

May 5, 2023

Vol. XXXV, No. 7

REGULATION X - RESPA SECTION 8 ***ONLINE MORTGAGE COMPARISON SHOPPING***

The CFPB (Consumer Financial Protection Bureau) recently issued an Advisory Opinion on Digital Mortgage Comparison Shopping Platforms and the potential for RESPA Section 8 issues. At issue are the ways in which these platforms may favor one lender or another when displaying search results to consumers searching for mortgages and real estate settlement services.

One of the prohibitions in RESPA Section 8, today found in Regulation X at 12 CFR § 1024.14, is the prohibition against any fees, kickbacks, or things of value for referring settlement services in connection with a federally related mortgage loan. This has become a concern in relation to “Digital Mortgage Comparison Shopping Platforms” (online marketplaces) which allow consumers to search for and compare options for mortgages or other settlement services, which in turn create potential leads for the providers that participate in the platform’s services.

The Advisory Opinion focuses on instances in which online marketplaces appear to consumers as if they provide objective comparisons between lenders and settlement service providers but are actually displaying results influenced by the fees paid by the lenders or providers. This could either take the form of some lenders paying one rate and other lenders paying another rate (with the higher presumed to be for enhanced placement), or some lenders not paying for advertising and other lenders paying for advertising. While the Advisory Opinion focuses on the operator of the online marketplace, RESPA works both ways (paying or receiving) so if the operator is violating RESPA in receiving payment for these referrals, the bank could easily also be found to be in violation by virtue of making the payments.

The bank must be highly aware that when paying for “advertising space” such as a listing with an online marketplace that the payments can only be for “neutral” placement on the website. To the extent that the payment is for non-neutral placement, that can constitute “referral activity,” and so if even part of the payment is interpreted as attributable to the “enhanced placement,” that can be at least a RESPA Section 8 violation – to the platform operator and/or the bank, if not also an Unfair, Deceptive, or Abusive Acts or Practices concern.

The foregoing Compliance Update is for informational purposes only, and does not constitute legal advice. As a reminder, the NBA general counsel is the attorney for the Nebraska Bankers Association, not its member banks. The general counsel is available to assist members with finding resources to help answer their questions. However, for specific legal advice about specific situations, members must consult and retain their own attorney.