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BUREAU OF CONSUMER FINANCIAL PROTECTION

12 CFR Part 1024

Real Estate Settlement Procedures Act (Regulation X); Digital Mortgage Comparison-Shopping Platforms and Related Payments to Operators

AGENCY: Bureau of Consumer Financial Protection.

ACTION: Advisory opinion.

SUMMARY: The Consumer Financial Protection Bureau (CFPB) is issuing this Advisory Opinion to address the applicability of the Real Estate Settlement Procedures Act (RESPA) section 8 to operators of certain digital technology platforms that enable consumers to comparison shop for mortgages and other real estate settlement services, including platforms that generate potential leads for the platform participants through consumers' interaction with the platform (Digital Mortgage Comparison-Shopping Platforms). Generally, this Advisory Opinion describes how an operator of a Digital Mortgage Comparison-Shopping Platform violates RESPA section 8 if the platform provides enhanced placement or otherwise steers consumers to platform participants based on compensation the platform operator receives from those participants rather than based on neutral criteria. More specifically, this Advisory Opinion states that an operator of a Digital Mortgage Comparison-Shopping Platform receives a prohibited referral fee in violation of RESPA section 8 when: the Digital Mortgage Comparison-Shopping Platform non-neutrally uses or presents information about one or more settlement service providers participating on the platform; 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 the operator receives a payment or other thing of value that is, at least in part, for that referral activity. Furthermore, if an operator of a Digital Mortgage Comparison-Shopping Platform receives a higher fee for including one settlement service provider compared to what it receives for including other

settlement service providers participating on the same platform, that can be evidence of an illegal referral fee arrangement absent other facts indicating that the payment is not for enhanced placement or other form of steering.

DATES: This advisory opinion is effective on [INSERT DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

FOR FURTHER INFORMATION CONTACT: Brandy Hood, Joan Kayagil, or Michael G. Silver, Senior Counsels, Office of Regulations, at (202) 435-7700 or https://reginquiries.consumerfinance.gov/. If you require this document in an alternative electronic format, please contact *CFPB_Accessibility@cfpb.gov*.

SUPPLEMENTARY INFORMATION: The Bureau is issuing this Advisory Opinion through the procedures for its Advisory Opinions Policy.[1] Please review those procedures for more information.

I. Advisory Opinion

A. Background

1. RESPA Section 8

The Real Estate Settlement Procedures Act (RESPA)[2] provides a series of protections for consumers who are engaged in the process of buying a home, applying for or closing on a mortgage, making escrow payments, or purchasing other services associated with most residential real estate transactions.[3] RESPA section 8(a)[4] provides that no person[5] shall give and no person shall accept any fee, kickback, or thing of value[6] pursuant to any agreement or understanding,[7] oral or otherwise, that business incident to or a part of a real estate settlement

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[1] 85 FR 77987 (Dec. 3, 2020).
[2] 12 U.S.C. 2601 *et seq.*
[3] *See generally* 12 U.S.C. 2601 *et seq.* and Regulation X, 12 CFR part 1024. Certain RESPA and Regulation X provisions address mortgage servicing and escrow issues (*e.g.*, 12 U.S.C. 2605), which are not the subject of this Advisory Opinion.
[4] 12 U.S.C. 2607(a). Regulation X, 12 CFR 1024.14(b), implements RESPA section 8(a)'s prohibition.
[5] *See* 12 U.S.C. 2602(5) (statutory definition of "person").
[6] *See* 12 CFR 1024.14(d) (regulatory definition of "thing of value").
[7] *See* 12 CFR 1024.14(e) (regulatory definition of "agreement or understanding").

service[8] involving a federally related mortgage loan[9] shall be referred[10] to any person. While RESPA section 8(a) prohibits referral fees, RESPA section 8(c) provides that bona fide payments for goods or facilities provided or services rendered (which do not include payments for referral fees) are not prohibited by RESPA section 8.[11]

RESPA and its implementing Regulation X[12] have been in effect for nearly a half century. One of the reasons for RESPA's enactment in 1974 was congressional concern over excessive settlement costs. Congress found that "significant reforms in the real estate settlement process are needed to insure that consumers throughout the Nation . . . are protected from unnecessarily high settlement charges caused by certain abusive practices that have developed in some areas of the country."[13] Among the RESPA statutory purposes is the "elimination of kickbacks or referral fees that tend to increase unnecessarily the costs of certain settlement services."[14] Congressional committee reports noted that kickbacks for the referral of settlement service business were a common practice in the real estate industry and cited payments for referrals of settlement services as a factor in the inflated prices for those services.[15]

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[8] *See* 12 CFR 1024.2(b) (defining settlement service as "any service provided in connection with a prospective or actual settlement" and providing 15 non-exhaustive examples). The regulatory definition is based on the broad statutory definition of settlement services in 12 U.S.C. 2602(3).

[9] 12 U.S.C. 2602(1). As the TILA-RESPA Integrated Disclosure rule summarized, a federally related mortgage loan "is broadly defined to encompass virtually any purchase money or refinance loan, with the exception of temporary financing, that is 'secured by a first or subordinate lien on residential real property (including individual units of condominiums and cooperatives) designed principally for the occupancy of from one to four families.'" 78 FR 79730, 79736 (Dec. 31, 2013) (quoting 12 U.S.C. 2602(1)). The term federally related mortgage loan also includes certain other loans, such as reverse mortgages and home equity loans and lines of credit, that meet the other criteria of the definition.

[10] *See* 12 CFR 1024.14(f) (regulatory definition of "referral").

[11] 12 U.S.C. 2607(c)(2) ("Nothing in this section shall be construed as prohibiting . . . the payment to any person of a bona fide salary or compensation or other payment for goods or facilities actually furnished or for services actually performed"); *accord* 12 CFR 1024.14(g)(1)(iv) ("Section 8 of RESPA permits . . . [a] payment to any person of a bona fide salary or compensation or other payment for goods or facilities actually furnished or for services actually performed . . . .").

[12] 12 CFR part 1024.

[13] 12 U.S.C. 2601(a).

[14] 12 U.S.C. 2601(b)(2).

