

CFPB Advisory on Placement Practices May Have Broader Market Implications

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On February 7, 2023, the Consumer Financial Protection Bureau (the “CFPB”) issued an advisory opinion (the “Advisory Opinion”)¹ on certain digital placement practices, which may have broader market implications. The Advisory Opinion provides that the prohibition on referral fees under section 8 of the Real Estate Settlement Procedures Act (“RESPA”) in real estate transactions that involve federally related mortgage loans extends to operators of websites that allow consumers to compare mortgages and other real estate settlement services.² Specifically, if a comparison-shopping website ranks lenders or settlement service providers (or utilizes certain design choices intended to steer consumers’ choices of providers) based on compensation received by the website operator rather than on neutral criteria, that compensation may be considered an unlawful referral fee in the CFPB’s view.

The Advisory Opinion applies to “digital platforms that include information or features that enable consumers to comparison shop options for mortgages and other settlement services, including those platforms that generate potential leads for the platform participants through consumers’ interaction with the platform.” Such platforms include websites and applications that allow a consumer to input personal or property data in order to generate a ranked list of providers suitable to the individual consumer’s needs.

The Advisory Opinion sets forth the CFPB’s position that RESPA, a nearly 50-year-old statute, applies to the modern digital marketplace that has largely displaced a community-centered real estate financing and purchasing model that yielded referral fees and kickbacks among mortgage lenders and settlement service providers that

¹ https://files.consumerfinance.gov/f/documents/cfpb_respa-advisory-opinion-on-online-mortgage-comparison-shopping-tools_2023-02.pdf.

² RESPA defines “settlement services” to include “any service provided in connection with a real estate settlement including, but not limited to, the following: title searches, title examinations, the provision of title certificates, title insurance, services rendered by an attorney, the preparation of documents, property surveys, the rendering of credit reports or appraisals, pest and fungus inspections, services rendered by a real estate agent or broker, the origination of a federally related mortgage loan (including, but not limited to, the taking of loan applications, loan processing, and the underwriting and funding of loans), and the handling of the processing, and closing or settlement.” 12 U.S.C. § 2602(3). Such settlement services include the provision of homeowners insurance products. See 12 C.F.R. § 1024.2(b)(29).

contributed to the inflated closing costs that the statute was enacted to address. Although the Advisory Opinion is limited in scope and non-binding,³ the Bureau's analysis previews an aggressive position that some common industry practices in connection with the shopping of mortgage loans and real estate settlement practices may in fact violate Section 8 of RESPA. That position may form the basis of a future supervisory examination or enforcement investigation.⁴

The Advisory Opinion is also the latest in a line of agency actions by the CFPB and other federal regulators, including the Federal Trade Commission (the "FTC") and Department of Justice Civil Division (the "DOJ"), that target business models that purport to influence consumer choice, including by limiting consumers' information about compensation arrangements.

In this Client In Depth, we discuss the Advisory Opinion and what it means for comparison-shopping websites for mortgage products and other real estate settlement services.

Relevant Statutory and Regulatory Considerations

Legal Background

Section 8 of RESPA prohibits payment of referral fees or kickbacks in connection with federally related mortgage loans. Specifically, Section 8(a) 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 federally related mortgage loan shall be referred to any person."⁵ Regulation X, which implements, RESPA, defines referral as "any oral or written action directed to a person which has the effect of affirmatively influencing the selection by any person of a provider of a settlement service or business incident to or part of a settlement service when such person will pay for such settlement service or business incident thereto or pay a charge attributable in whole or in part to such settlement service or business."⁶ Section 8(b) prohibits fee-splitting among persons

³ In the past approximately 12 months, the CFPB has issued several non-binding interpretations of the laws it enforces in the form of policy statements, Consumer Finance Circulars, advisory opinions and interpretive rules.

⁴ At least one such guidance on certain fees for overdrafts resembled UDAAP violations found by the CFPB in a consent order against Regions Bank. *Compare*

https://files.consumerfinance.gov/f/documents/cfpb_unanticipated-overdraft-fee-assessment-practices_circular_2022-10.pdf with https://files.consumerfinance.gov/f/documents/cfpb_Regions_Bank-Consent-Order_2022-09.pdf.

