

## CFPB Addresses “Pay-to-Play” Mortgage Loan Digital Comparison-Shopping Platforms under RESPA

The CFPB recently issued [an advisory opinion](#) entitled *Real Estate Settlement Procedures Act (Regulation X); Digital Mortgage Comparison-Shopping Platforms and Related Payments to Operators*. The CFPB states that it issued the advisory opinion “to address the applicability of the Real Estate Settlement Procedures Act (RESPA) section 8 to operators of certain digital technology platforms that enable consumers to comparison shop for mortgages and other real estate settlement services, including platforms that generate potential leads for the platform participants through consumers’ interaction with the platform (Digital Mortgage Comparison-Shopping Platforms).” The advisory opinion is effective upon publication in the Federal Register, which is scheduled for February 13, 2023.

In the advisory opinion the CFPB provides general guidance on how Digital Mortgage Comparison-Shopping Platforms (Platforms) may be operated in a manner that violates RESPA and other laws, and addresses five specific examples of arrangements that it believes to be non-compliant. While CFPB mainly addresses RESPA, it appears that UDAP concerns are a significant motivating force behind the issuance of the advisory opinion.

### Background

The CFPB states that Platforms generally are covered by [Statement of Policy 1996-1: Computer Loan Origination Systems](#) (CLOs). The Statement of Policy was issued by the US Department of Housing and Urban Development (HUD) in conjunction with the withdrawal of a RESPA section 8 exemption that applied to borrower payments for computerized loan origination services. Pursuant to the Dodd-Frank Act, the Statement of Policy transferred over to the CFPB along with the authority for the CFPB to interpret and enforce RESPA.

The CFPB notes that the Statement of Policy defines a CLO as “a computer system that is used by or on behalf of a consumer to facilitate a consumer’s choice among alternative products or settlement service providers in connection with a particular RESPA-covered real estate transaction” and that the definition was not meant to be restrictive or exhaustive given the rapid evolution of technology at the time. The CFPB then addresses guidance set forth in the Statement of Policy, including the following:

- Settlement service providers “may pay CLOs a reasonable fee for services provided by the CLO to the settlement service provider, such as, having information about the provider’s products made available to consumers for comparison with the products of other settlement service providers.”
- “[I]f a CLO lists only one settlement service provider and only presents basic information to the consumer on the provider’s products, then there would appear to be no or nominal compensable services provided by the CLO to either the settlement service provider or the consumer, only a referral.” As a result, “any payment by the settlement service provider for the CLO listing could be considered a referral fee in violation of section 8 of RESPA.”
- “[F]avoring one settlement service provider over others may be affirmatively influencing the selection of a settlement service provider.”
- “[I]f one lender always appears at the top of any listing of mortgage products and there is no real difference in interest rates and charges between the products of that lender and other lenders on a particular listing, then this may be a non-neutral presentation of information which affirmatively influences the selection of a settlement service provider.”

- “[I]f a CLO charges different fees to different settlement service providers in similar situations, an incentive may exist for the CLO to steer the consumer to the settlement service provider paying the highest fees,” which could lead to RESPA violations.

The CFPB states that HUD’s concern about the steering of consumers by CLOs as being “both compelling and prescient.” The CFPB also notes that HUD did not mean for the Statement of Policy to discourage CLOs from assisting consumers in determining which products are most advantageous to them, and that HUD advised, by way of an example, that if “a CLO consistently ranks lenders and their mortgage products on the basis of some factor relevant to the borrower’s choice of product, such as APR calculated to include all charges and to account for the expected tenure of the buyer, HUD would consider this practice as a neutral display of information.”

#### CFPB Warning

Ominously, the CFPB states that “[b]ased on the evolution of business arrangements and technology platforms, the CFPB’s market monitoring, and regulator activity, the CFPB understands that operators of . . . Platforms and participating settlement service providers in some cases may be engaging in activities that violate RESPA section 8.”