[15] *See* H.R. Rep. No. 93-1177, at 7 (1974) and S. Rep. No. 93-866, at 6 (1974) (providing examples where the payment or other thing of value furnished by the person to whom the settlement business is referred tended to increase the cost of settlement services without providing any benefits to the homebuyer, and noting that "[w]hile the making of such payments may heretofore have been necessary from a competitive standpoint in order to obtain or retain business, and in some areas may even be permitted by state law, it is the intention of [this] section . . . to prohibit such payments, kickbacks, rebates, or unearned commissions").

Further, Congress in 1983 amended RESPA to permit what are now called affiliated business arrangements subject to certain conditions.[16] In doing so, Congress recognized that settlement service providers engage in reverse competition for their business—that is, they do not compete for a consumer's business directly, but rather compete for and almost exclusively rely on referrals from, e.g., real estate brokers or lenders—and that this dynamic can have deleterious effects on consumers and markets beyond higher settlement costs.[17] One court, citing the legislative and regulatory history concerning the affiliated business arrangement provisions, noted that "RESPA's overarching goal" was to "mitigat[e] market-distorting practices."[18] Consistent with the notion that RESPA section 8 addresses consumer harms beyond settlement cost increases, Regulation X provides that a RESPA section 8 violation can occur even if the consumer's settlement costs do not increase.[19]

2. Digital Mortgage Comparison-Shopping Platforms

RESPA section 8 applies broadly, and in many circumstances covers conduct by persons who connect settlement service providers to consumers who may be interested in purchasing a home, applying for a mortgage, or otherwise using a settlement service provider in a RESPA-covered transaction. This may include selling the consumer's contact information (i.e., leads) to settlement service providers. Leads are increasingly sold through a variety of digital platforms and related business agreements.

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[16] Housing and Urban-Rural Recovery Act of 1983, Pub. L. 98-181, section 461, 97 Stat. 1155, 1230 (1983) (codified as amended at 12 U.S.C. 2607(c)(4)).

[17] As explained in a House Committee Report: "[T]he advice of a person making the referral may lose its impartiality and may not be based on his professional evaluation of the quality of service provided if the referror or his associates have a financial interest in the company being recommended." H.R. Rep. No. 97-532, at 52 (1982). The 1983 RESPA amendments addressed questions following RESPA's enactment about "the legality of more sophisticated transactions where . . . there was a less obvious causal link between the referral and the payment." *Minter v. Wells Fargo Bank, N.A.*, 274 F.R.D. 525, 536 (D. Md. 2011). This arose most frequently within the context of what were then called "controlled business arrangements" where "one provider of one settlement service maintained an enhanced relationship with a second provider of a different settlement service, through which each service provider captured the clients of the other." *Id.*

[18] *Id.* at 538-39; *see also Baehr v. Creig Northrop Team*, 953 F.3d 244, 253-56 & n.7 (4th Cir. 2020) (finding that "deprivation of impartial and fair competition between settlement services providers" was not sufficient to confer standing on a private litigant under RESPA section 8's statutory purposes in absence of increased settlement costs, but noting that increased settlement costs were not a requirement for a statutory violation and that governmental entities are not bound to the same standing constraints as private litigants).

[19] *See* 12 CFR 1024.14(g)(2) ("The fact that the transfer of the thing of value does not result in an increase in any charge made by the person giving the thing of value is irrelevant in determining whether the act is prohibited.").

In particular, some digital platforms are structured as consumer-facing websites or online applications that allow consumers to search for and compare options for mortgages or other settlement services.[20] These digital platforms—in some cases called "online marketplaces"—can facilitate a consumer's choice among alternative products or settlement service providers and may be operated by settlement service providers or third parties.[21] Through their interaction with these digital platforms, consumers often provide their contact information to set up an account, and sometimes they may provide additional information that is typically part of a mortgage application or fill out an online long form. The platform operator then purports to use the consumer's information to help the consumer compare a range of options to find a suitable lender or other settlement service provider that the consumer can contact. The platforms typically will generate leads for the participating lender or other settlement service provider by facilitating the consumer's click-through to the website of the participating provider, selling the consumer's contact information to the provider, or both. The comparison information may be presented to the consumer viewing the platform in a static or interactive format. In the latter case, the platform may give consumers the ability to sort the options or rankings based on different criteria or to customize the presentation of options or rankings based on factors they can select (sometimes after default options or rankings are presented). Digital platforms may also combine online marketplace and lead generation activities with other services, such as advertising to consumers.

This Advisory Opinion focuses on digital platforms that include information or features that enable consumers to comparison shop options for mortgages and other settlement services, including those platforms that generate potential leads for the platform participants through

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[20] *See* Rory Van Loo, *Rise of the Digital Regulator*, 66 Duke L.J. 1267, 1281 (2017) (describing how "digital intermediaries" can list mortgage options from specific financial institutions, permit consumers to use mortgage calculators, or allow consumers to input information to generate a response as to whether they should refinance).
[21] *See* Miriam Cross, *Bank comparison sites recast themselves, with celeb help and new services*, Am. Banker (Aug. 9, 2022) (describing how "[o]nline marketplaces have revamped their branding or adapted their strategy over the course of the pandemic to maintain financial institution partnerships and meet new customer needs" and noting that "[b]anks and lenders are closely intertwined with these platforms").

consumers' interaction with the platform (Digital Mortgage Comparison-Shopping Platforms). Digital Mortgage Comparison-Shopping Platforms generally are covered by a 1996 policy statement issued by the Department of Housing and Urban Development (HUD) on "computer loan origination systems," or CLOs (HUD CLO Policy Statement),[22] which the CFPB has applied, as relevant, since 2011, when Congress transferred responsibility for RESPA to the CFPB from HUD.[23]

3. HUD CLO Policy Statement

The HUD CLO Policy Statement defined a CLO as "a computer system that is used by or on behalf of a consumer to facilitate a consumer's choice among alternative products or settlement service providers in connection with a particular RESPA-covered real estate transaction" and gave seven examples of CLO system functions.[24] The description of CLOs in the HUD CLO Policy Statement was "not meant to be restrictive or exhaustive" and "merely attempt[ed] to describe existing practices of service providers," and the HUD CLO Policy Statement elaborated that with the "use of technology evolving so rapidly," it is difficult "to

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[22] HUD, *RESPA Statement of Policy 1996–1, Regarding Computer Loan Origination Systems (CLOs)*, 61 FR 29255 (June 7, 1996). The HUD CLO Policy Statement was issued as part of a broader set of HUD regulations and interpretations that addressed employer-to-employee payments. *See* 61 FR 29238 (June 7, 1996). Because some of these regulations and interpretations were never finalized, *see* 61 FR 58472 (Nov. 15, 1996), certain aspects of the HUD CLO Policy Statement not relevant to this Advisory Opinion—for example, section 4, addressing "Payments of Commissions or Bonuses to Employees"—were not made effective by HUD and would not be applied by the CFPB. *See id.* at 58473.

