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RESPA Revival: CFPB Sets Their Sights on Illegal Kickbacks

After a brief respite, Section 8 of the Real Estate Settlement Procedures Act (RESPA) is back on the Consumer Financial Protection Bureau's (CFPB's) enforcement radar. On August 17, 2023, the CFPB issued two parallel consent orders alleging that a residential mortgage lender and real estate brokerage violated Section 8(a) of RESPA in connection with providing and receiving illegal kickbacks in exchange for mortgage referrals. Without admitting or denying any findings of fact or conclusions of law, the consent orders imposed penalties of \$1.75 million for the mortgage lender and \$200,000 for the real estate brokerage.

Section 8(a) of RESPA

Section 8(a) of RESPA prohibits a person from **giving or accepting** any fee, kickback, or "thing of value" in exchange for a referral related to a real estate settlement service involving a federally related mortgage loan. Under RESPA, a "thing of value" may include a payment, advance, loan, service, or other consideration, while a real estate settlement service may include title services; appraisals and inspections; real estate agent or broker services; and mortgage loan origination, processing, closing, or settlement.

Mortgage originator consent order

The CFPB's consent order against the mortgage lender highlighted three activities conducted over a five-year period (2017-2022) for or with real estate agents and brokers that allegedly violated RESPA Section 8(a): (1) providing free subscription services, (2) hosting and subsidizing events, and (3) entering into certain marketing services agreements (MSAs).

First, the CFPB alleged that the mortgage lender paid for multiple subscription services providing real estate property data and then gave free access to real

estate agents and brokers, many of whom referred customers to the mortgage lender. Further, according to the consent order, the mortgage lender sometimes required real estate agents and brokers to be paired with one of the mortgage lender's loan officers prior to giving them access to the subscription services.

Second, the CFPB alleged that the mortgage lender hosted and subsidized events for real estate agents and brokers, often paying for food, beverages, and alcohol provided to the real estate agents and brokers or providing the agents and brokers free tickets to events (including sporting events and charity galas). Moreover, the CFPB claimed that these events targeted new or existing mortgage referral sources, while denying requests for event sponsorship from real estate brokerages that did not refer mortgage business.

Finally, the CFPB alleged that the mortgage lender had entered into more than 40 MSAs, whereby the mortgage lender made monthly payments to each respective real estate brokerage. Allegedly, some of the MSAs focused on providing the mortgage lender access to internal events and meetings so that the lender could promote its services and products directly to the real estate brokerage's agents and brokers instead of requiring the brokerage to market the lender to the general public. In other MSAs, the CFPB alleged that the mortgage lender performed most of the actual marketing services to consumers and the real estate brokerage did not perform any of the substantive marketing tasks. The CFPB concluded that the payments made by the mortgage lender to the real estate brokerages "bore no reasonable relationship to the net market value" of any marketing services the brokerages may have actually performed, and therefore, the MSAs were structured and implemented to generate mortgage referrals, as opposed to compensating the brokerages for marketing services that were performed.

In relation to all three of these activities, the CFPB concluded that a "thing of value" had been given by the mortgage lender to real estate agents and brokers as part of a pattern, practice, or course of conduct to create, maintain, and strengthen mortgage referral relationships.

Real estate brokerage consent order

In the CFPB consent order against the real estate brokerage, the CFPB alleged that the real estate brokerage accepted the free subscription services and subsidized or hosted events provided by the mortgage lender in exchange for referrals. Further, by entering into the MSA with the mortgage lender, the real estate brokerage accepted monthly payments that bore no reasonable relationship to the market value of the marketing services performed in connection with the MSA. Therefore, the CFPB concluded that in all three instances, the real estate brokerage had accepted things of value under an agreement or understanding to refer mortgage origination business for federally related mortgage loans.

What this means to you

These two RESPA consent orders, in conjunction with the CFPB's recent re-affirmation of prior HUD RESPA guidance and the CFPB's earlier advisory opinion on RESPA and Digital Mortgage Comparison-Shopping Platforms, are clear indications that the CFPB is showing a renewed and growing interest in RESPA and RESPA enforcement. In addition, a rising interest rate environment often fuels an increased interest by loan officers and real estate agents and brokers in establishing business relationships and arrangements that may not be legally compliant or advisable under RESPA. Taken together, these developments should have those in the mortgage and real estate industry proactively reviewing their RESPA compliance programs to ensure they are up to date and complete and contain sufficient policies, procedures, internal controls, training, and monitoring.

Contact us

If you have any questions regarding whether your current or proposed business practices and agreements are in compliance with RESPA Section 8, please contact Leslie Sowers, Jacob Huston, Shelby Lomax, or your Husch Blackwell attorney.