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CFPB Guidance Affects Mortgage Comparison-Shopping Websites



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The Consumer Financial Protection Bureau (“CFPB”) [issued guidance](#) on February 7 in the form of an Advisory Opinion intended to “protect mortgage borrowers from pay-to-play digital comparison-shopping platforms.” Specifically, [the Advisory Opinion](#) is focused upon addressing the applicability of the Real Estate Settlement Procedures Act (“RESPA”) to operators of “digital technology platforms that enable consumers to comparison shop for mortgages and other real estate settlement services, including platforms that generate potential leads for platform participants through consumers’ interaction with the platform.” (“Digital Platforms”)

Section 8 of RESPA, which carries criminal penalties if violated, provides that “no person shall give and no person shall accept any fee, kickback, or thing of value pursuant to any agreement or understanding, oral or otherwise, that business incident to or a part of a real estate settlement service involving [a mortgage] shall be referred to any person.” 12 U.S.C. 2607(a). This section of RESPA does go on to say, however, that when compensation of some kind is received for bona fide payments for goods or facilities provided or services rendered (excluding referral fees), then such compensation is not prohibited. 12 U.S.C. 2607(c).

The CFPB explains that some Digital Platforms facilitate a consumer’s choice among alternative products or settlement service providers and are generally covered by the Department of Housing and Urban Development’s (“HUD”) [1996 policy statement](#) on “computer loan origination systems.” The 1996 HUD policy clearly provides that when a particular lender or settlement service provider is highlighted, but has no “real difference in interest rates and charges,” then the non-neutral presentation can influence the consumer, and, further, that any fee received by the Digital Platforms to highlight such lender or service provider could be deemed to be a referral fee in violation of Section 8.

Accordingly, the CFPB’s Advisory Opinion re-casts the 1996 HUD policy and makes it specific to today’s marketplace:

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. By non-neutrally using or presenting information, the Operator impedes the consumer's ability to engage in meaningful comparison of options and, instead, preferences certain options over others or presents options for reasons other than presenting them based on neutral criteria such as APR, objective consumer satisfaction information, or factors the consumer selects for themselves to rank or sort the settlement service providers on the platform. In these instances, the payment received by the Operator for such preferences or presentation of options is not merely for compensable services; instead, it is, at least in part, for referral activity. Further, when the Operator receives a higher fee for including one settlement service provider than it receives for including other settlement service providers participating on the same platform, that can be evidence of an illegal referral fee arrangement, absent other facts indicating that the payment is not for enhanced placement or other form of steering.

The CFPB further states that when the lender or service provider pays to participate in the Digital Platform and be highlighted in a non-neutral way, or even just has signed an agreement with the Digital Platform, it is likely that a conclusion can be drawn that the non-neutral presentation steers or affirmatively influences the consumer, and would therefore be a referral in violation of Section 8 of RESPA. However, when a Digital Platform receives payment for participation on the platform and the information provided to consumers is both neutrally used and neutrally presented, then such payment is for a bona fide service and would not be a violation of Section 8 of RESPA.

In terms of how a Digital Platform can neutrally present lenders, the CFPB highlighted a variety of methods that would be considered NOT neutral, including:

- rotating the top spot to highlight all participating lenders;
- preferencing platform participants that are affiliates;
- providing consumers with a ranking of lenders, using criteria chosen by the consumer and displaying the information neutrally, but having the Digital Platform send a follow-up email on behalf of only some of the lenders ranked; and
- presenting comparison information on multiple lenders, and connecting the consumer directly to a lender through a phone call placed by the Digital Platform, even though the lender is only the first that responded to a "push" notification from the Digital Platform.

Director Chopra, [in his comments regarding this Advisory Opinion](#), highlighted additional efforts the CFPB has made to assist consumers in understanding how to interact with Digital Platforms, including enforcement actions and [the issuance of policy guidance regarding fake reviews](#).
