

CFPB advisory opinion details RESPA implications for mortgage comparison websites

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Summary

On February 7, the Consumer Financial Protection Bureau (CFPB) issued an Advisory Opinion¹ detailing potential RESPA implications for companies that operate online mortgage and settlement service comparison platforms, as well as the lenders and service providers who may pay to be featured on such platforms.

The purpose of the Advisory Opinion appears to be to warn market participants of specific types of conduct that the CFPB believes may be violating RESPA and, potentially, to preview future CFPB enforcement theories.

The true importance, and enforcement implications, of the Advisory Opinion sweep wider than first appears.

The Advisory Opinion does not suggest it is establishing any new law or rules, and, in fact, the CFPB would be prohibited from doing so through the use of this type of advisory opinion, as opposed to, for example, notice and comment rulemaking.

Instead, the CFPB suggests it is building on guidance previously provided by the Department of Housing and Urban Development (HUD) in a 1996 Policy Statement focused on digital platforms that allowed consumers to comparison shop for settlement services, which HUD termed “computer loan origination systems” or CLOs.

The CLO Policy Statement was issued when HUD had substantive authority over RESPA, before that authority was transferred to CFPB in Dodd-Frank. Rather than adopt HUD’s terminology, the CFPB defines these online comparison platforms as “Digital Mortgage Comparison-Shopping Platforms” or “DMCSPs,” in either case quite the mouthful.

The Advisory Opinion most directly targets conduct in the operation of online comparison platforms that it refers to as “non-neutral,” borrowing a phrase coined in the CLO Policy Statement, by which CFPB means the presentation of provider names or information in a way that singles out or prefers one lender over another for reasons other than neutral criteria, such as interest rate for a possibly available loan.

The CFPB states that such non-neutral presentations can have the effect of affirmatively influencing the selection of the favored provider, by, for example, listing the provider first on the page of search results.

The first page of the Advisory Opinion, in its “Summary” section, opines that online comparison platforms receive an illegal referral payment in violation of Section 8 of RESPA when the following three factors are all present:

- (1) The 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 platform receives a payment or other thing of value that is, at least in part, for that referral activity.

The scarce details in the Opinion, however, provide market participants with little helpful guidance.

Although this is how the CFPB summarizes the Advisory Opinion’s scope, the Opinion goes on to provide over a dozen different examples of types of conduct that, in the CFPB’s view, would constitute either a RESPA violation or potential evidence of one.

Further, Director Chopra issued an accompanying Statement that warned the Opinion is “part of a broader all-of-government effort to end the illegal biasing of ostensibly neutral platforms.” As a result, the true importance, and enforcement implications, of the Advisory Opinion sweep wider than first appears.

Analysis and marketplace implications

The two types of entities most immediately affected by the Opinion are the operators of online comparison platforms and the mortgage lenders who use them to advertise and generate consumer leads.

For those entities, the most critical considerations include: (1) What information is being presented to consumers?, (2) How is it being presented?, and (3) What payments are flowing from lenders to the platform operator?

Whether a RESPA violation may be present in one arrangement as opposed to another can be a highly fact and case specific determination, which is highlighted by the many nuanced fact discussions throughout the Opinion.

Although the Advisory Opinion concludes with a list of five specific scenarios that involve the presence of a RESPA violation, even before those scenarios are presented, the central discussion in the Opinion calls out numerous other examples and factors that could indicate the presence of a RESPA violation.

Supervisory inquiries and enforcement actions by regulators are likely to soon follow in the wake of this Advisory Opinion.

Many are founded on the CFPB's opinions, formed without the benefits of notice-and-comment rulemaking, as to what consumer users of online comparison platforms want from the service or whether they even expect that information will be "non-neutral" in all instances. The Yellow Pages were universally used, but no one thought they were neutrally presented.

Several of the CFPB's examples appear to break little new ground and instead largely re-state prior guidance. This includes the Opinion's discussion of it being potentially problematic for a lender to pay enhanced compensation to be featured as a "sponsored" or "featured" provider.

However, the Opinion also notes that RESPA may be violated even where every lender pays the same compensation to the platform operator, if the information presented has the effect of steering a consumer to a particular lender.

Other examples provided by the CFPB appear, at first blush, to be straight-forward, but when they are considered in the reality of the mortgage lending marketplace, they actually create significant potential uncertainty as to how broadly the CFPB intends the Advisory Opinion to be read.

For example, the Opinion cites back to the 1996 HUD Policy Statement to suggest the presentation of only a single lender as a lender option may be problematic. But the Opinion offers no guidance as to how this could be affected by scenarios where only one available provider meets the consumer's needs or stated preferences.

Similarly, the Opinion states, in general terms, that certain types of so-called "warm handoffs," wherein a platform operator facilitates a direct contact between a consumer and a particular lender, can be problematic where the identification of the lender is not based on non-neutral criteria. The scarce details in the Opinion, however, provide market participants with little helpful guidance as to what is "non-neutral" selection in this context and when and how a hand-off becomes "warm."

It is unclear for example, whether a lender's selection based on its speed of response or whether it's available loan product meets all of the consumer's identified criteria, is non-neutral. It is also unclear whether the CFPB only considers person-to-person contact to be "warm" or whether a message depicted on a screen, even a general one, could be viewed as sufficiently heated to trigger RESPA concerns.

Importantly, the Advisory Opinion also states that an online comparison platform's clear and conspicuous disclosure of how it uses and presents participating lenders' information, while a best practice, does not prevent a RESPA section 8 violation.

Thus, even if an online platform clearly discloses to a consumer exactly how lenders are ranked or presented, the CFPB may still view it as a RESPA violation where the presentation or ranking methodology is not done in a sufficiently "neutral" manner. This commentary is starkly out of step with typical practice across many types of websites that explain relationships between the site and persons or companies whose products it hosts.

In giving texture to what constitutes a referral in the digital age, highlighting potential pitfalls in attempting to assist consumers with unraveling a complex marketplace, and touching on largely-unexplored RESPA issues around lead generation, the Opinion is important reading across the mortgage industry.

And in resurrecting the moribund, decades-old CLO Policy Statement, the CFPB shows that understanding RESPA's history can be as important as predicting its present. Industry participants of all kinds should also be cognizant that left unexplored in the Advisory Opinion are its potential implications for many other types of RESPA-covered conduct and entities.

Next steps

We anticipate that supervisory inquiries and enforcement actions by regulators are likely to soon follow in the wake of this Advisory Opinion. Going forward, it is critical that market participants understand risks that may or may not be present with the potentially problematic factual scenarios identified by the CFPB and compare them to their current practices. It is also critical that those participants consider the significant grey areas created by this Advisory Opinion.

Notes

¹ <https://bit.ly/3knjCBh>

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