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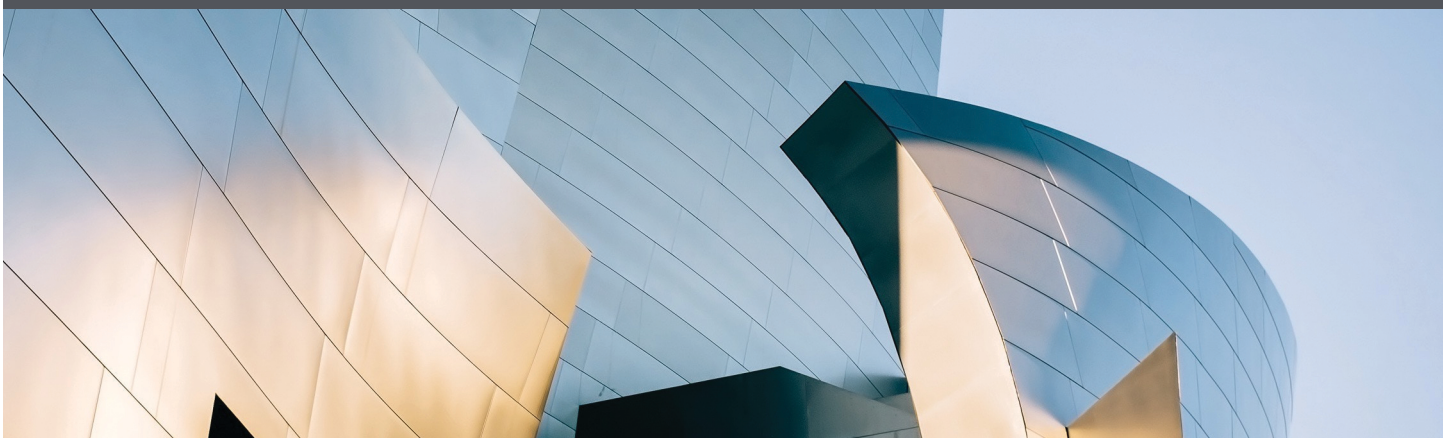

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Welcome to Internet and Mobile Marketing: HUD's 1996 RESPA CLO Policy Statement Finally Refreshed

A new Consumer Financial Protection Bureau ("CFPB") advisory opinion refreshes the Department of Housing and Urban Development's computer loan origination system policy statement for a new generation of online marketing technology, specifically targeting the policy to "operators of certain digital technology platforms" that function via website and online applications. These "Digital Mortgage Comparison-Shopping Platforms," as described by the CFPB, "enable consumers to comparison shop for mortgages and other real estate settlement services, and include platforms that generate potential leads for platform participants through consumer interactions."

The CFPB advisory opinion applies long standing interpretations on unlawful referrals to new online marketing technology platforms. However, even if such platforms are permissible under a referral analysis, they still could violate prohibitions on unfair, deceptive, or abusive acts or practices and other federal and state laws. The advisory also functions to put the industry on notice for future enforcement actions should operators of noncompliant marketing platforms not heed the guidance in the advisory.

I. BACKGROUND

After nearly 30 years, the CFPB issued an advisory opinion ("CFPB Opinion")[1] last week picking up where the Department of Housing and Urban Development ("HUD") left off in 1996 with its policy statement on computer loan origination systems ("CLOs").[2] The HUD policy statement, which addressed the applicability of the Real Estate Settlement Procedures Act's ("RESPA")[3] Section 8 prohibition on kickbacks in exchange for settlement service business referrals to CLOs, was drafted at a time when CLOs often consisted of a lender's Internet dial-up computer kiosk located in a real estate broker or other settlement service provider's office.