⁵ 12 U.S.C. § 2607(a); 12 C.F.R. § 1024.14(b).

⁶ 12 C.F.R. § 1024.14(f)(1).

“for the rendering of a real estate settlement service in connection with a federally related mortgage loan other than for services actually performed.”⁷

RESPA does not, however, prohibit payments to persons of “a bona fide salary or compensation or other payment ... for services actually performed.”⁸ These include payments made to an attorney or to a title insurer for services rendered or for promotional activities that are not conditioned on the referral of business.⁹

The Advisory Opinion

The Advisory Opinion provides that operators of comparison-shopping websites and applications receive prohibited referral fees when the websites (1) non-neutrally use or present information about one or more mortgage or real estate settlement service providers (2) that has the effect of steering or otherwise affirmatively influencing a consumer’s use or selection of a particular lender or settlement service provider, and the operator receives payment or a thing of value at least in part for the referral.

According to the Advisory Opinion, non-neutral use or presentation of information is problematic because it impedes a consumer’s ability to engage in a meaningful comparison of their mortgage loan or settlement service provider options. Business practices that purportedly restrict consumer choice have been a focus of recent regulatory actions by the CFPB, FTC and DOJ, which are discussed further below.

Non-Neutral Use or Presentation of Information

The Advisory Opinion defines non-neutral use of information as the manipulation or biasing of inputs or a formula that a website or application uses to generate mortgage product or service provider options to consumers. This could happen, for example, by according less weight in a sorting algorithm to a consumer’s preferences or selection criteria or prioritizing placement of lenders or settlement service providers that pay fees for a top ranking, notwithstanding features of products or services that may make those top-ranked companies a less desirable option for any particular consumer.

Non-neutral presentation of information refers to situations where information is presented in such a way as to increase the likelihood that consumers will select a lender or service provider that pays more than others also listed with the website or application. The Advisory Opinion cites illustrative examples, including where a website or

⁷ 12 U.S.C. § 2607(b); 12 C.F.R. § 1024.14(b).

⁸ 12 U.S.C. § 2607(c)(3).

⁹ See, e.g., 12 C.F.R. § 1024.14(g)(1).

application provides names and contact information for all participating lenders or service providers but only furnishes hyperlinks to the websites of select lenders or service providers.

Payments for Placement

Payments from a listed company to the website or application operator meet Section 8(a)'s requirement that a "thing of value" be exchanged to constitute a prohibited referral unless there is evidence that the payment is not for enhanced placement or steering a consumer's selection.

More Options or Broader Distribution May Attract Less Scrutiny

A website or application's presentation of a greater number of options to a consumer or dissemination of information about lenders or settlement service providers to a large audience, for example in a broad advertising context, suggest that the practice is not unlawful steering or referral.

Potentially Prohibited Fee Arrangements

The Advisory Opinion sets forth several examples of violative fee arrangements in a non-exhaustive list.

- **Pay to Play.** A website or application that features the highest-paying lender or settlement service provider as a purported "best match" based on a consumer's selected criteria may violate Section 8 of RESPA because the match is likely to be viewed as a non-neutral use of information to steer a consumer toward a particular platform participant.
- **Rotation through Top Rankings Spot.** A website or application may violate RESPA Section 8 when it rotates lenders or settlement service providers at the top of a ranked list in exchange for a fee. This is because "a consumer could reasonably perceive, 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 [o]perator to be best suited to the consumer's needs," even though it may not be the most suitable.
- **Favoring Affiliates.** A technology platform operator likewise may violate RESPA Section 8 by prioritizing the placement of affiliated settlement service providers or lenders. Although Section 8(c) of RESPA provides that certain payments made pursuant to affiliated business arrangements may be permissible so long as certain conditions are satisfied, the Advisory Opinion makes clear that a payment by an

affiliate in exchange for a high placement on a comparison-shopping website or application would constitute a prohibited referral fee.

