-ranked provider while presenting other providers less prominently in exchange for a higher fee if the consumer clicks on the top-ranked provider.
- Labeling a provider as "sponsored" or "featured" because the provider has paid for enhanced placement but designing the platform and displaying the provider in a manner that implies that provider earned that placement based on neutral criteria.
- Listing a provider that paid for enhanced placement multiple times in the rankings, using either the same name or an affiliated name.
- After a consumer runs an initial comparison, showing only the top-ranked provider when the consumer revisits the platform.
- Allowing a consumer to input information to generate rankings but permitting all providers participating on the platform to take turns appearing in the top spot, either randomly or on a predetermined schedule, generating rankings that are not based on the information input by the consumer.
- After a consumer has input criteria that generates a neutral ranking, sending the consumer a text message or email that encourages the consumer to submit an application to a particular provider because the provider will be a good fit for the consumer's needs.
- After a consumer inputs information specific to the consumer's needs, such as credit score or loan amount, transferring the consumer (either by phone or live chat) to a particular provider with a message stating that the consumer will be "in good hands" when, in fact, the provider is merely the first to respond to the platform operator's alert about an available consumer and not based on whether the provider can meet the consumer's specified needs.

CONCLUSION

These examples highlight the fact-specific nature of RESPA compliance. But they do not close the door on the operation of (and payment to) a digital comparison-shopping platform that complies with RESPA. Settlement service providers and operators of comparison platforms may wish to reevaluate relevant agreements and activities in light of this new

guidance and carefully consider it when entering into new agreements and activities in the future.

NOTES:

¹CFPB, Advisory Opinion, Real Estate Settlement Procedures Act (Regulation X); Digital Mortgage Comparison-Shopping Platforms and Related Payments to Operators, 88 Fed. Reg. 9,162 (Feb. 13, 2023).

²HUD, Statement of Policy 1996-1: Computer Loan

Origination Systems (CLOs), 61 Fed. Reg. 29,255 (June 7, 1996). HUD enforced RESPA and Regulation X prior to the CFPB's existence.

³See, e.g., HUD Advisory Letter from Grant E. Mitchell, dated March 24, 1994; HUD Advisory Letter from Grant E. Mitchell, dated January 26, 1989; HUD Advisory Letter from Grant E. Mitchell, dated May 31, 1985.

⁴The CFPB also noted that this conduct could be a deceptive misrepresentation in violation of the Consumer Financial Protection Act, particularly if the platform contains misrepresentations about the accuracy of the information.