In a statement accompanying the release of the CFPB Opinion, Director Chopra noted "the CFPB's action to rein in the manipulation of digital mortgage comparison-shopping platforms is part of a broader all-of-government effort to end the illegal biasing of ostensibly neutral platforms. As part of this effort, the CFPB has also taken action to combat fake reviews on digital platforms."[4] In the CFPB's press release for the Opinion, Director Chopra also stated that "given the rise in mortgage interest rates, it is even more important for homebuyers to shop and compare loan offers... We are working to ensure that online platforms are not manipulating their search results in order to coerce kickbacks from lenders."[5]

Regarding potential RESPA Section 8 violations, the CFPB Opinion advises that "an operator of a Digital Mortgage

Comparison-Shopping Platform receives a prohibited referral fee in violation of RESPA Section 8 when:

(1) the Digital Mortgage Comparison-Shopping Platform *non-neutrally* uses or presents information about one or more settlement service providers participating on the platform;

(2) that *non-neutral* use or presentation of information has the effect of steering the consumer to use, or otherwise affirmatively influences the selection of, those settlement service providers, thus constituting referral activity; and

(3) the operator receives a payment or other thing of value that is, at least in part, for that referral activity."

Further, the CFPB Opinion states that if a Digital Mortgage Comparison-Shopping Platform is receiving higher fees for including one settlement service provider compared to what it would receive if it includes others on the same platform, "that can be evidence of an illegal referral fee arrangement absent other facts" showing the higher payment is not for "enhanced placement or other form[s] of steering."

The CFPB does not provide a comprehensive definition of "non-neutral" presentation but includes several indicators of such presentations. Additionally, the CFPB notes that "by non-neutrally using or presenting information, the Operator impedes the consumer's ability to engage in meaningful comparison," instead preferencing certain "options for reasons other than ... neutral criteria such as APR, objective consumer satisfaction information, or factors the consumer selects for themselves."

II. RESPA OVERVIEW

RESPA Section 8(a) generally prohibits: (1) the payment or receipt of a (2) thing of value pursuant to an agreement or understanding[6] in exchange for (3) the referral of (4) settlement service business. All four elements of this prohibition must be present for a Section 8 violation. RESPA is not a price setting statute[7] and advertisements generally directed to a broader audience,[8] not to a particular consumer, typically are not analyzed for referral consideration. Further, the statute provides a safe harbor for payments at market rates for non-referral services actually performed.[9] For example, regulators have long-recognized that payments for "leads" or customer lists (absent direct referrals) are a legitimate payment for services, and HUD issued an advisory letter confirming that interpretation.[10] However, regulators have been equally clear that payment for a referral is not a bona fide service that fits within this safe harbor.[11]

Much of the uncertainty when analyzing a given situation revolves around whether a "referral" occurred and whether any payment made was for such a referral or for an actual service that is compensable.[12] Referrals are deemed to have no compensable value for RESPA Section 8 purposes.[13] Regulation X, the implementing Regulation of RESPA, essentially defines a referral as an "action directed to a person that has the *effect of affirmatively influencing"* that *person's selection* of and payment for a settlement service or business incident to that service.[14] A referral also occurs if a person is "required to use" a particular settlement service provider.[15]

III. CFPB OPINION'S APPLICATION OF RESPA TO DIGITAL PLATFORMS

The CFPB Opinion did not significantly alter existing RESPA Section 8 interpretations and principles first applied in the HUD Statement, but rather generally applied long standing views to new facts that have evolved with online digital marketing. Undoubtedly, however, this refresh will provide comfort to industry participants. As was usual with HUD formal and informal RESPA Program Office guidance, the guidance in the CFPB Opinion also depends on an analysis of "the total facts and circumstances." Or, as the CFPB indicated in numerous places throughout the opinion, "absent other facts" the x, y, z scenario would violate RESPA. Readers should pay close attention to that phrase when conducting a regulatory change management analysis of similar scenarios.

The HUD policy statement recognized there was value in providing a service that allows consumers to compare mortgage options based on objective factors such as APR. The CFPB Opinion goes further to address how consumers interface with online comparison platforms and develops a framework for determining when a payment is for a referral versus when it is for a service actually performed. The CFPB Opinion further analyzes newer technologies that permit consumers to comparison shop based on options tailored to their particular circumstances in a way that was not possible with the CLO systems originally reviewed by HUD. These technologies also permit consumers to choose a mortgage option and either proceed with an application or generate a lead that a settlement service participant receives and can convert into new business.