- **Additional Services to Promote Platform Participants.** Even a neutral use or presentation of information to a consumer may be undermined by any promotional activity, such as pushing out a text message or sending an email to the consumer, that the website or application undertakes to steer the consumer toward a particular lender or settlement service provider. Any payment in exchange for that promotional activity would constitute a prohibited referral under Section 8 of RESPA.
- **Warm Handoffs.** Payments for what are commonly referred to as “lead generation” activities in the mortgage lending or real estate settlement service space are likely to run afoul of RESPA Section 8. Lead generation occurs where a website or application, upon collecting a consumer’s information, offers to connect a consumer directly to a lender or service provider that is first to respond to a notification from the website or application that a consumer is available and pays for the consumer’s information.

The CFPB warns that disclosure of these arrangements cannot cure a RESPA Section 8 violation, although it notes that disclosure of certain business practices may be necessary to avoid violating the prohibition on unfair, deceptive or abusive acts or practices (“UDAAP”) in the Consumer Financial Protection Act of 2010 (the “CFPA”), which the Bureau is authorized to enforce against “covered persons” and “service providers.”

The Advisory Opinion also notes that comparison-shopping websites or applications cannot escape RESPA Section 8 liability by relying on a sorting or ranking algorithm whose use or presentment of information may not be known to or understood by the operators of such sites or applications.

The Bigger Picture

The Advisory Opinion may be viewed as part of a series of regulatory guidance, research, policy statements and enforcement actions by the CFPB, FTC and DOJ taking aim at business practices that purportedly impede consumer choice and access to information, including in some instances information to which consumers may have a statutory right. These actions have addressed a number of issues salient to financial institutions, financial technology companies, lead generators and digital advertisers that serve these companies, including:

- **Establishment of the FTC Office of Technology.** On February 17, 2023, the FTC announced the establishment of an Office of Technology intended to support its enforcement and policy work on “technological challenges in the digital marketplace.”¹⁰ The CFPB also has been hiring technologists to embed within its supervision and enforcement staff.¹¹
- **Dark Patterns.** Last September, the FTC published a report titled, “Bringing Dark Patterns to Light,” describing how certain design practices by digital providers may have “the effect of obscuring, subverting, or impairing consumer autonomy and decision-making.”¹² Recent enforcement actions by the CFPB, FTC and DOJ, including actions against ACTIVE Network LLC,¹³ Vonage, Inc.¹⁴ and Epic Games, Inc.,¹⁵ affirm that prosecuting such design choices under UDAAP and Section 5 of the FTC Act, which prohibits unfair and deceptive acts or practices (“UDAP”), is a top priority for federal consumer protection regulators.
- **Negative Option Contracts.** Both the CFPB and FTC have issued policy statements and guidance on their position that certain practices associated with negative option contracts, which renew automatically in the absence of an affirmative act to cancel by the consumer, may be unfair, deceptive or abusive.¹⁶ In addition, the FTC enforces the Restore Online Shoppers’ Confidence Act (“ROSCA”),¹⁷ which requires certain affirmative disclosures to be made in connection with negative option contracts. The CFPB’s enforcement action against ACTIVE Network LLC and the FTC’s enforcement action against Vonage, Inc., assert claims arising out of practices and disclosures concerning negative option contracts.
- **Consumer Reviews.** In October 2021, the FTC sent a Notice of Offense letter to more than 700 companies to warn them that publishing false customer reviews or product endorsements could warrant the assessment of civil penalties.¹⁸ The CFPB followed several months later with a policy statement that practices resulting in false

¹⁰ https://www.ftc.gov/news-events/news/press-releases/2023/02/ftc-launches-new-office-technology-bolster-agencys-work?utm_source=govdelivery.

¹¹ <https://www.consumerfinance.gov/about-us/blog/technologists-wanted/>.

¹² https://www.ftc.gov/system/files/ftc_gov/pdf/P214800_Dark_Patterns_Report_9.14.2022_-_FINAL.pdf.

¹³ https://files.consumerfinance.gov/f/documents/cfpb_active-network-llc_amended-complaint_2022-10.pdf.

¹⁴ <https://www.ftc.gov/news-events/news/press-releases/2022/11/ftc-action-against-vonage-results-100-million-customers-trapped-illegal-dark-patterns-junk-fees-when-trying-cancel-service>.

¹⁵ <https://www.justice.gov/opa/pr/epic-games-inc-developer-fortnite-video-game-agrees-275-million-penalty-and-injunction>.

