LEGAL UPDATES

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FDIC's Continued Focus on RESPA Section 8 Violations: What Bank and Non-Bank Lenders Should Know

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It is no secret that the Federal Deposit Insurance Corporation (FDIC) actively monitors its banks for compliance with Section 8 of the Real Estate Settlement Procedures Act (RESPA Section 8). However, in its March 2024 Consumer Compliance Supervisory Highlights (Supervisory Highlights), the FDIC addresses interpretive issues that have a long history. Specifically, the FDIC found that certain relationships that banks have with mortgage brokers violate RESPA Section 8(a)'s prohibition on paying for referrals. Moreover, the FDIC claims that many of these relationships do not fall under RESPA Section 8(c)(2)'s safe harbor for bona-fide payments for services. This stance is consistent with the regulator's aggressive approach to RESPA Section 8 issues more generally in recent years.

Historical treatment of mortgage broker payments under RESPA

The FDIC's observation regarding mortgage broker arrangements with lenders and RESPA Section 8 compliance is based on an extended regulatory history.

In 1999, and again in 2001, the Department of Housing and Urban Development (HUD) issued two Statements of Policy (SOPs) addressing how RESPA Section 8's prohibition on kickbacks applies to lenders making payments to mortgage brokers. According to these SOPs (SOPs 1999-1 and 2001-1, respectively), payments from lenders to mortgage brokers are permissible under RESPA Section 8 as long as (1) goods or facilities are actually furnished or services are actually performed for the compensation paid, and (2) the compensation paid is reasonably related to the value of the goods or facilities actually furnished or services actually performed. Generally, HUD noted that this two-prong test will be satisfied if a mortgage broker provides sufficient origination work to justify compensation: namely, if the broker takes the application and performs at least five additional services, which generally should include at least one non-counseling service. In determining what counts as five additional services, HUD emphasizes that referrals, no work, nominal work, or duplicative work are not compensable. However, the FDIC reiterates HUD's cautionary statement that the "app plus five" analysis was not intended to be "dispositive in analyzing more costly mortgage broker transactions where more comprehensive services are provided" and the determinative test under RESPA is the relationship of the services, goods, or facilities furnished to the total compensation received by the broker.

The SOPs remain valid guidance, notwithstanding their age and issuance by an agency that no longer has jurisdiction over RESPA. After assuming jurisdiction over RESPA under the Consumer Financial Protection Act, the CFPB published a Transfer of Authorities Notice in the Federal Register on July 21, 2011, listing the enforceable rules and orders that transferred from HUD and other predecessor agencies to the CFPB. In September 2023, the CFPB issued guidance confirming that the SOPs are among the official documents issued by HUD that continue to apply unless the CFPB were to take further action. Thus, regulators continue to look to the SOPs to evaluate payments to mortgage brokers under RESPA Section 8.

FDIC Supervisory Highlights RESPA Section 8 findings

The FDIC's recent examinations found that bank payments to mortgage brokers violated this two-prong test. As we recently noted, although banks satisfied the first prong of the SOPs' test by implementing policies and procedures to ensure goods or facilities were actually furnished or services were actually performed for the compensation paid, the FDIC found that banks failed to meet the second prong. That is, they lacked processes to ensure that payments to mortgage brokers are reasonably related to the value of the services provided.

The Supervisory Highlights call attention to three specific scenarios where the compensation paid was not reasonable based on the services provided. In these instances, the mortgage broker stated that it had provided five additional services, but the FDIC found that the services were (i) limited in nature and value, (ii) irregularly conducted or not conducted at all, or (iii) essentially variations of the same counseling services.

Recognizing that there have been significant changes in technology since the SOPs were issued, the FDIC explains that technological advancements warrant a review of compensation paid for services that were once "intensive and time consuming" but are now "completed quickly and easily using technology." Acknowledging that technology comes at a cost, the FDIC warns banks that there may be significant variation in the time, effort, and cost associated with these services, and as a result, managing RESPA Section 8 risk "is not merely a service-counting exercise."

Notably, the Supervisory Highlights provide three specific risk-mitigating activities for banks to manage their mortgage broker relationships. In turn, these activities would strengthen their compliance management system and assist with RESPA Section 8 compliance:

Policies and Procedures. Lenders should develop policies and procedures documenting which services are provided by the mortgage broker. The policies and procedures should also include "sufficient detail to determine if services are actually provided and how the services will be valued."

Comprehensive Monitoring. Lenders should establish comprehensive monitoring of the services provided and payments made. Moreover, lenders should regularly evaluate the bank's compliance with the policies and procedures relating to mortgage broker relationships.

Trainings. Lenders should ensure that their employees and the mortgage broker employees receive sufficient training on the lender's mortgage broker relationship policies and procedures.

FDIC activity on RESPA Section 8 generally

The FDIC's focus on RESPA Section 8 issues in the Supervisory Highlights is by no means an anomaly. Rather, the FDIC has been among the most active regulators on RESPA Section 8 issues, taking a number of public actions in recent years:

The FDIC's March 2021 Supervisory Highlights described conduct that impermissibly blurred the line between paying for leads and paying for referrals.

A 2022 consent order with a bank discussed alleged RESPA Section 8 violations in connection with mortgage lead generation arrangements with the operator of a real estate website and the operator of an online loan marketplace that "were used to facilitate and disguise referral payments for mortgage business." The bank paid a $425,000 civil monetary penalty in connection with the asserted RESPA violation as well as FTC Act and Fair Credit Reporting Act violations.

The FDIC's March 2023 Consumer Compliance Supervisory Highlights identified RESPA Section 8(a) violations where a bank contracted with third parties that took steps to identify and contact consumers in order to directly steer and affirmatively influence the consumer's selection of the bank as the settlement service provider.

What this means to you

Although the FDIC's supervisory jurisdiction is restricted to the banks it monitors, all lenders—whether bank or nonbank, and whether under the FDIC's purview or not—should pay attention to the FDIC's RESPA Section 8 developments.

Of note, the FDIC's focus on lead generation and third-party sites dovetails with the CFPB's guidance on similar topics. Factors described in the March 2023 Supervisory Highlights relating to steering and affirmatively influencing consumers, for example, overlap with areas of discussion in the CFPB's 2023 Advisory Opinion on digital mortgage comparison-shopping platforms. Therefore, regulated entities should assume that issues of importance to the FDIC may be areas of focus for the CFPB, and vice versa.

The Supervisory Highlights address longstanding RESPA Section 8 interpretive issues and provide guidance that accounts for technological advancements, a subject that remains relevant across various regulatory bodies. Furthermore, it wouldn't be surprising if the CFPB, or other regulators, consider these findings and take similar positions when conducting examinations of lenders within their authority. Since RESPA Section 8's prohibitions attach to either the payor or the recipient of a referral fee, mortgage brokers who receive the payments under these arrangements should heed this development as well.

Contact us

If you have questions about RESPA Section 8 compliance, mortgage broker arrangements, or any other residential mortgage regulatory matter, contact Christopher Friedman, Mike G. Silver, Leslie Sowers, Shelby Lomax, or your Husch Blackwell attorney.