[23] *See* 12 U.S.C. 5581(b)(7). When the CFPB assumed jurisdiction over the enumerated consumer laws in the Dodd-Frank Act on the designated transfer date, it issued a rule identifying the enforceable rules and orders from transferor agencies. The preamble to that rule explained that "official commentary, guidance, and policy statements" previously issued by transferor agencies with exclusive rulemaking authority over the law in question, including RESPA, "will be applied by the CFPB pending further CFPB action." 76 FR 43569, 43570 (July 21, 2011) (Transfer of Authorities Rule). The CFPB also wrote that it "will seek over time to improve the clarity and uniformity of guidance regarding the laws it will administer as necessary . . . to facilitate compliance with the Federal consumer financial laws." *Id.* Although the CFPB considers this Advisory Opinion to be "further CFPB action" as such term was used in the Transfer of Authorities Rule, this Advisory Opinion is intended to supplement the HUD CLO Policy Statement, rather than supersede it. The CFPB will continue to apply the HUD CLO Policy Statement, as relevant, pending further CFPB action.

[24] 61 FR 29255, 29256 (June 7, 1996) ("Such a computer system: (1) may provide information concerning products or services; (2) may pre-qualify a prospective borrower; (3) may provide consumers with an opportunity to select ancillary settlement services; (4) may provide prospective borrowers with information regarding the rates and terms of loan products for a particular property in order for the borrower to choose a loan product; (5) may collect and transmit information concerning the borrower, the property, and other information on a mortgage loan application for evaluation by a lender or lenders; (6) may provide loan origination, processing, and underwriting services, including but not limited to, the taking of loan applications, obtaining verifications and appraisals, and communicating with the borrower and lender; and (7) may make a funding decision.").

provide guidance on future unspecified practices in the abstract."[25] Based on the HUD CLO Policy Statement's description of CLOs, which expressly left room for platform evolution, Digital Mortgage Comparison-Shopping Platforms are a type of CLO.[26] Further, for clarity, this Advisory Opinion sometimes refers to the person that receives payment from participants on a Digital Mortgage Comparison-Shopping Platform as the "Operator."[27]

The HUD CLO Policy Statement noted that settlement service providers "may pay CLOs a reasonable fee for services provided by the CLO to the settlement service provider, such as, having information about the provider's products made available to consumers for comparison with the products of other settlement service providers."[28] Moreover, "if a CLO lists only one settlement service provider and only presents basic information to the consumer on the provider's products, then there would appear to be no or nominal compensable services provided by the CLO to either the settlement service provider or the consumer, only a referral"; thus, "any payment by the settlement service provider for the CLO listing could be considered a referral fee in violation of section 8 of RESPA."[29] The HUD CLO Policy Statement, further, noted that "favoring one settlement service provider over others may be affirmatively influencing the selection of a settlement service provider" and that "if one lender always appears at the top of any listing of mortgage products and there is no real difference in interest rates and charges between the products of that lender and other lenders on a particular listing, then this may be a non-neutral presentation of information which affirmatively influences the selection of a settlement service provider."[30] The HUD CLO Policy Statement also noted that the statement

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[25] *Id.*

[26] The CFPB recognizes that the platforms will continue to evolve as technology and business arrangements continue to evolve. Thus, similar to the HUD CLO Policy Statement's approach when defining the term CLO, the CFPB intends the term Digital Mortgage Comparison-Shopping Platform to be flexible and non-exhaustive.

[27] For purposes of this Advisory Opinion, a payment or other thing of value would be considered to be received from a settlement service provider participating on a Digital Mortgage Comparison-Shopping Platform even if it is provided to the Operator by another person on behalf of the participating provider, rather than directly by the participating provider.

[28] 61 FR 29255, 29257 (June 7, 1996).

[29] *Id.* at 29256. Depending on the facts and circumstances, such a payment could also violate RESPA section 8(b), which prohibits splitting charges made or received for settlement services, except for services actually performed, in connection with a federally related mortgage loan. *See* 12 U.S.C. 2607(b), 12 CFR 1024.14(c).

[30] 61 FR 29255, 29258 (June 7, 1996).

"should not be read to discourage CLOs from assisting consumers in determining which products are most advantageous to them" and that if, for example, "a CLO consistently ranks lenders and their mortgage products on the basis of some factor relevant to the borrower's choice of product, such as APR [annual percentage rate] calculated to include all charges and to account for the expected tenure of the buyer, HUD would consider this practice as a neutral display of information."[31]

The HUD CLO Policy Statement further noted that "if a CLO charges different fees to different settlement service providers in similar situations, an incentive may exist for the CLO to steer the consumer to the settlement service provider paying the highest fees," which could lead to RESPA violations.[32] HUD's concern over 26 years ago about steering was both compelling and prescient. Based on the evolution of business arrangements and technology platforms, the CFPB's market monitoring, and regulator activity, the CFPB understands that operators of Digital Mortgage Comparison-Shopping Platforms and participating settlement service providers in some cases may be engaging in activities that violate RESPA section 8.

In this Advisory Opinion, the CFPB is addressing, as a general matter, certain circumstances in which payments received by Operators from settlement service providers for participating on Digital Mortgage Comparison-Shopping Platforms violate RESPA section 8. This Advisory Opinion also identifies additional, illustrative examples of Digital Mortgage Comparison-Shopping Platforms that involve RESPA section 8 violations. The CFPB, finally, briefly discusses the potential applicability of other consumer-protection laws and regulations.