#### CFPB General Guidance

The CFPB sets forth this general interpretation of when the operator of a Platform violates RESPA section 8:

An operator of a Platform receives a prohibited referral fee in violation of RESPA section 8 when:

- The Platform non-neutrally uses or presents information about one or more settlement service providers participating on the Platform;
- 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
- The operator receives a payment or other thing of value that is, at least in part, for that referral activity.

The CFPB reflects what appears to be an underlying UDAAP concern when it states that an operator’s non-neutral use or presentation of information “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.” The CFPB then states in these situations, the payment received by the operator for the preferences or presentations of options “is not merely for compensable services; instead, it is, at least in part, for referral activity.” The CFPB also observes that when an 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 concept of a referral under RESPA section 8 is very broad. The CFPB states an operator of a Platform makes a referral when it “non-neutrally uses or presents information and that has the effect of steering the consumer to use, or otherwise affirmatively influences the selection of, a settlement service provider.” The CFPB provides examples of the non-neutral use of information:

- Boosting the rankings of lenders who pay more to participate on the Platform by excluding or placing low weight on the purportedly objective comparison criteria that would otherwise favor the lower-paying provider.
- Manipulating the formula used by the Platform to favor certain participating providers by declining to honor the consumer’s preferences or unwarrantedly placing weight on inaccurate information about the provider, such as by giving credit in the formula to a lender for more favorable interest rates that the operator knows are outdated.

The CFPB also provides examples of the non-neutral presentation of information:

- Providing the names and telephone numbers of all participating providers, but only providing weblinks for a subset of higher-paying providers.
- Listing the lenders that pay more to the operator on the first page and ranking them by interest rate—so the Platform appears to have ranked all participants by that factor—while at the same time showing on the second page other participants with the same or lower interest rates but that pay less to the operator.
- Labeling a lender that appears within, and at or near the top of, the Platform’s rankings as a “sponsored lender,” “featured lender,” or similar phrase because the lender has paid for enhanced placement, but the operator nonetheless designs the Platform and displays the lender in a manner that implies the lender earned its placement within the Platform’s rankings based on neutral criteria.
- Listing the same participant who has paid for enhanced placement multiple times in the rankings, using either the same name or an affiliated name.
- A situation in which a Platform permits a consumer to generate a presentation of ranked lender options, the operator receives a higher fee if the consumer clicks on the top-ranked lender compared with the other lenders, and the operator segregates and highlights prominently the top-ranked option and presents the other options in very small font requiring the consumer to scroll down.
- A situation in which a consumer visits a Platform and runs an initial search of comparison options that yields a “top-ranked lender” and other lenders. Based on an agreement between the “top-ranked lender” and the operator, when the consumer revisits the Platform they only see that lender.

Based on its view that the non-neutral use or presentation of information on Platform by an operator constitutes a referral to a favored lender, the CFPB advises that a RESPA section 8 violation would exist if there is an agreement or understanding between the operator and lender regarding the presentation and the lender provides the operator a thing of value. The CFPB notes that the RESPA regulation, Regulation X, provides that an agreement or understanding can be established through a pattern, practice, or course of conduct.

After explaining how a RESPA section 8 violation can be established in connection with a Platform, the CFPB then addresses the RESPA section 8(c)(2) exemption. Under that exemption, RESPA section 8 does not prohibit “the payment to any person of a bona fide salary or compensation or other payment for goods or facilities actually furnished or for services actually performed.” The CFPB advises that the

exemption “does not provide a defense to payment of referral fees because referrals are not compensable services under RESPA.” The CFPB appears to indicate that the RESPA section 8(c)(2) exemption would not avoid a RESPA section 8 violation in a situation in which (1) a 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, because the operator would be receiving a payment that is not merely for compensable services.

