

National Reverse Mortgage Lenders Association Presents The

2023

ANNUAL MEETING & EXPO

OCTOBER 23-25 NASHVILLE, TN

NRMLA

National Reverse Mortgage Lenders Association

Effective Strategies to Mitigate Government Investigation & Litigation Risk

- James Brodsky, Partner, Weiner Brodsky Kider PC
- Bob Niemi, Director of Government Affairs, Weiner Brodsky Kider PC
- Tim Ofak, Partner, Weiner Brodsky Kider PC
- Soroush Shahin, Partner, Weiner Brodsky Kider PC

October 24, 2023

State Examination Topics

- Routine Part of Supervisory Process
- Prevention of Enforcement Actions
- Preparation and Preparedness
- Knowledge and Experience

NRMILA

Supervisory Process

- Examinations are routine part of supervision
- Compliance with state and federal law
- Access to locations, records, financials and...
- Any other information that the regulator may require
- Examinations vary by examiner and state
- When it is not routine – targeted
- Multistate and concurrent examinations

Prevention of Enforcement Actions

- Routine review can lead to findings when noncompliance is found
- Noncompliance can lead to enforcement
- Consumer harm elevates the action
- Best practices for managing process
 - Webinar with State Examiners
 - Best Practices
- Communication and preparation are key

Knowledge and Experience

- Is your team experienced in examination response?
- Do you have defined roles, process and plan?
- Communication plan with 100% retention
- Check Pilot
- Mock examinations and planned responses
- Identify gaps and evolve process

Interfacing with State Examiners

- When speaking with examiners remember that these entities are your regulators and have the ability to bring enforcement actions
- Keep your responses factual and focused on the questions posed
- If the examiners are asking questions about whether errors were made, run your responses by either your in-house or outside counsel

State Enforcement Actions

- Lenders face enforcement from a number of directions (state regulators, state AGs, private litigation)
- Dodd-Frank Act authorizes states to bring actions under Consumer Financial Protection Act (CFPA)
 - Permits states to fill gaps in federal enforcement
- Enforcement of state UDAP statutes (“Baby FTC Acts”)
- Every state has a statute that prohibits deceptive practices
- States have started to create their own “mini-CFPBs,” enhance state consumer protection laws, and increase enforcement actions
 - NY DFS creating new Consumer Protection and Financial Enforcement Division

State Enforcement Actions

- State Trends
 - In addition to advertising, disclosures, and overcharges, states are investigating (and enforcing) many other types of violations:
 - Servicing
 - Unlicensed activity
 - LO Comp
 - State-specific rules
 - Data security is figuring in more examinations
 - State enforcement so far has focused on breach notice violations

On CFPB's Radar: RESPA § 8

- February 7, 2023 - Advisory Opinion on Digital Mortgage Comparison-Shopping Platforms
- August 17, 2023 - Consent Orders against Freedom Mortgage and Realty Connect
- September 1, 2023 - Affirms Continued Applicability of HUD's RESPA Guidance Documents:
 - RESPA Statement of Policy 1996-1, Regarding Computer Loan Origination Systems (CLOs) (June 7, 1996)
 - RESPA Statement of Policy 1996-2, Regarding Sham Controlled Business Arrangements (June 7, 1996)
 - RESPA Statement of Policy 1996-3, Rental of Office Space, Lock-outs, and Retaliation (June 7, 1996)
 - RESPA Statement of Policy 1996-4, Statement of Enforcement Standards: Title Insurance Practices in Florida (September 19, 1996)
 - RESPA Statement of Policy 1999-1, Regarding Lender Payments to Mortgage Brokers (March 1, 1999)
 - RESPA Statement of Policy 2001-1, Regarding Clarification of Statement of Policy 1999-1 Regarding Lender Payments to Mortgage Brokers, and Guidance Concerning Unearned Fees Under Section 8(b) (October 18, 2001)
 - RESPA: Home Warranty Companies' Payments to Real Estate Brokers and Agents Interpretive Rule (June 25, 2010)

RESPA § 8 Key Provisions & Terms

Section 8(a)

- Prohibits **giving *or* accepting** 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 will be referred** to any person

Section 8(b)

- Prohibits **giving *or* accepting** any portion/split/percentage of **any charge** made or received for the rendering of real estate settlement services in connection with a transaction involving a federally related mortgage loan **other than for services actually performed**

Section 8(c)(2)

- “**Nothing in this section shall be construed as prohibiting**...payment to any person of **bona fide salary or compensation** or other payment for goods or facilities actually furnished or for services actually performed”
 - ***Part 1: Goods and Services***
 - *Actual* = real
 - *Necessary & Distinct* = needed and not done elsewhere in transaction
 - ***Part 2: Reasonable Market Value***
 - Payment must commensurate with value of services and goods

“Referral”

- 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 to such service or business

“Thing of value”

- Includes any payment, service, or other consideration, such as monies, **things, discounts, salaries, commissions, fees**, duplicate payments of a charge, stock, distributions of partnership profits, the opportunity to participate in a money-making program, services of all types at **special or free rates, trips, payments of another person’s expenses**, etc.