B. Scope of Coverage

This Advisory Opinion applies to any "person" to which RESPA section 8's prohibitions apply. RESPA defines "person" to include individuals, corporations, associations, partnerships, and trusts.[33] RESPA does not apply to extensions of credit to government or governmental

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[31] *Id.*
[32] *Id.* at 29257.
[33] 12 U.S.C. 2602(5).

agencies or instrumentalities.[34] It also does not apply to extensions of credit primarily for business, commercial, or agricultural purposes.[35]

C. Legal Analysis

1. Interpretation of RESPA Section 8

An operator of a Digital Mortgage Comparison-Shopping Platform receives a prohibited referral fee in violation of RESPA section 8 when: (1) the Digital Mortgage Comparison-Shopping 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 Operator receives a payment or other thing of value that is, at least in part, for that referral activity. By non-neutrally using or presenting information, the Operator impedes the consumer's ability to engage in meaningful comparison of options and, instead, preferences certain options over others or presents options for reasons other than presenting them based on neutral criteria such as APR, objective consumer satisfaction information, or factors the consumer selects for themselves to rank or sort the settlement service providers on the platform.[36] In these instances, the payment received by the Operator for such preferences or presentation of options is not merely for compensable services; instead, it is, at least in part, for referral activity.[37] Further,

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[34] 12 U.S.C. 2606(a)(2).

[35] 12 U.S.C. 2606(a)(1). Regulation X, 12 CFR 1024.5, provides additional limits on the coverage of RESPA.

[36] *See* 61 FR 29255, 29258 (June 7, 1996). Although these are examples of information that Operators may be using or presenting with regard to Digital Mortgage Comparison-Shopping Platforms in today's market, the Bureau emphasizes that this Advisory Opinion implicates the *manner* in which an Operator uses and presents information, not *what* information an Operator must or must not use or present. Moreover, the CFPB notes that presenting comparable options based on neutral criteria (e.g., listing lenders with the lowest to highest APR in ascending order) would be a neutral presentation of information.

[37] The CFPB is aware that some Digital Mortgage Comparison-Shopping Platforms contain certain disclosures addressing how the participating settlement service providers' information is used and presented. While it may be a best practice for an Operator to disclose clearly and prominently how it is using and presenting the information of platform participants—for compliance with the prohibition on unfair, deceptive, or abusive acts or practices (UDAAPs), 12 U.S.C. 5531, 5536(a)(1)(B), or for other reasons—a disclosure would not, absent other facts, turn a directed action that has the effect of affirmatively influencing into one that does not. Unlike RESPA section 8(c)(4)—where giving a disclosure along with meeting other specified conditions would allow for referrals to be

when the Operator receives a higher fee for including one settlement service provider than it receives for including other settlement service providers participating on the same platform, that can be evidence of an illegal referral fee arrangement, absent other facts indicating that the payment is not for enhanced placement or other form of steering; see further explanation and illustrative examples below.

a. RESPA section 8(a)

When a Digital Mortgage Comparison-Shopping Platform Operator non-neutrally uses or presents information and that has the effect of steering the consumer to use, or otherwise affirmatively influences the selection of, a settlement service provider, the Operator is making a referral. Under Regulation X, the term "referral" is defined as "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 in whole or in part to such settlement service or business."[38] Steering is a form of referral because it is an action directed to a person[39] that exerts affirmative influence.[40]

The Operator can steer or otherwise affirmatively influence the consumer to select certain platform participants by non-neutrally *using* information to generate the comparison options.

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made and a return on an ownership interest or franchise relationship to be received under the ambit of an affiliated business arrangement—a disclosure does not cure what would otherwise be a RESPA section 8(a) or 8(b) violation. *See HUD RESPA Statement of Policy 1999–1 Regarding Lender Payments to Mortgage Brokers*, 64 FR 10080, 10087 (Mar. 1, 1999) ("[D]isclosure alone does not make illegal fees legal under RESPA.").

[38] 12 CFR 1024.14(f)(1). To qualify as a "referral," the oral or written action at issue need not be directed to a person that is a consumer. Rather, it might be directed to a variety of persons, such as appraisers, real estate agents, title companies and agents, lenders, mortgage brokers, or other companies that provide information in connection with settlements, such as credit reports and flood determinations. *See* 12 CFR 1024.14(b) and (f).

[39] Based on the CFPB's understanding of how consumers interact with Digital Mortgage Comparison-Shopping Platforms in the market today, the Operator will typically take action that is "directed to a person." For example, if the consumer makes a request of the platform to run a search of comparison options, sort the comparison options into different categories, or use the consumer's preferences to generate or refine the comparison options, the Operator's response to the consumer's request is an action "directed to a person," i.e., the consumer. 12 CFR 1024.14(f)(1).

[40] *See Wilborn v. New Century Mortg. Corp.*, No. C 08-5044 JL, 2009 WL 10695188, at *6 (N.D. Cal. Apr. 29, 2009) (noting that RESPA section 8 in general ensures that "fees or commissions are not kickbacks for steering business to a particular lender"); Paul Barron et al., 1 *Fed. Reg. of Real Estate & Mortgage Lending* section 2:51 (4th ed. Sept. 2022 update) (treatise excerpt explaining that the HUD CLO Policy Statement reflects HUD's concern that "i[f] there is steering, the implication is that the settlement service provider to whom the consumer is steered is paying a referral fee").

Non-neutral use of information involves manipulation or biasing of the inputs or formula that the Operator employs to generate the comparison options before they are presented to the consumer. This can happen in a variety of ways. For example, some Digital Mortgage Comparison-Shopping Platforms allow consumers to generate comparison options based on purportedly objective criteria specified by the Operator (e.g., lower interest rate, superior customer service). In this scenario, the Operator would non-neutrally use information if it were to set the formula to boost the rankings of lenders who pay more to participate on the platform by, behind the scenes, excluding or placing low weight on the purportedly objective comparison criteria that would otherwise favor the lower-paying provider. Another example involves a platform that seeks—and purports to incorporate into the formula used to generate comparison results—the consumer's preferences regarding the factors that are most important to them in choosing a settlement service provider. In that scenario, the Operator could manipulate the formula to favor certain participating providers by declining to honor the consumer's preferences or unwarrantedly placing weight on inaccurate information about the provider (e.g., giving credit in the formula to a lender for more favorable interest rates that the Operator knows are outdated, which ensures that lender will have a higher ranking under the formula).