¹⁶ https://www.ftc.gov/system/files/documents/public_statements/1598063/negative_option_policy_statement-10-22-2021-tobureau.pdf; <https://www.consumerfinance.gov/about-us/newsroom/cfpb-issues-guidance-to-root-out-tactics-which-charge-people-fees-for-subscriptions-they-dont-want/>.

¹⁷ 15 U.S.C. § 8401 *et seq.*

¹⁸ https://www.ftc.gov/system/files/attachments/penalty-offenses-concerning-endorsements/npo_endorsement_template_letter.pdf.

reviews or preventing consumers from posting accurate, negative reviews could constitute a UDAAP violation.¹⁹ On February 16, 2023, the FTC filed its first “review hijacking” action against The Bountiful Company for combining customer reviews of its newer or weaker-selling products with reviews for its more established or better-selling products.²⁰ According to the complaint, this resulted in, among other things, certain products appearing to have been reviewed when the consumer instead had purchased a different product and certain Bountiful products falsely identified as top-selling products.²¹

- **Adverse Action Notices.** Last spring, the CFPB issued a Consumer Financial Protection Circular to assert that creditors cannot avoid compliance with ECOA’s requirement that they provide specific and accurate reasons for any adverse action taken against credit applicants by delegating decision-making to algorithms that the creditor cannot understand.²² The Advisory Opinion expressly references this guidance.
- **Digital Advertisers.** The CFPB issued an interpretive rule last summer taking the position that digital advertisers that identify prospective consumers using behavioral data and/or deliver targeted content to those consumers on behalf of financial services firms are “service providers” within the meaning of the CFPA and, thus, are subject to enforcement of the CFPA’s prohibition on UDAAP.²³

Key Takeaways

Digital technology companies that allow consumers to compare and shop for mortgage loan products as well as real estate settlement services may wish to examine their placement and payment practices in light of this Advisory Opinion. In particular, companies should consider carefully assessing their fee structures against the manner in which their technology inputs and utilizes consumer information to present options to consumers. Websites that rely on neutral factors in addition to or other than consumer-selected factors should consider documenting those factors and their rationale. Mortgage lenders and settlement service providers that partner with such technology platforms likewise should consider reviewing the payments they make to website and application operators to confirm they are in exchange for compensable services and not

¹⁹ https://files.consumerfinance.gov/f/documents/cfpb_bulletin-2022-05_unfair-deceptive-acts-practices-impede-consumer-reviews.pdf.

²⁰ <https://www.ftc.gov/legal-library/browse/cases-proceedings/2223019-bountiful-company>.

²¹ https://www.ftc.gov/system/files/ftc_gov/pdf/the_bountiful_company_complaint.pdf.

²² <https://www.consumerfinance.gov/compliance/circulars/circular-2022-03-adverse-action-notification-requirements-in-connection-with-credit-decisions-based-on-complex-algorithms/>.

²³ https://files.consumerfinance.gov/f/documents/cfpb_time-or-space_interpretive-rule_signed_2022-08.pdf.

simply in exchange for placement in a top-ranked spot, return as a “best match” or to pay for a notification promoting the lender or provider pushed to a consumer, among other examples, all of which are at risk of being considered unlawful referral fees under the Bureau’s interpretation of Section 8 of RESPA. Consistent with previous guidance the CFPB has issued with respect to the permissibility of marketing services agreements under RESPA, prohibited referral agreements may be inferred from limited options made available to consumers or the size of the audience that receives targeted content. Accordingly, companies should consider assessing these factors to determine their risk exposure.

The Advisory Opinion is the latest in a trend of regulatory guidance that signals the federal consumer protection regulators’ strong interest in taking action against business practices that the agencies view as undercutting consumer autonomy, choice and access to information. Companies subject to CFPB or FTC jurisdiction should consider reviewing and documenting the design choices and inputs of consumer-facing interfaces or algorithms that influence consumer selection of financial products or services. They should also consider appropriate governance and other risk-management measures to ensure that the model or user interface delivers content in a neutral manner (such as cost to the consumer) or one that is driven by the consumer’s application of filters or other criteria.

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