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MORTGAGE LENDING: IMPORTANT LESSONS ABOUT ADVERTISING, AFFILIATES, AND AUTHORIZATIONS

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On August 12, the Consumer Financial Protection Bureau (CFPB or Bureau) entered into a consent order with an online mortgage company, its affiliated appraisal company, and its chief executive officer; they agreed to pay $20.8 million to settle allegations of deceptive advertising and illegal lending practices. This particular action, *In the Matter of Amerisave Mortgage Corporation et al.*, reflects the CFPB's continued focus on mortgage lending and online advertising practices. As such, this enforcement action provides a window into potential pitfalls that third-party marketers, including online lead generators, mortgage lenders, and brokers can encounter when advertising mortgages online.

Mortgage Advertising

The Order alleges – and Amerisave Mortgage neither admits nor denies the allegations in the Consent Order – that the mortgage company offered mortgage loans to consumers over the Internet via three paths: its own website, a "rate publisher" (*e.g.*, lead generator), and banner advertisements.

According to the CFPB, for approximately two years, the mortgage company allegedly listed rates with the rate publisher that were lower than the mortgage company was willing to honor for jumbo conforming loans. Additionally, the mortgage company is alleged to have provided mortgage rates for other mortgage companies that were not likely to be locked by the majority of the companies' customers.

The rates displayed by the rate publisher were allegedly based on a sample consumer profile that included an 800 credit score even though the majority of the mortgage company's customers had credit scores below 800. The ads, according to the Order, also often assumed factors in the pricing such as paying relatively high discount points of $10,000, without disclosures of the parameters.

Because of the arguably misleading nature of the rates disclosed, the CFPB found that these advertisements were materially inaccurate for most of its customers and violated the Mortgage Advertising Practices (MAP) rule. The Bureau also found that the mortgage company provided inaccurate rate quotes for consumers with credit scores below 800. This resulted in higher costs, interest, and fees paid by these consumers.

Frequently, mortgage companies confront the question of how many of their customers or potential customers must qualify for an advertised rate for it to be "actually available" as required by Regulation Z. Although the Bureau's Order does not answer this question directly, it suggests that unless the rate is available to a ***majority*** of applicants, the lender should either refrain from advertising that rate ***or*** make it clear that the rate is available only to highly qualified borrowers.

Authorizations

Lenders are familiar with the prohibitions arising under both the Real Estate Settlement Procedures Act (RESPA) and the Truth in Lending Act (TILA) against charging a fee (other than a credit report fee) before providing a Good Faith Estimate (GFE) and early Truth in Lending disclosure and receiving an affirmative intent to proceed with the application. Lenders may, however, be surprised to learn that not only can they not charge any other fees, the CFPB's Order takes issue with placing a "hold" on a consumer's credit card.

The Order states:

By marking up the cost of credit reports and requiring appraisal fee credit or debit card authorizations before giving customers their first GFE and receiving an indication of the consumer's intention to proceed with a loan covered by the GFE, [company] violated RESPA, Regulation X and TILA, Regulation Z.

The CFPB's position is significant for lenders who are currently enhancing their policies and procedures

in preparation of the TILA/RESPA integration. The Order suggests that the CFPB's expectation is that not only should lenders expressly prohibit the charging of fees (other than for a credit report) before receiving an intention to proceed, they also should expressly prohibit the marking-up of a credit report fee and the "holding" of any amounts on a credit or debit card.

Mortgage Company Affiliates

The Order also states that the mortgage company maintained an affiliate relationship with an appraisal company and referred over 99% of its appraisals to its affiliate. Consumers were allegedly not allowed to shop for appraisal services.

The mortgage company, however, allegedly failed to disclose the affiliate nature of the relationship to consumers; and, in fact, provided disclosures that could arguably mislead consumers regarding the nature of the relationship:

"Appraisers do not work for [company]…they are an independent third party."
Based on their affiliated relationship, and the alleged failure to disclose such affiliation to consumers, the Bureau found that the mortgage company violated the anti-kickback prohibition under Section 8(a) of RESPA.

The mortgage company also allegedly made certain representations related to fees charged for an appraisal review fee. Although this fee was paid to the company's affiliates, the company allegedly made representations suggesting, inaccurately, that it did not receive any benefit from the fee: "[t]hese fees are not paid to [company]." The Order also alleges that the mortgage company suggested that consumers were receiving a beneficial price on the service: "[i]f a fee is guaranteed, this means that [company] has negotiated a special deal on your behalf for this fee," when, in fact, according to the Bureau, other lenders were charging much less for the appraisal review service.

The Bureau found that these statements constitute an unfair practice and mislead consumers regarding the nature of the fee that they pay for the appraisal review service. The Bureau also found that this practice violates the MAP rule's prohibition against misleading consumers about the nature or existence of fees on a mortgage loan.

Takeaways

This Order is yet another reminder that mortgage advertising and RESPA cases are appealing enforcement actions to the Bureau for a couple of reasons. First, these cases are often easier to bring than other types of enforcement actions because they frequently involve less intensive fact-gathering; and, for the CFPB, the link between alleged misconduct and consumer injury is frequently easier to allege. Second, RESPA cases are perhaps easier to explain to a fact finder than other consumer financial protection cases, as the concept of kickbacks and why they should be prohibited generally resonates with experts and non-experts alike.

Unlike most affiliated business cases, however, this case also provides insights into the Bureau's perspective on acceptable mortgage advertising practices and pre-application activities. Lenders and lead generators should take this opportunity to review their advertising relationships and be prepared for heightened scrutiny.

Finally, mortgage lenders should also ensure that, as part of their preparation for August 2015, they have clear policies and procedures related to their pre-application communications with applicants.
A copy of the CFPB's Consent Order is available **here**.

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Related Articles and Presentations

Below is a list of several relevant articles and presentations from our attorneys, which may be of assistance to your company in this environment of enhanced scrutiny.

To view any of these articles, alerts, or presentations, please click on the title.

Preparing for a CFPB Examination or Investigation (Article)

CFPB Compliance Myths That Deserve Debunking (Article)

Lessons from the FTC's Latest Lead Generation Enforcement Action (Article)

Are You Ready for the New Mortgage Landscape? (Article)

Advertising and Marketing Law Fundamentals for Consumer Financial Products and Services (Presentation)

The FTC's Revised .com Disclosures Guide: What Third Party Advertisers and

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What to Look for in 2014 – CFPB Regulatory Outlook (Recording and Presentation)

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CFPB and FTC Target Mortgage Advertising (Article)

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CFPB Issues Its Spring 2014 Supervisory Highlights Report with a Focus on Nonbank Examination Findings (Article)