The Operator also can steer or otherwise exert affirmative influence by non-neutrally *presenting* information about comparison options to the consumer while the consumer is interacting with a Digital Mortgage Comparison-Shopping Platform.[41] The Operator could do this in several ways, including through subtle actions that bias the presentation for the consumer. For example, an Operator could provide the names and telephone numbers of all participating providers but only provide weblinks for a subset of higher-paying providers. Alternatively, the Operator might list the lenders that pay more to the Operator on the first page and rank them by

[41] The CFPB emphasizes that the distinction between non-neutral *use* and *presentation* of information is not binary. For example, Digital Mortgage Comparison-Shopping Platforms with more interactive elements—where consumers can sort options by different categories, indicate preferences which will affect the generation of comparison options, or generate multiple sets of comparison options—will involve both the use and presentation of information, often in rapid succession. The distinction is intended to elucidate the legal interpretation rather than suggest that there is a rigid delineation as an operational or practical matter.

interest rate—so the platform appears to have ranked *all* participants by that factor—while at the same time showing on the second page other participants with the same or lower interest rates but that pay less to the Operator. Another example is if an Operator: permits a consumer to generate a presentation of ranked lender options; receives a higher fee if the consumer clicks on the top-ranked lender compared with the other lenders; and segregates and highlights prominently the top-ranked option but presents the other options in very small font requiring the consumer to scroll down.[42] Another example is if the Operator labels a lender that appears within, and at or near the top of, the platform's rankings as a "sponsored lender," "featured lender," or similar phrase because the lender has paid for enhanced placement, but nonetheless designs the platform and displays the lender in a manner that implies the lender earned its placement within the platform's rankings based on neutral criteria. Alternatively, the Operator could list the same participant who has paid for enhanced placement multiple times in the rankings, using either the same name or an affiliated name. Another example would be where a consumer visits a Digital Mortgage Comparison-Shopping Platform and runs an initial search of comparison options which yields a "top-ranked lender" and other lenders, but when revisiting the platform, the consumer only sees that "top-ranked" lender based on the Operator and lender's agreement to show only that lender when the consumer revisits the platform. This action prevents the consumer from using the platform for comparison shopping based on neutral criteria and boosts the likelihood the consumer will choose that lender over other options.

Through all these actions, the Operator non-neutrally presents information to increase the odds that the consumer will select the lender who pays more, as opposed to other options that are similarly suitable or even better for the consumer. The HUD CLO Policy Statement recognized that these types of non-neutral presentations (which it sometimes called "non-neutral displays") of information on a CLO platform may constitute a referral.[43] The illustrative examples in

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[42] *See* 61 FR 29255, 29257 (June 7, 1996).
[43] *See id.* at 29258.

section I.C.2 of this Advisory Opinion highlight other ways in which an Operator non-neutrally uses or presents information.

By non-neutrally using or presenting information on a Digital Mortgage Comparison-Shopping Platform, the Operator is putting a thumb on the scale. Consequently, the Operator is no longer merely providing the most basic function of a Digital Mortgage Comparison-Shopping Platform, which was identified in the HUD CLO Policy Statement—"having information about the provider's products made available to consumers for comparison with the products of other settlement service providers."[44] Instead, the Operator is receiving payment for steering or otherwise affirmatively influencing the consumer, which constitutes a referral. This activity could also potentially implicate the Dodd-Frank Act's prohibition on unfair, deceptive, or abusive acts or practices (UDAAPs).[45]

In addition to the element of referral, a RESPA section 8(a) violation occurs when two other elements are present: a thing of value, and an agreement or understanding. Thing of value is defined in Regulation X broadly and non-exhaustively.[46] The term "thing of value" would include payments received by the Operator under a contractual agreement for the settlement service provider to participate on the platform where referrals are being generated for the settlement service provider. Furthermore, if the settlement service provider receives enhanced, non-neutral placement on a Digital Mortgage Comparison-Shopping Platform, there presumably would be an express agreement or understanding to pay for that enhanced placement. Even if there is not such an express agreement or understanding for the enhanced placement, because the Operator is providing the participating settlement service providers with access to a Digital Mortgage Comparison-Shopping Platform that non-neutrally uses or presents information and results in steering or other affirmative influence (as discussed above), it is likely that an

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[44] *Id.* at 29257.
[45] 12 U.S.C. 5531, 5536(a)(1)(B).
[46] *See* 12 CFR 1024.14(d); *see also Edwards v. First Am. Corp.*, 798 F.3d 1172, 1179 (9th Cir. 2015) ("[A]n exchange of a 'thing of value' is used as synonymous with a payment and does not require a transfer of money.").

agreement or understanding for referrals can be established under Regulation X through a pattern, practice, or course of conduct.[47]

b. RESPA section 8(c)(2)

RESPA section 8(c)(2) provides that section 8 of RESPA does not prohibit "the payment to any person of a bona fide salary or compensation or other payment for goods or facilities actually furnished or for services actually performed."[48] Regulation X further clarifies RESPA section 8(c)(2). It provides that "[i]f the payment of a thing of value bears no reasonable relationship to the market value of the goods or services provided, then the excess is not for services or goods actually performed or provided."[49] Regulation X also provides that "[t]he value of a referral (i.e., the value of any additional business obtained thereby) is not to be taken into account in determining whether the payment exceeds the reasonable value of such goods, facilities or services."[50] Moreover, under Regulation X, "[t]he fact that the transfer of the thing of value does not result in an increase in any charge made by the person giving the thing of value is irrelevant in determining whether the act is prohibited."[51]

RESPA section 8(c)(2) does not provide a defense to payment of referral fees because referrals are not compensable services under RESPA.[52] As described above, when (1) a Digital Mortgage Comparison-Shopping Platform non-neutrally uses or presents information about one