Significantly, the CFPB states that even if the operator of a Platform receives the same fees from lenders, the non-neutral use or presentation of information still can constitute a RESPA section 8 violation. Specifically, the CFPB states that “if (1) a . . . Platform’s non-neutral use or presentation of information has the effect of steering the consumer to use, or otherwise affirmatively influences the selection of, one or more settlement service providers participating on the platform, and therefore constitutes referral activity, and (2) the Operator receives a payment for including participating settlement service providers on the platform that is, at least in part, for those referrals, then the Operator’s actions would violate RESPA section 8 even if the Operator were to receive the *same* fee from each provider (or from some, but not all, providers).” The CFPB explains that “[b]y steering the consumer to particular settlement service providers, even where the fees paid by those providers are the same as one another, the Operator is providing a different—and non-compensable—service from those identified as compensable under the [CLO Statement of Policy].”

#### CFPB Examples of Platforms That Violate RESPA Section 8

The CFPB sets forth five examples of Platform arrangements that the CFPB would deem to violate RESPA section 8, and the examples are illustrative and non-exhaustive.

Pay to Play and Steering to Highest Bidder. A consumer is able to input relevant information on a Platform to aid in the consumer’s search for mortgage options, such as location, anticipated loan amount, and credit score, and the Operator represents that the Platform will use the information to identify the “best match.” The Platform presents a purported “best match” lender to the consumer, or ranks the lenders, but skews the results of the comparison function to ensure that the “best match” is the highest bidding lender participating on the Platform.

The CFPB explains that this would violate RESPA section 8 because the operator non-neutrally uses information to preference the highest bidding lender, resulting in the operator steering the consumer to that lender. The CFPB states that the operator’s actions imply an endorsement by leading the consumer to believe that the operator did an analysis behind the scenes (possibly driven by an algorithm) to determine the most suitable lender for the consumer, which thereby influences the consumer to select that lender.

The CFPB notes that this situation may also involve a UDAAP violation.

Payments Only From and Promotion of Lenders Who Rotate in Top Spot. In a variation of the prior example, a Platform allows consumers to input information about their needs and then generate lender rankings. All lenders participating on the Platform take turns appearing in the top spot randomly or based on a predetermined schedule. That is, the rankings do not reflect a tailoring to the consumer’s

needs based on their inputted information. Additionally, the operator is paid by only the lender appearing in the top spot, or lenders pay in advance for the opportunity to appear in the top spot randomly or based on the predetermined schedule.

The CFPB explains that this example involves a referral because a consumer would reasonably perceive that, after entering information about their needs and using the Platform to call up a ranking of participating lenders, the lender appearing in the top spot would be the one determined by the operator to be best suited to the consumer's needs, not the lender who is next in a round robin. The CFPB adds that the payment would be considered a referral fee even if it does not differ from the payments made by other lenders participating in the round robin.

The CFPB notes that this situation may also involve a UDAAP violation.

Preferencing Platform Participants That Are Affiliates. A Platform is designed and operated in a manner that steers consumers to use settlement service providers that are affiliates of the operator. For example, a mortgage lender develops a Platform permitting consumers to search information about and view rankings of comparable mortgage brokers, and the Platform includes both affiliated and non-affiliated mortgage brokers. However, the mortgage lender/operator manipulates the application of the ranking criteria so that its affiliated mortgage brokers appear higher than the non-affiliated mortgage brokers. The operator receives payments for the higher ranking of affiliated mortgage brokers.

The CFPB advises that in this example, the operator's receipt of payments from the affiliated mortgage brokers for the higher ranking would violate RESPA section 8.

The CFPB notes that this situation may also implicate the RESPA section 8(c)(4) provisions regarding affiliated business arrangements.

Additional Services That Promote Platform Participant. A Platform gathers the consumer's contact information and permits the consumer to generate a ranking of lender options based on criteria selected by the consumer. The ranking reflects neutral use and display of information. The operator contracts with one of the participating lenders (which is not necessarily the top-ranked lender) to promote that lender by sending a text message or email to any consumer who uses the Platform to generate a ranking of lender options. The text message or email encourages the consumer to submit an application to that lender because it would be a good fit for the consumer's needs.

