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CFPB Brings RESPA Section 8 Into 21st Century With Digital Marketing Risk Advisory Opinion

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On February 7, 2023, the Consumer Financial Protection Bureau issued an advisory opinion warning operators of digital mortgage comparison platforms of specific practices the bureau may view as violating Section 8 of the Real Estate Settlement Procedures Act (RESPA), which prohibits the payment of fees for the referral of real estate settlement services. The advisory opinion cautions operators against presenting information on their platforms in a non-neutral way or steering consumers to specific service providers based on the level of compensation received. Importantly, the CFPB indicates that some platform operators, and their participating settlement service providers, may currently be engaging in activities that violate RESPA Section 8.

Overview of the advisory opinion

RESPA Section 8 prohibits companies and individuals from receiving kickbacks and referral fees in connection with a transaction involving a residential mortgage or real estate settlement service. In this new advisory opinion, the CFPB sets forth a three-part test to determine whether a digital mortgage comparison platform violates RESPA. Specifically, the CFPB indicates that an operator violates RESPA when (1) the platform displays settlement service provider information to consumers in a "non-neutral way," (2) that presentation has the effect of affirmatively influencing the consumer's selection of the provider, and (3) the operator receives a payment or other thing of value that is, at least in part, for the referral activity. Importantly, the CFPB warns that disclosing on the platform the criteria regarding how the information is presented to consumers will not cure a RESPA violation if the operator's practices otherwise satisfy each prong of the CFPB's test.

The advisory opinion also offers a detailed set of hypothetical business practices that, according to the CFPB, might constitute prohibited referral activity and run afoul of RESPA's Section 8 prohibition. For example, the bureau warns that ranking settlement service providers, or presenting a service provider as the "best option" on the platform, based on compensation received and irrespective of the consumer's preferences, could violate RESPA. Similarly, presenting information about settlement service providers differently to consumers, such as by using a larger font or incorporating weblinks for providers paying higher fees so as to influence the consumer's selection of higher-paying providers, could also run afoul of that prohibition.

Lastly, the CFPB clarifies that digital marketing practices also may violate other federal or state financial protection laws, including the CFPB's prohibition against unfair, deceptive, or abusive acts and practices, to the extent that consumers are expecting a neutral and fair comparison of providers on the platform but are instead steered to providers not necessarily tailored to their needs.

What to expect?

One of the long-standing challenges of complying with RESPA's Section 8 obligations has been applying decades-old guidance to emerging technologies (official RESPA commentary still refers to "facsimile transmission machines"). This advisory opinion places compliance risks in the context of modern technologies, and may require operators of digital marketing platforms to reevaluate how information is presented on their websites, as well as existing ranking methodology and fee structures with participating providers to ensure compliance with the CFPB's expectations. Operators also should review any ancillary marketing services offered to lenders and settlement service providers, such as promotional activities or endorsements, to ensure those services do not otherwise negate the neutral display of information to consumers. Participating lenders and settlement service providers should likewise review their arrangements with digital mortgage comparison platforms to mitigate regulatory scrutiny.

While the specific RESPA focus may be new, the regulatory interest in transparency and accuracy in advertising is not. Indeed, many of the principles in the advisory opinion align with the Federal Trade Commission's

endorsement guides, which are rooted in Section 5 of the Federal Trade Commission Act (prohibiting unfair or deceptive acts or practices). Last year, the FTC proposed updates to those guides – which are still under consideration – to include, among other things, an emphasis on the roles and potential liability of digital platforms, which the FTC said should "bear greater responsibility." This additional regulatory focus from the CFPB signals once again the close coordination between agencies – and the heightened risk for noncompliance.

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