

Client Alert.

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No RESPA Respite - Continued

By Donald Lampe, Angela Kleine, and Michael Raines

The CFPB continues to crack down on basic RESPA violations. On August 12, 2014, the CFPB announced yet another Consent Order with alleged violations of RESPA. In this case, an on-line retail mortgage company, the company's CEO, and an affiliated management corporation agreed to pay \$14.8 million in restitution to consumers. The CFPB also demanded \$6 million in civil money penalties, \$1.5 million of which is the personal responsibility of the company's CEO. As forecasted in our earlier client alert, this Consent Order reaffirms the CFPB's intent to enforce "common" RESPA violations, with an emphasis on basic compliance.

SIMPLE PROBLEMS, MAJOR CONSEQUENCES

The Consent Order included claims against Amerisave Mortgage Company (Amerisave) under the Consumer Financial Protection Act for unfair and deceptive practices in connection with its advertising of mortgage rates and representation of appraisal fees. The CFPB also alleged that Amerisave improperly charged consumers fees prior to presenting consumers with Good Faith Estimates (GFEs). Under RESPA, lenders are prohibited from charging consumers any fees for appraisals, inspections, or other settlement services prior to providing the consumer with a GFE. Lenders are, however, permitted to charge consumers the actual cost of credit reporting fees prior to providing a GFE. In this case, the CFPB alleged that consumers were required to pay a \$35 application fee, as well as an inflated credit report fee, prior to obtaining a GFE. Prior to providing the consumer with the GFE, Amerisave also required consumers to provide credit card authorization for the purpose of scheduling appraisals. The CFPB found that imposing these fees violated the plain language of RESPA. The CFPB emphasized that charging fees prior to providing the GFE makes consumers less likely to compare rates because they have already invested in closing the loan with the lender. Additionally, the CFPB reasoned that Amerisave was able to pad its profits by charging upfront fees to consumers who ended up not closing their loans with Amerisave.

The CFPB also claimed that Amerisave's referral of appraisal services to its affiliate, Novo Appraisal Management Corporation (Novo), violated RESPA's disclosure requirements for Affiliated Business Arrangements (ABAs). RESPA expressly prohibits the payment or acceptance of kickbacks and fees for referring real estate settlement services in connection with federally related mortgages. RESPA contains an exception to this prohibition for ABAs. Specifically, lenders must provide ABA disclosures at the same time the consumer receives the GFE. The ABA disclosures must inform the consumer of the business affiliation and contain a "written estimate of the charge or range of charges generally made by the provider." Further, consumers must have a choice of whether to utilize the affiliated business's services, and nothing of value may be received from the arrangement, other than a return on an ownership interest. Properly constructed ABAs will not ordinarily result in Section 8 violations as long as the lender provides the statutory notice, a form of which is provided in the RESPA regulations.¹

¹ HUD established other requirements for setting up and operating a lawful ABA. HUD's authority to do so was set aside in *Carter v. Welles-Bowen Realty, Inc.*, 736 F.3d 722 (6th Cir. 2013).

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The CFPB found that Amerisave referred 99% of its appraisal business to Novo since 2011. Novo is owned in part by Amerisave's CEO and his family through beneficial trusts. The CFPB alleged that Amerisave's website misled consumers by stating that the appraisal company was independent from Amerisave. Amerisave also informed consumers that it only accepted payment for the appraisals as a convenience to consumers. The CFPB claimed that Amerisave actually directed fees to Novo through referrals by not allowing consumers to choose the appraisal company. In doing so, Amerisave did not disclose its affiliation to Novo until after Amerisave received authorization to charge consumers for Novo's appraisal services. The CFPB alleged that Amerisave forced consumers to pay up to \$500 for an appraisal conducted by Novo while consumers did not understand how the fees would ultimately benefit Amerisave and its CEO. The CFPB reasoned that Novo shareholder distributions to the beneficial trusts of Amerisave's CEO and his family constituted improper referral fees and kickbacks under Section 8 of RESPA. The shareholder distributions were improper because they were largely the result of profits that Novo generated from the appraisal referrals Novo received from the CEO of Amerisave.

In addition to the over \$20 million in penalties, Amerisave is now subject to restrictive compliance requirements and additional regulatory scrutiny. Specifically, Amerisave must bear the cost of developing a compliance plan, which, over the next three years, will be subject to an independent consultant's review and annual reporting requirements.

CONCLUSION

Amerisave may have come to the CFPB's attention because of other alleged consumer protection violations, including its advertising of loan terms. But once the CFPB became interested in Amerisave, the CFPB discerned basic RESPA violations in Amerisave's operations. The CFPB will continue to enforce RESPA, particularly ABAs. No one knows who's next on the CFPB's RESPA hit list, but basic RESPA compliance issues remain a priority for the agency.

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