Given that new methods and sources for gathering data generated by consumers and providing it to business users are emerging daily, below are key concepts the CFPB used for its conclusions with some of the more popular platform scenarios. These concepts typically apply to an analysis of any web based or mobile application marketing technology used by consumers.

1. Marketing vs. Advertising

Recall, general advertising usually is not viewed as a referral for RESPA purposes.[16] So when does the RESPA referral analysis apply? The more advertising is directed to one or very few individuals (*e.g.,* a married couple) with particularized content based on their individual circumstances, the more it transitions from advertising to marketing. Marketing is not prohibited under RESPA *per se,* but if such customized and focused marketing influences the selection of a provider based on something other than merit or objective criteria, and the provider pays more for this type of marketing versus marketing that results in the provider's selection based on objective criteria such as APR, the differential in payment could be considered payment for a referral.

The difference between general advertising and marketing is critical when reviewing online platforms for RESPA Section 8 compliance, especially when those platforms display content customized for the particular user as well as general advertising content on the same screen. Advertising has additional considerations beyond the scope of this writing if the advertiser is also a settlement service provider or in a position to refer settlement service business.[17]

2. Affirmatively Influencing Consumer Choice and Steering

As noted above, for the necessary referral element to be present, an action must take place that has the "effect of affirmatively influencing a person's selection" of a particular settlement service provider (or settlement service). There has been much consternation over the years regarding what "affirmatively influencing" means in practice. What if you see the influential "Don't Be Like Larry" advertisement on TV and that compels you to create an FTX account and buy FTX tokens? Isn't that affirmatively influencing you to choose FTX and FTX tokens? Not in the RESPA world.

Although the "affirmative" term leaves much room for interpretation, in practical use it generally requires active interaction with content addressed to a particular person or focused audience that would influence the recipient's decision making. The more focused and influential the content and the smaller the audience, the more likely the content affirmatively influences the recipient. A passive billboard on the side of the highway or the Larry David advertisement—which ran during Super Bowl LVI with an audience of at least 100 million people—are not interacting with particular consumers or directed to particular consumers.

But what if a real estate agent tells a homebuyer client that the client should use ABC Lender because they are the best lender in town, would offer great pricing, and would likely approve the homebuyer? This would be an example of affirmatively influencing the client to choose ABC Lender. Moreover, for a number of possible reasons, clients tend to look to their real estate agents for advice on which lender and other settlement agents to use. On the other hand, a banner hanging out front of the real estate agent's office building in the parking lot that advertises ABC Lender does not have the same active or "affirmative" component. That is, no additional action or statements to influence the home buyer.

That said, there are seemingly passive advertisements that could affirmatively influence consumers. What if, instead of the real estate agent telling a homebuyer that ABC Lender is the best lender in town, the agent leaves flyers advertising the real estate agent with language recommending ABC Lender as the agent's "preferred" or "trusted" lender next to a "Take One" sign on the agent's desk for clients to "discover" on their own? It could be argued that the additional preferred or trusted lender language on the agent's flyer is the action needed to influence the homebuyer.[18]

Returning to the CFPB Opinion, a mortgage comparison website that provides a list of ten mortgage lenders ranked alphabetically with available loans matching criteria submitted by a consumer such as income, credit score, and zip code could be viewed as an affirmative action to influence the selection of a provider as well. However, because the ten lenders are ranked alphabetically, there is no additional action taken to influence the selection of any particular lender and therefore there would not be a Section 8 violation.[19] If the list of ten is ranked in order of lowest to highest APR, that would also be permissible because, as the CFPB Opinion points out, ranking based on objective variables that potentially reduce costs for consumers is classified as a neutral presentation and compensable because it provides an actual value to the consumer.