Digital Mortgage Comparison-Shopping Platforms

- February 7, 2023: Advisory Opinion on Digital Mortgage Comparison-Shopping Platforms (“Platforms”)
- Defined as “**digital technology platforms** that enable consumers to comparison shop for mortgages and other real estate settlement services, **including platforms that generate potential leads . . . through consumers’ interaction with the platform”**
- RESPA Section 8 violation occurs when:
 - Platform **non-neutrally uses or presents info** about settlement service providers participating on the Platform;
 - The **non-neutral use or presentation of info** has the effect of steering consumers to use, or otherwise affirmatively influences the selection of, those settlement service providers (i.e., it **has the effect of making a “referral”** for RESPA purposes); and
 - Platform **receives payment for the referral activity** rather than for compensable goods or services
- If Platform **receives a higher fee** for including one settlement service provider compared to the fee received from another provider, the **higher payment can be evidence of an illegal referral fee arrangement** absent other facts indicating payment is not for enhanced placement/steering
- However, CFPB confirmed that online **lead generation that neutrally uses and presents info is a service** that settlement service providers can **legally pay for** under RESPA

Digital Mortgage Comparison-Shopping Platforms

- What is non-neutral *use* of information?
 - Manipulation or biasing of the inputs or formulas the operator employs to generate the comparison options before they are presented to the consumer
- What is non-neutral *presentation* of information?
 - Visual presentation of information that sets apart certain providers from others
- Don't forget about UDAAP!
- Takeaways
 - Due diligence
 - Review Platforms on a periodic basis
 - Run sample searches
 - Check your agreement with the vendor

Freedom Mortgage & Realty Connect Consent Orders

- August 17, 2023: Consent orders against Freedom Mortgage and Realty Connect
- **Penalties**
 - Freedom Mortgage- \$1.75MM
 - Realty Connect-\$200K
- **Lender's RESPA Section 8 violations:**
 - Lender paid for several subscription services for real estate agents and brokers
 - Hosted and subsidized events for real estate agents and brokers
 - Gave real estate agents free tickets to sporting events, charity galas, and other events
 - Improper MSAs
 - MSAs structured as B2B- lender was marketed to real estate agents rather than to general public
 - Encouraged MSA partners to use third-party smartphone app (that were shared with consumers) that featured lender's logo, lender's MLOs' headshots, and buttons to contact lender's MLOs directly
 - Tracked referrals for MSAs
 - Improper co-marketing arrangements
 - Payments for marketing services bore no reasonable relationship to FMV of services actually performed
- **Takeaways**

Marketing Services Agreements (MSAs)

- Although historically risky, MSAs can be permissible under RESPA Section 8 as long as they are structured properly

Best Practices

- Agreement should provide **details on marketing activities** to be performed
- Pay **FMV** for **compensable** marketing services
- Avoid listing/paying for **access** and other **non-compensable services**
- Marketing activities should be **directed to general public**
- Ongoing **monitoring and oversight** (e.g., confirm services were actually provided)
- **No endorsements**
- Try to **limit the number of RESPA-implicated arrangements** with same counterparty

Co-Marketing Arrangements

- Co-marketing arrangements are also permitted under RESPA Section 8 if structured properly

Do's

- **Do** create and implement **policies/procedures/guidelines** that detail how the arrangements will be conducted
- **Do** ensure that each co-marketing party pays its **pro rata share of the marketing**
- **Do** conduct **sufficient due diligence & ongoing oversight/monitoring**
- **Do** maintain & document **reasonable procedures to calculate joint marketing charges &/or create a standardized rate sheet** that represents FMV for such marketing, & apply procedures **consistently** to all joint marketing parties

Don'ts

- **Don't** **defray/discount expenses** that **otherwise would be incurred** by persons in a **position to refer** settlement services or business (e.g., if both parties represented 50/50 in single ad & one pays more than ½ of the advertising expense)
- **Don't** require or allow any co-marketing party to **endorse you** and vice versa
- **Don't** allow one party to serve in a “**gatekeeper**” function in dealing with 3rd-party marketing service provider (i.e., when one party has access to a platform & can “invite” others to advertise w/ provider on platform (when could not have otherwise used platform)) → function/invitation = “**thing of value**”
- **Don't** **perform services** for the other co-marketing party **outside of the terms of the agreement**

Promotional & Educational Activities

- **Narrow exception**, but Reg. X expressly provides that RESPA Section 8 permits “[n]ormal promotional and educational activities that are not conditioned on the referral of business and that do not involve the defraying of expenses that otherwise would be incurred by persons in a position to refer settlement services or business incident thereto.”