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[47] *See* 12 CFR 1024.14(e). Where the elements of a RESPA section 8 violation are otherwise satisfied, it is no defense that a Digital Mortgage Comparison-Shopping Platform's non-neutral use or presentation of information was allegedly the product of a complex algorithm. Operators are expected to know whether their platform uses or presents information in a non-neutral manner, even if the platform may employ complex algorithms in using or presenting the information. *See generally* Consumer Financial Protection Circular 2022-03, *Adverse Action Notification Requirements in Connection with Credit Decisions Based on Complex Algorithms*, 87 FR 35864 (June 14, 2022) ("A creditor cannot justify noncompliance with ECOA and Regulation B's requirements based on the mere fact that the technology it employs to evaluate applications is too complicated or opaque to understand."). Moreover, when structuring or implementing a contractual agreement to participate on a Digital Mortgage Comparison-Shopping Platform that results in steering or other affirmative influence based on non-neutral criteria, settlement service providers likely would know that the Operator is non-neutrally using or presenting information.
[48] 12 U.S.C. 2607(c)(2); *accord* 12 CFR 1024.14(g)(1)(iv).
[49] 12 CFR 1024.14(g)(2); *see also O'Sullivan v. Countrywide Home Loans, Inc.*, 319 F.3d 732, 739 (5th Cir. 2003) (explaining that this provision "was promulgated for the purpose of assisting courts in ferreting out kickbacks disguised as legitimate payments for goods and services in complex real estate settlement transactions").
[50] 12 CFR 1024.14(g)(2).
[51] *Id.*
[52] *See* HUD, *Real Estate Settlement Procedures Act (RESPA): Home Warranty Companies' Payments to Real Estate Brokers and Agents*, 75 FR 36271 (June 25, 2010) (distinguishing where home warranty companies could legally pay real estate brokers for services versus where such payments were non-compensable referral fees).

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 Operator receives a payment or other thing of value that is, at least in part, for that referral activity, the Operator is receiving a payment that is not merely for compensable services. Consequently, the Operator is not only providing what the HUD CLO Policy Statement described as a CLO operator's compensable service of "having information about the provider's products made available to consumers for comparison with the products of other settlement service providers"[53] or other compensable services. Rather, as described above, the Operator is being paid, at least in part, for conduct that has the effect of steering or otherwise affirmatively influencing the consumer to select a provider on the platform. Yet, Regulation X does not permit the value of the referral to be taken into account when determining the reasonable value of the services under RESPA section 8(c)(2).[54]

In contrast, an Operator that receives payment from settlement service providers for their participation on a Digital Mortgage Comparison-Shopping Platform that both neutrally uses and neutrally presents information is receiving payment for compensable services,[55] and thus would be compliant with RESPA section 8, assuming no other facts were present that would call such RESPA section 8 compliance into question.[56]

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[53] 61 FR 29255, 29257 (June 7, 1996).
[54] 12 CFR 1024.14(g)(2).
[55] As noted above, an example of a neutral presentation of information would be a platform that lists participating lenders with the lowest to highest APR in ascending order. *See supra* note 36.
[56] Similarly, advertising arrangements where actual services are being provided and reasonable payment is being received are compensable services under RESPA section 8 depending on the facts and circumstances. *See* 12 U.S.C. 2607(c)(2). *Cf.* CFPB Real Estate Settlement Procedures Act FAQs, *RESPA Section 8: Marketing Services Agreements (MSAs)*, no. 2, https://www.consumerfinance.gov/compliance/compliance-resources/mortgage-resources/real-estate-settlement-procedures-act/real-estate-settlement-procedures-act-faqs/ (explaining that "[w]hether a particular activity is a referral or a marketing service is a fact-specific question," and noting that a marketing service, in contrast to a referral, "is not directed to a person" but instead "is generally targeted at a wide audience"—e.g., "placing advertisements … in widely circulated media" such as "a newspaper, a trade publication, or a website").

c. HUD CLO Policy Statement

The HUD CLO Policy Statement, as noted above, cautioned that differential payments by settlement service providers (e.g., lenders) participating on CLO platforms create steering incentives that could lead to RESPA violations.[57] When examining the fees received by an Operator from similarly situated settlement service providers that participate on the same Digital Mortgage Comparison-Shopping Platform, a fee differential can be evidence of an illegal referral fee arrangement. The reason is commonsensical. If the Operator receives a higher fee from one settlement service provider than another for participating on the same Digital Mortgage Comparison-Shopping Platform, and if the higher-paying settlement service provider is, in fact, also receiving enhanced placement on the platform, then it is reasonable to infer that the settlement service provider is paying for the enhanced placement on the platform rather than merely the compensable service of "having information about the provider's products made available to consumers for comparison with the products of other settlement service providers"[58] or other compensable services. The higher charge paid by some providers thus can be "evidence of a violation of section 8,"[59] absent other facts indicating that the payment is not for enhanced placement or other form of steering.

Notwithstanding the CLO Policy Statement's language about *differential* fees, if (1) a Digital Mortgage Comparison-Shopping Platform's non-neutral use or presentation of information has the effect of steering the consumer to use, or otherwise affirmatively influences the selection of, one or more settlement service providers participating on the platform, and therefore constitutes referral activity, and (2) the Operator receives a payment for including participating settlement service providers on the platform that is, at least in part, for those referrals, then the Operator's actions would violate RESPA section 8 even if the Operator were

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[57] 61 FR 29255, 29257 (June 7, 1996). As noted above, the CFPB has applied the HUD CLO Policy Statement since the CFPB's designated transfer date under the Dodd-Frank Act, and the CFPB will continue to apply the HUD CLO Policy Statement, as relevant, pending further CFPB Action. *See supra* note 23.

[58] *Id.*

[59] 12 CFR 1024.14(g)(2) (providing that fees in excess of reasonable market value can be evidence of a RESPA section 8 violation).

to receive the *same fee* from each provider (or from some, but not all, providers). Although the HUD CLO Policy Statement noted the potential for steering and described how a RESPA violation could occur if different settlement service providers were paying different fees for participating on the same CLO system,[60] the HUD CLO Policy Statement did not identify that scenario as the only problematic one under RESPA section 8 with respect to CLOs.[61] By steering the consumer to particular settlement service providers, even where the fees paid by those providers are the same as one another, the Operator is providing a different—and non-compensable—service from those identified as compensable under the HUD CLO Policy Statement, including "having information about the provider's products made available to consumers for comparison with the products of other settlement service providers."[62] See sections I.C.2.b and I.C.2.e below for examples illustrating where a Digital Mortgage Comparison-Shopping Platform refers consumers to participating settlement service providers and where the Operator receives illegal referral fees, even if those fees do not differ among the participating providers.