However, what if a lender with the 4th lowest APR paid more to the operator of the platform to always be listed first? The platform operator agrees, but requires the lender to further agree to the placement of disclaimer next to that lender's name stating "sponsored" or "paid advertisement"? The CFPB Opinion addresses a similar scenario and states that the extra payment would be considered payment for a referral ("absent other facts"), even with the disclaimer and regardless of whether the disclaimer helps mitigate unfair, deceptive, or abusive acts or practices ("UDAAP") risk. Notwithstanding the CFPB's view, this is likely more a borderline judgment call from a regulatory legal interpretive perspective of RESPA. Whether to rely on disclaimers in practice to reduce the possibility of affirmative influence and potential RESPA violations, is another question.

Remember that, regardless of whatever affirmative influence for a particular lender is directed by a platform operator to a consumer, it must also have the "effect" of influencing the consumer's selection of that lender for the purposes of RESPA Section 8. Arguably, reasonable users familiar with shopping on the Internet may not select this lender given they know it's a paid ranking. Taking that into account, the question would then become: did the paid ranking actually influence the selection of this lender more than the other lenders (who did not pay extra) despite the disclaimer? However, while parsing the issue in that way may be worthwhile in theory, it could be less helpful as a practical matter when responding to examination or enforcement inquiries given that the lender (or platform operator) must show that for RESPA Section 8 purposes the paid rankings did not result in the actual selection of the higher ranked lenders with the disclaimer versus the other lenders without a disclaimer.

On the other hand, what if the participant was actually paying to appear first in a clearly demarcated section (with the "sponsored" or "paid advertisement" disclaimer) above the ranking list and the participant also appeared neutrally this time in the separate ranking list below based on an objective factor? In that scenario the additional payment could be a payment for advertising and not a referral depending on the presentation (*e.g.,* the extra payment is reasonably related to time, geography, and number of page views of an advertisement) of the placement above the list.

Along these lines, the CFPB Opinion also indicates that "steering" a consumer to a particular lender by non-neutral placement could violate RESPA Section 8. While RESPA Section 8 prohibits referrals (in addition to the other Section 8(a) elements), steering may be considered an aspect of referral similar to a "required use." Although it can be reasonably argued that steering must have the actual effect of affirmatively influencing a consumer's selection of a particular provider to violate Section 8, demonstrating the contrary—that the consumer was not affirmatively influenced—in the context of regulatory enforcement could also be difficult. The CFPB Opinion only requires that the non-neutral placement of the provider have the effect of steering a consumer to use that provider.

3. Relationship of RESPA and UDAAP

The Congressional findings and purpose in Section 2(a) of RESPA state that "the Congress finds that significant reforms in the real estate settlement process are needed to insure that consumers throughout the Nation are provided with greater and more timely information on the nature and costs of the settlement process and are protected from unnecessarily high settlement charges caused by certain *abusive* practices that have developed in some areas of the country." In that vein, the CFPB Opinion discusses situations that have underpinnings in unfair competition as well as UDAAP issues with regard to consumers. Indeed, we would note that UDAAP principles that may be drawn from this opinion would apply beyond mortgages and related settlement services to **all** financial products within the CFPB's jurisdiction.

In the realm of unfair competition and perhaps abusive consumer facing practices, the CFPB Opinion reiterates the position in the HUD policy statement that no compensable services would be present if a platform lists only one settlement service provider and only presents basic information to the consumer on the provider's products. However, the CFPB did not indicate how many providers should be listed to be compensable. The CFPB Opinion also does not further elucidate whether listing only one provider, but with comprehensive information on that provider's products, could be compensable.

The CFPB Opinion further indicated that it could be permissible for one participant to pay more than another participant on a platform. That is, a competition-based market is free to determine how much participation in the platform should be valued. However, if the higher paying recipient receives enhanced placement on the platform, the difference in amount paid would be viewed as payment for a referral fee, absent other facts indicating the "payment is not for enhanced placement or other form of steering."

With regard to deceptive practices, the CFPB included an example based in part on a Federal Trade Commission ("FTC") enforcement action where a consumer inputs information to find the "best match" and a list of providers appears with one being listed as "best match" but skews the results of the comparison function to ensure that the "best match" is the highest bidding participant in the platform. The CFPB indicated this would violate RESPA Section 8 and would also likely be considered a UDAAP. The CFPB further noted that deceptive misrepresentations could serve to accentuate any affirmative influence. In a similar example, the CFPB noted that lenders paying to be listed in the top spot or paying with other lenders to appear in the top spot randomly, or on predetermined schedule, would be a referral and a possible UDAAP depending on the representations made to consumers such as purporting to find the "best match" when the match is based on nothing more than payment or scheduling.

