LEGAL UPDATES PUBLISHED: SEPTEMBER 13, 2023

CFPB Affirms HUD RESPA Guidance Related to Housing Credit Counselors

Service

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The Consumer Financial Protection Bureau (CFPB) has been making waves in the mortgage settlement services space with its renewed increased attention to the Real Estate Settlement Procedures Act's (RESPA) anti-kickback provisions. For instance, in August, the Bureau issued a $1.75 million civil penalty against a non-bank mortgage company and a real estate brokerage firm for alleged RESPA Section 8 violations. And earlier this year, the CFPB issued new guidance related to digital mortgage comparison shopping platforms. Continuing this trend, the CFPB recently affirmed that certain RESPA policy statements issued by HUD prior to the transfer of RESPA authorities to the CFPB continue to apply. One of these, HUD Statement of Policy 1999-1, reiterated that bona fide fees for settlement services, including mortgage counseling services, are allowable under Section 8(a)(2). This is welcome news for mortgage lenders who pay a fee to HUD-approved mortgage counseling services.

CFPB affirms certain HUD guidance

On September 1, the Bureau quietly posted a two-page document titled "Other applicable RESPA documents: HUD Documents." This guidance provides a list of "select HUD-issued official rules, interpretations, or policy statements that…continue to be applied today by the CFPB." In particular, the CFPB included in the list HUD RESPA Statement of Policy 1999-1 (Regarding Lender Payments to Mortgage Brokers) which states that mortgage originators can charge a fee for pre-purchase counseling and homeownership education services under certain circumstances. Clarification by the CFPB that it continues to apply this position provides clear regulatory authority for lenders to contract services with HUD-approved Housing Counseling Agencies.

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This regulatory clarity was also affirmed this week by HUD Deputy Assistant Secretary for Housing Counseling David Berenbaum in a LinkedIn post. According to Berenbaum:

"This simple step by the CFPB provides clear regulatory authority and confidence for lenders to contract for services with HUD Approved Housing Counseling Agencies to help the next generation of homeowners to realize their homeownership goals. This is a significant and positive step by the CFPB that should be applauded and affirms the agencies [sic] commitment to the critical role that housing counseling plays to expand access to credit."

RESPA Section 8 and HUD's Statement of Policy 1999-1

Section 8(c)(2) of RESPA allows for 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." In 1999, HUD issued a Statement of Policy addressing payments to mortgage brokers. Specifically, the agency guidance states that certain payments to settlement service providers do not violate RESPA Section 8(a) because they fall under the Section 8(c) safe harbor if (1) "goods or facilities were actually furnished or services were actually performed for the compensation paid" and (2) "the payments are reasonably related to the value of the goods or facilities that were actually furnished or services that were actually performed."

As part of this guidance, the bureau discussed brokers that provide counseling services to borrowers in exchange for a lender-paid fee. In the guidance, HUD expressed concern that "a fee for steering a customer to a particular lender could be disguised as compensation for 'counseling-type' activities." In order to address this concern, HUD stated that it would "look to see if meaningful counseling—not steering—is provided" and laid out three factors that it would consider:

Is the borrower given the opportunity to consider products from at least three different lenders?

Does the broker receive the same compensation regardless of which products are ultimately selected?

Is the broker's compensation reasonably related to the services performed and not based on the amount of the loan business referred to a particular lender?

According to Assistant Secretary Berenbaum's LinkedIn post,

"…mortgage companies and banks who contract with housing counseling agencies for pre and post purchase housing counseling services have clear authority under RESPA to use a fee for service. This ongoing interpretation of the rule has informed HUD guidance over the years and is included in the Office of Housing Counseling Handbook for practitioners."

CFPB No-Action Letter for HUD-Approved Housing Counseling Agencies

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We also want to remind mortgage lenders that in 2019, the CFPB issued its first No-Action Letter to HUD providing that the CFPB will not take supervisory or enforcement action under RESPA against HUD-certified housing counseling agencies that have entered into certain fee arrangements with lenders for housing counseling services. Mortgage lenders may apply for their own No-Action Letter using the No-Action Letter Template issued under the HUD Letter. Granted No-Action Letters are posted on the CFPB's website.

What this means to you

We are encouraged by the CFPB's affirmation of HUD's Statement of Policy 1999-1 and the regulatory clarity that it brings. The interplay between RESPA's prohibition against kickbacks and the Section 8(c)(2) safe harbor for bona-fide services has been contested since the earliest days of the bureau; however, HUD's Statement of Policy 1999-1 provides valuable guidance confirming that fees for bona-fide services are allowable under relatively well-defined circumstances. This will also bring long awaited guidance for mortgage lenders who seek to compensate HUD-approved counseling agencies for bona fide counseling services. In this complex regulatory landscape, housing counseling plays a pivotal role in expanding access to credit. The CFPB's new guidance affirms the agency's commitment to the critical role that housing counseling plays, especially when RESPA violations are under increased scrutiny.

Contact us

RESPA Section 8 presents complex issues that often overlap with other federal and state legal requirements. Virtually any time mortgage companies seek to work with third-party settlement service providers, RESPA issues are implicated. If you have questions about how to properly structure an arrangement with a settlement service provider or any other RESPA-related question, reach out Christopher Friedman, Leslie Sowers, or your Husch Blackwell attorney.

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