The CFPB advises that in this example, the promotional activity by the operator undermines the Platform's neutral presentation of information by steering the consumer to use a particular provider soon after the consumer had searched for comparison information. As a result, the operator's promotional activity, either by itself or when combined with the effect of the operator's action in presenting the comparison options to the consumer, affirmatively influences the consumer's selection of that lender and is a referral. Thus, the CFPB states that a payment in exchange for the promotional activity is not merely a payment for compensable services under RESPA section 8(c)(2).

Warm Hand-Off. The operator of a Platform presents comparison information on multiple lenders and uses an online long form to gather detailed information from a consumer who is browsing the Platform. The consumer's information relates to the consumer's particular borrowing needs, such as credit score and target loan amount. Soon thereafter, the operator calls the consumer to offer an immediate phone or live chat transfer to, or callback from, a lender participating on the Platform and tells the consumer

that they will be “in good hands” with that lender. However, the lender that receives the lead is merely the first lender to respond to the operator’s push notification alerting a network of lenders that a consumer is available for an immediate transfer, rather than a lender the operator identified as meeting the consumer’s needs based on the consumer’s inputted information.

The CFPB explains that the sequence of events described in this example is one variation of a lead generation practice that industry stakeholders sometimes call a “warm handoff” or “live transfer.” The CFPB advises that through its enforcement activity, it has identified other examples of so-called “warm handoff” or “live transfer” activity that led to RESPA section 8 violations.

The CFPB states that in this example, (1) the operator’s actions convey to the consumer an implied endorsement of the lender when the operator tells the consumer that they will be “in good hands” with that lender and (2) regardless of the specific words used when the transfer occurs, a consumer who inputs detailed information on the Platform immediately before a transfer to a lender would reasonably infer that the consumer is being connected to the lender that best meets their needs. With regard to the fact that the first lender to respond to the push notification receives the lead exclusively, the CFPB notes that HUD identified exclusivity as a relevant factor in determining whether a referral arrangement is present. The CFPB concludes that (1) the operator’s actions exert affirmative influence and constitute a referral, (2) an operator that receives payment for a warm handoff is not merely receiving payment for a compensable service, and (3) the payment also would be considered a referral fee even if it does not differ among the providers participating in the warm transfer process.

#### Other Applicable Laws

The CFPB notes that in addition to RESPA and UDAAP, operators of Platforms may also be subject to other laws, such as Regulation Z under the Truth in Lending Act, Regulation H regarding state compliance under the S.A.F.E. Mortgage Licensing Act and state laws regarding the licensing of mortgage originators, state laws imposing restrictions on referral fees and unearned fees, Regulation B under the Equal Credit Opportunity Act, the Telemarketing Sales Rule, the Federal Trade Commission Act, the Telephone Consumer Protection Act, and federal and state privacy laws. The CFPB does not provide any explanation on how each of the laws it identifies may apply. The CFPB also notes that its enforcement activity has also focused on the applicability of the Fair Credit Reporting Act in lead generation scenarios involving trigger leads.

#### Director Chopra Statement

CFPB Director Rohit Chopra [issued a statement](#) in connection with the advisory opinion that includes the following:

Comparison-shopping platforms have exploded into multiple markets including insurance, travel, and banking. In theory, they give consumers an opportunity to benefit from free-market competition – by presenting what competitors have to offer and then letting the consumer decide the option that is best for them. When designed and operated legally, these platforms provide a valuable service and help consumers make sound financial decisions.

But in practice, the game is sometimes rigged when companies that operate comparison-shopping platforms coerce payments to skew the offers presented to consumers instead of acting as fair referees. With digital mortgage comparison-shopping platforms, payments

extracted from providers for steering shoppers are prohibited by the Real Estate Settlement Procedures Act (RESPA) – in contrast to payments for the service of including providers on a comparison-shopping platform that follows the law.