Also note the UDAAP example discussed above where the platform operator agrees to place a lender higher on a ranking list as long as a label such as "sponsored content" or "paid advertisement" is included to next the lender's name. The CFPB Opinion reiterates in several places that if a platform operator makes false or misleading representations about the objectivity or veracity of the information presented on the platform, it may violate the Dodd-Frank Act prohibition on UDAAPs. However, the CFPB also stated in a footnote with regard to RESPA Section 8 and non-neutral presentation that "while it may be a best practice for an Operator to disclose clearly and prominently how it is using and presenting the information of platform participants—for compliance with the prohibition on unfair, deceptive, or abusive acts or practices (UDAAPs), 12 U.S.C. 5531, 5536(a)(1)(B), or for other reasons—a disclosure would not, *absent other facts,* turn a directed action that has the effect of affirmatively influencing into one that does not." (Emphasis added.) That is, the CFPB affirmatively recognized that disclosures (*e.g.,* disclaimers) could mitigate UDAAP risk to the extent the disclosure effectively communicates how the information is being presented.

4. Affiliates

Similarly, the CFPB indicated that if an affiliate received preferential placement or non-neutral presentation, the platform could violate the prohibition on referral payments under RESPA Section 8 as well as the affiliated business arrangement exception given there could be a thing of value received beyond a bona fide return on ownership interest, assuming the operator is "in a position to refer settlement service business."[20] The CFPB further indicated that even if an affiliate is presented in a neutral manner in response to information consumers submitted, there could be a RESPA violation depending on other facts and circumstances. For example, assume this platform additionally sent emails or texts to that consumer promoting the affiliate apart from the ranking list each time the affiliate neutrally appeared in the consumer's search. This could also be considered affirmatively influencing the selection of the affiliate in violation of RESPA Section 8.[21]

5. Other Federal & State Laws

The CFPB Opinion is clear that it is narrowly tailored to RESPA Section 8-related purposes only, but also notes that the behavior covered could be subject to other laws, which include: Regulation Z, Regulation H, state licensing laws, state law restrictions on referral fees, Regulation B, the Telemarketing Sales Rule, the FTC Act, the Telephone Consumer Protection Act, applicable federal and state privacy laws, and the Fair Credit Reporting Act ("FCRA") with regard to trigger leads.

We further note that such platforms could also be subject to Regulation N (the MAP rule) and more specifically the loan originator compensation rule ("LO Comp Rule"), Truth in Lending Act ("TILA"), and TILA-RESPA Integrated Disclosure ("TRID") provisions applicable to advertisements and mortgage terms presented to consumers prior to the TRID disclosures as well as data safeguards rules. FCRA requirements around becoming a credit reporting agency or credit report reseller could also come into play along with information sharing among affiliates. Vendor management or third-party oversight requirements for participants subject to state licensing, CFPB, banking, or credit union regulatory supervision would also apply.

Last, also recall that the CFPB has issued a series of several advanced notices of proposed rulemaking and proposed rules on data collection, data usage, and data sharing (aka "open banking rules"). One or more of these proposals, if finalized, could also impact the platforms addressed in the CFPB Opinion.

For additional information, contact R. Colgate Selden, R. Andrew Arculin, Scott D. Samlin, Paula M. Vigo Marques, or Daniel V. Funaro, or another member of Blank Rome's Financial Institutions Litigation and Regulatory Compliance ("FILARC") group.