Two Conditions:

1. **The activities are not conditioned on referral of business**
 - Are the items or activities narrowly targeted to referral sources or broader group of recipients?
 - How often are the items or activities given to a referral source?
2. **The activities do not involve defraying expenses that otherwise would be incurred by the referral source**
 - Does the item or activity involve a good or service the referral source would otherwise have to pay for themselves?

Best Practices

- Develop and implement **specific policies and procedures**
- Avoid directing activities to **the same referral sources on frequent basis**
- Ensure item or activity **does not defray expenses**
- If you are going to provide items, **distribute items with your name/logo and avoid giving expensive items**
- If you are going to host events, **avoid holding events for only referral sources that have given you referrals and make sure the event is not too extravagant**

Lead Purchases/Sales

Leads vs referrals

- **Lead** = basic info about person who may be interested in purchasing your product; **purchasing info & working the lead yourself** – winning own business
- **Referral** involves any action directed to a consumer that **affirmatively influences consumer to select you**
- HUD's prior informal guidance on permissibility of purchasing customer lists or leads:
 - “Our answer historically has been that there is **no objection** to such payment, **so long as the payment is for the use of the list and is not further conditioned upon the number of closed transactions** resulting from that list, **or on any other consideration, such as an endorsement** of the product being offered by the seller of the list.”

Best Practices

- Pay **flat dollar amount on per lead basis** (not per application/closed loan)
- Fees **reasonable** in relation to **value of lead** (not of resulting loan)
- Retain **documentation** of the arrangement (e.g., evidence of leads actually purchased, including invoices, and justification of the value of such leads)
- **Due diligence**
 - **No endorsement** by lead provider
 - For leads purchased from Digital Mortgage Comparison- Shopping Platforms, make sure they **neutrally use and present information**

False Claims Act: Elements

The FCA imposes liability on one who "knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval," or "knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim."

Four Elements:

1. a false statement or fraudulent course of conduct,
2. made knowingly and intentionally,
3. that was material,
4. causing the government to pay out moneys due.

Six year statute of limitations; 10 year statute of repose.

- *Cochise Consultancy Inc. v. United States, ex rel. Hunt* (May 13, 2019)

Origins of False Claims Act Cases

Whistleblower

- FCA allows a “relator” to file a complaint on behalf of the United States.
- Whistleblower complaints filed under seal (“*qui tam*”).
- Government must investigate and decide whether to intervene.

Independent Investigation

- DOJ can investigate FCA on their own, or as part of a broader case.

Referrals

- Referrals to DOJ from other government agencies.
- FHA cases often involve referral from HUD’s Inspector General

Theories Giving Rise to FCA Liability

Factually False Claims: “[A]n incorrect description of goods or services provided, or a request for reimbursement for goods or services never provided.” *U.S. ex. rel. Mikes v. Straus*, 274 F.3d 687, 697 (2d Cir. 2001).

Legally False Claims

- (1) Express False Certification: an outright statement expressing compliance with a regulation/condition when submitting the claim.
- (2) Implied False Certification: no direct statement – claimant impliedly certifies compliance simply by submitting the claim for payment.

Fraudulent Inducement/Promissory Fraud: Original contract with government was obtained through false statements or fraudulent conduct.

Theories can overlap. See *U.S. ex rel. Campie v. Gilead*, 862 F.3d 890 (9th Cir. 2017).

Universal Health Servs. v. United States (Escobar), 136 S. Ct. 1989 (2016)

- 2016 Supreme Court case set forth a heightened materiality standard that is “demanding.”
- *Escobar* did not deal with FHA loans, but still controls in the context of all implied certification cases.
- The heightened materiality standard should also apply to promissory fraud.

Escobar Materiality

- “A misrepresentation cannot be deemed material merely because the Government designates compliance with a particular statutory, regulatory, or contractual requirement as a condition of payment. Nor is it sufficient for a finding of materiality that the Government would have the option to decline to pay if it knew of the defendant’s noncompliance.”
- Noncompliance cannot be “minor or insubstantial.”
- Must be material to the Government’s “decision to pay.”

Escobar Summary (Defense Perspective)

- Implied certification theory for FHA False Claims is rigorous and demanding.
- *Escobar's* heightened materiality standard requires loan-level violations and loan-level evidence related to payment.
- Minor HUD Handbook and Mortgagee Letter violations may not meet the materiality threshold.
- Government's knowledge and continued payment for FHA insurance claims is relevant to materiality analysis. *See, e.g., Ruckh v. Salus Rehab.*

The Granston Memo – FCA Dismissal

The government may choose to intervene in a *qui tam*, or it can dismiss the action, even over the objection of the relator. 31 U.S.C. § 3730(c)(2)(A). Granston memo (January 10, 2018) gave factors to consider for dismissal:

- Curbing Meritless *Qui Tams*
- Preventing Parasitic or Opportunistic *Qui Tams*
- Preventing Interference with Agency Policies/Programs
- Controlling Litigation Brought on Behalf of United States
- Safeguarding Classified Information
- Preserving Government Resources
- Addressing Egregious Procedural Errors



Questions?