The HUD CLO Policy Statement also noted that no compensable services would be present if a CLO were to list only one settlement service provider and only present basic information to the consumer on the provider's products.[63] As noted above, the HUD CLO Policy Statement described as compensable services a CLO operator's "having information about the provider's products made available to consumers for comparison with the products of other settlement service providers."[64] For these particular CLO services to be compensable, a range of options must be presented to the consumer. RESPA section 8 does not require a particular numerical threshold, but in general, presenting a greater number of comparison options rather

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[60] *See* 61 FR 29255, 29257 (June 7, 1996).
[61] The CFPB also emphasizes that there is no "market" value to be ascribed to a referral, since a referral is not compensable under RESPA section 8. *See* 12 CFR 1024.14(g)(2) ("The value of a referral (i.e., the value of any additional business obtained thereby) is not to be taken into account in determining whether the payment exceeds the reasonable value of such goods, facilities or services.").
[62] 61 FR 29255, 29257 (June 7, 1996).
[63] *Id.* at 29256.
[64] *Id.* at 29257.

than fewer makes it less likely that the Operator is steering the consumer to one or more settlement service providers.

2. *Examples of Digital Mortgage Comparison-Shopping Platforms Violating RESPA Section 8*

Below are examples of Digital Mortgage Comparison-Shopping Platforms where, based on the interpretation above, the CFPB would find that there is a RESPA section 8 violation. The CFPB emphasizes that these examples are illustrative and non-exhaustive.

a. Pay to play and steering to highest bidder

In an example of conduct that would violate RESPA section 8, assume the Operator permits the consumer to input relevant information on the Digital Mortgage Comparison-Shopping Platform to aid in the consumer's search for mortgage options (e.g., location, anticipated loan amount, credit score) and represents that the platform will use the information to identify the "best match." Assume further that the platform presents a purported "best match" lender to the consumer, or ranks the lenders, but skews the results of the comparison function to ensure that the "best match" is the highest bidding lender participating on the platform. Such conduct would violate RESPA section 8 because here, the Operator non-neutrally uses information to preference the highest bidding lender, resulting in the Operator steering the consumer to that lender. The Operator's actions imply an endorsement by leading the consumer to believe that the Operator did an analysis behind the scenes (possibly driven by an algorithm) to determine the most suitable lender for the consumer—which thereby influences the consumer to select that lender.[65] Furthermore, for the reasons described in section I.C.1.b above, the Operator is not merely receiving a bona fide payment for services under RESPA section 8(c)(2). The CFPB notes that this example could also potentially implicate the prohibition against UDAAPs, particularly if the Digital Mortgage Comparison-Shopping Platform were to contain misrepresentations about the accuracy of the information on the platform (including about the

[65] An endorsement is an example of an action that exerts "affirmative influenc[e]" within the meaning of 12 CFR 1024.14(f)(1)'s definition of "referral." *See NewDay Fin., LLC*, File No. 2015-CFPB-0004, at 6-8 (Feb. 10, 2015) (consent order), https://files.consumerfinance.gov/f/201502_cfpb_consent-order_newday-financial.pdf.

objectivity of the rankings).[66] Deceptive misrepresentations could serve to accentuate the affirmative influence noted above.

b. Payments only from and promotion of lenders who rotate in top spot

A variation of the previous scenario involves a Digital Mortgage Comparison-Shopping Platform that allows consumers to input information about their needs and then to generate lender rankings, but where all lenders participating on the platform take turns appearing in the top spot randomly or based on a predetermined schedule, i.e., the rankings do not reflect a tailoring to the consumer's needs based on their inputted information. Moreover, assume that the Operator is paid by only the lender appearing in the top spot or that lenders pay in advance for the opportunity to appear in the top spot randomly or based on the predetermined schedule. This example involves a referral because a consumer would reasonably perceive that, after entering information about their needs and using the platform to call up a ranking of participating lenders, the lender appearing in the top spot would be the one determined by the Operator to be best suited to the consumer's needs, not the lender who is next in a round robin. For reasons similar to those described in section I.C.1.b, the Operator is not merely receiving a bona fide payment for services under RESPA section 8(c)(2), and this scenario likewise would also raise UDAAP concerns. The payment would be considered a referral fee even if it does not differ from the payments made by other lenders participating in the round robin.

c. Preferencing platform participants that are affiliates

In another scenario, assume that a Digital Mortgage Comparison-Shopping Platform is designed and operated in a manner that steers consumers to use settlement service providers that are affiliates of the Operator. For example, assume that a mortgage lender develops a Digital

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[66] *See* Fed. Trade Comm'n, Policy Statement on Deception (Oct. 14, 1983), https://www.ftc.gov/legal-library/browse/ftc-policy-statement-deception. The CFPB notes that in 2020, the Federal Trade Commission (FTC) finalized a settlement with the operator of a consumer loan comparison website, LendEDU. The FTC found that, among other deceptive conduct, LendEDU misled consumers to believe its website provided objective product information, when in fact it offered higher rankings and ratings to companies that paid for placement. *Shop Tutors, Inc.*, No. 182-3180 (F.T.C. May 21, 2020) (complaint), https://www.ftc.gov/system/files/documents/cases/c-4719_182_3180_lendedu_complaint.pdf (FTC LendEDU Matter).

Mortgage Comparison-Shopping Platform permitting consumers to search information about and view rankings of comparable mortgage brokers and that the platform includes both affiliated and non-affiliated mortgage brokers. However, the mortgage lender/Operator manipulates the application of the ranking criteria so that its affiliated mortgage brokers appear higher than the non-affiliated mortgage brokers. The Operator receives payment for the higher ranking of affiliated mortgage brokers. In this scenario, the Operator's receipt of payments from the affiliated mortgage brokers for the higher ranking would violate RESPA section 8. A platform that preferences affiliated settlement service providers non-neutrally uses or presents information. Therefore, the Operator is affirmatively influencing the consumer's selection of the providers on the platform and is referring the consumer, and the Operator is receiving payment for the preferential treatment, i.e., the referral.