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Endnotes

1. RESPA Advisory Opinion on Online Mortgage Comparison Shopping Tools (consumerfinance.gov) (last visited Feb. 15, 2023).
2. HUD, RESPA Statement of Policy 1996–1, Regarding Computer Loan Origination Systems (CLOs), 61 FR 29255 (June 7, 1996).
3. 12 U.S.C. 2601 *et seq.*
4. Statement of CFPB Director Rohit Chopra on Mortgage Comparison Shopping in a Time of Higher Interest Rates | Consumer Financial Protection Bureau (consumerfinance.gov) (last visited Feb. 16, 2023)).
5. CFPB Issues Guidance to Protect Mortgage Borrowers from Pay-to-Play Digital Comparison-Shopping Platforms | Consumer Financial Protection Bureau (consumerfinance.gov) (last visited Feb. 16, 2023)).
6. Many RESPA Section 8 practitioners assume there is an agreement or understanding if there are multiple or ongoing payments.
7. *See* 12 U.S.C. 2607; *Morrisette v. Novastar Home Mortg., Inc.,* 284 Fed. Appx. 729 (2008); *Moody v. Commonwealth Land Title Ins. Co.,* 284 Fed. Appx. 735 (2008).
8. RESPA Section 8 permits "normal promotional and educational activities that are not conditioned on the referral of business and that do not involve the defraying of expenses that otherwise would be incurred by persons in a position to refer settlement services or business incident thereto." 12 CFR 1024.14(g)(1)(vi).
9. 12 U.S.C. § 2607(c).
10. *See* HUD Advisory Letter from Grant E. Mitchell, dated March 24, 1994.
11. *See* HUD, Real Estate Settlement Procedures Act (RESPA): Home Warranty Companies' Payments to Real Estate Brokers and Agents, 75 FR 36271 (June 25, 2010) ("[A] referral is not a compensable service.").
12. RESPA Section 8 permits "a payment to any person of a bona fide salary or compensation or other payment for goods or facilities actually furnished or for services actually performed." 12 CFR 1024.14(g)(1)(iv).
13. Note that states in the past such as California have permitted the payment of "finder's fees," which are essentially a payment for a referral. *See Tyrone v. Kelley,* 507 P.2d 65 (Cal. 1973) (upholding an exception that allows compensation for finders who introduce parties to a real estate transaction, even if the finder does not maintain a license). This would violate RESPA section 8. *See* HUD Advisory Letter from Grant E. Mitchell, dated November 10, 1993 (citing two 1970s-era Withdrawn HUD Rulings, which nonetheless still accurately stated the HUD's view that certain finder's fees allowed under California law are prohibited by RESPA).
14. 12 CFR 1024.14(f)(1). A referral includes any oral or written action directed to a person which has the effect of affirmatively influencing the selection by any person of a provider of a settlement service or business incident to or part of a settlement service when such person will pay for such settlement service or business incident thereto or pay a charge attributable in whole or in part to such settlement service or business.
15. 12 CFR 1024.14(f)(2).
16. However, general advertising can be used as a vehicle to disguise payments for referrals. For example, if a lender pays to advertise on a real estate broker's website and pays more than the reasonable market value for such advertising, that overpayment could be viewed as an additional payment to the real estate broker for referring borrowers via other means.
17. Extra care and review are usually required when one settlement service provider advertises for another settlement provider or such providers share the costs of joint advertising. These advertising arrangements are often scrutinized by regulators as vehicles to facilitate payments for referral fees as mentioned in the footnote above.
18. In fact, CFPB has taken the position that paying for "preferred" or "exclusive" status with a referral source can constitute both a RESPA and UDAAP violation. *See In the Matter of Newday Financial, LLC,* 2015 C.F.P.B. 0004 (Feb. 10, 2015).
19. Absent other facts that might suggest a referral such as, for example, the first lender alphabetically also pays more to the operator of the platform to ensure first listing in case another lender with a name that would be alphabetically ranked higher on the list participates on the platform.
20. For more information on permissible affiliated business arrangements see: 12 U.S.C. 2602(7); 12 CFR 1024.15(c); 12 U.S.C. 2607(c)(4); 12 CFR 1024.15(b)(3). Note that the violation could occur regardless of whether the Affiliated Business Arrangement disclosure in Appendix D of Regulation X is provided.
21. The CFPB Opinion discusses this example outside of the affiliate context but it also applies to affiliates.