Client Alert

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Bad Day for NewDay: CFPB Section 8 Enforcement Continues

By Donald Lampe, Joseph Rodriguez and Ashley Hutto-Schultz

On February 10, 2015, the Consumer Financial Protection Bureau ("CFPB") added another company to its litany of alleged Real Estate Settlement Procedures Act ("RESPA") Section 8 offenders (Michigan Title, PHH Corporation, New Jersey Title, Fidelity Mortgage Corporation). In its Consent Order ("Order") against NewDay Financial, LLC ("NewDay"), the CFPB claimed that the company violated Section 8's prohibition against kickbacks by paying "licensing fees" and "lead generating fees" in exchange for referrals from a non-profit organization that serves veterans ("Veterans Organization"). As a result of the alleged violations, the CFPB ordered NewDay to pay a $2 million civil money penalty and to submit a compliance plan detailing steps the entity will take to address each allegation contained in the Order. Moreover, NewDay will undoubtedly suffer severe reputational harm due to the alleged injury to veterans. In addition, the CFPB increased its oversight of NewDay's marketing relationships and prohibited NewDay from entering into any business relationship inconsistent with FTC guidance.

Under Section 8, a person is prohibited from accepting "any fee, kickback, or other thing of value pursuant to any agreement or understanding, oral or otherwise" in exchange for referring any real estate settlement business. Based on the Order, since 2010, NewDay made 3,900 payments to a broker company and a Veterans Organization for the referral of business from the organization's members. Allegedly, pursuant to the agreement, NewDay became the exclusive lender for the Veterans Organization and paid for leads that resulted from more than 50 million direct mail solicitations to the Veterans Organization's members. The Order alleges that those direct mail solicitations were designed to appear as if they came from the Veterans Organization, rather than NewDay. The solicitations recommended NewDay as the preferred source for home loans while providing contact information and a link to the NewDay website. The Bureau found this marketing arrangement to constitute deception under its authority to regulate unfair, deceptive, or abusive, acts and practices (UDAAP).

Reading between the lines of the Order, the CFPB has made one point exceedingly clear – RESPA's Section 8 is a strict liability statute. Companies will pay for violating the statute regardless of whether consumers have been harmed by the violations. To that point, the Order provides no indication that the costs associated with the relationship between NewDay and the other entities were passed on to consumers, or that the loan terms obtained by NewDay's borrowers were in any way inconsistent with what was generally available in the market. That said, given the presence of an Office of Servicemember Affairs within the CFPB, it is no surprise that the Bureau is concerned about lenders that derive profit from their relationship with veterans or active servicemembers (US Bank, Rome Finance).

As noted in our previous client alerts (RESPA Respite is Over, CFPB as HUD, No RESPA Respite Cont'd), the CFPB is bringing the hammer down on potential RESPA violators and has a particular interest in Section 8. We anticipate the CFPB will remain active on RESPA compliance beat.

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