This fact scenario may also implicate the RESPA section 8(c)(4) provisions regarding affiliated business arrangements.[67] Whether a particular arrangement is an affiliated business arrangement would depend on various factors, including the nature of the relationship between the parties and whether the Operator is "in a position to refer [settlement service] business."[68] In theory, the Operator could follow the conditions for affiliated business arrangements and then claim that the platform is permissible under RESPA section 8. However, other than payments separately permitted under RESPA section 8(c), the only "thing of value" persons in an affiliated business arrangement may receive is a return on ownership interest (or franchise relationship).[69] In the scenario described above, the Operator would be receiving a thing of value other than payments separately permitted under RESPA section 8(c) or a return on an ownership interest (or franchise relationship).[70] Furthermore, for reasons similar to the other examples, that payment

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[67] 12 U.S.C. 2607(c)(4)(A)-(C); 12 CFR 1024.15(b)(1)-(3).
[68] *See* 12 U.S.C. 2602(7) (definition of affiliated business arrangement); 12 CFR 1024.15(c) (definition of "[p]erson who is in a position to refer settlement service business").
[69] 12 U.S.C. 2607(c)(4)(C); 12 CFR 1024.15(b)(3).
[70] Variations of this example—such as where the Operator receives no payment from the affiliated mortgage broker for being listed on the platform but receives indirect compensation because the Operator's preferential treatment

would not be merely for compensable services under RESPA section 8(c)(2). Thus, the RESPA affiliated business arrangement provisions would not permit this arrangement.

d. Additional services that promote platform participant

In another example, assume an Operator designs a Digital Mortgage Comparison-Shopping Platform that gathers the consumer's contact information and permits the consumer to generate a ranking of lender options based on criteria selected by the consumer. The ranking reflects neutral use and display of information. Assume, further, that the Operator also contracts with one of the participating lenders (which is not necessarily the top-ranked lender) to promote that lender by sending a text message or email to any consumer who uses the platform to generate a ranking of lender options, encouraging the consumer to submit an application to that lender because it would be a good fit for the consumer's needs. The promotional activity by the Operator undermines the platform's neutral presentation of information by steering the consumer to use a particular provider soon after the consumer had searched for comparison information. The Operator's promotional activity, either by itself or when combined with the effect of the Operator's action in presenting the comparison options to the consumer, affirmatively influences the consumer's selection of that lender and is a referral. For the reasons described in section I.C.1.b above, payment in exchange for the promotional activity is not merely a payment for compensable services under RESPA section 8(c)(2).[71]

e. Warm handoff

In another example, assume the Operator of a Digital Mortgage Comparison-Shopping Platform presents comparison information on multiple lenders and uses an online long form to

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generated additional business for the affiliate—may also violate RESPA section 8 depending on the circumstances. *See, e.g.,* 12 CFR 1024.15(b)(3)(ii) through (iv) (describing exclusions from the meaning of "a return on an ownership interest" and when returns on ownership interests or franchise relationships under an affiliated business arrangement are not bona fide).

[71] Regulation X provides that when a person in a position to refer settlement service business receives a payment for providing additional settlement services as part of a real estate transaction, such payment must be for services that are actual, necessary, and distinct from the primary services provided by such person. 12 CFR 1024.14(g)(3); *see also* 12 CFR 1024.15(c) ("person who is in a position to refer settlement service business" includes mortgage brokers). In this example, the Operator, who may be a mortgage broker, is providing a promotional "service" that is not actual, necessary, and distinct from the Operator's comparison function (i.e., its primary service).

gather detailed information from a consumer who is browsing the platform. The consumer's information relates to the consumer's particular borrowing needs, such as credit score and target loan amount. Soon thereafter, the Operator calls the consumer to offer an immediate phone or live chat transfer to, or callback from, a lender participating on the platform and tells the consumer that they will be "in good hands" with that lender. However, the lender that receives the lead is merely the first lender to respond to the Operator's push notification alerting a network of lenders that a consumer is available for an immediate transfer, rather than a lender the Operator identified as meeting the consumer's needs based on the consumer's inputted information. The sequence of events described above is one variation of a lead generation practice that industry stakeholders sometimes call a "warm handoff" or "live transfer."[72] Through its enforcement activity, the CFPB has identified other examples of so-called "warm handoff" or "live transfer" activity that led to RESPA section 8 violations.[73]

In this example, the Operator's actions convey to the consumer an implied endorsement of the lender when the Operator tells the consumer that they will be "in good hands" with that lender. Further, regardless of the specific words used when the transfer occurs, a consumer who inputs detailed information to the Operator immediately before a transfer to a lender would reasonably infer that the consumer is being connected to the lender that best meets their needs. Moreover, the first lender to respond to the push notification receives the lead exclusively; HUD identified exclusivity as a relevant factor in determining whether a referral arrangement is present.[74] Therefore, the Operator's actions exert affirmative influence and constitute a referral. An Operator that receives payment for a warm handoff is not merely receiving payment for a compensable service, for the reasons described in section I.C.1.b above. The payment also

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[72] Variations of this example, including where the Operator makes a "warm handoff" of a consumer to a lender that is not displayed to the consumer on the platform, may also violate RESPA section 8.

[73] *See, e.g.*, *Planet Home Lending, LLC*, File No. 2017-CFPB-0007, at 4-5 (Jan. 31, 2017) (consent order) (Planet Home Order), https://files.consumerfinance.gov/f/documents/201701_cfpb_PlanetHomeLending-consent-order.pdf.

[74] *See* HUD, *Real Estate Settlement Procedures Act (RESPA): Home Warranty Companies' Payments to Real Estate Brokers and Agents Interpretive Rule: Response to Public Comments*, 75 FR 74620, 74621 (Dec. 1, 2010).

would be considered a referral fee even if it does not differ among the providers participating in the warm transfer process.

3. Other applicable laws

The design, operation, and payments associated with Digital Mortgage Comparison-Shopping Platforms may implicate other Federal and State laws and regulations. As noted above, if an Operator makes false or misleading representations about the objectivity or veracity of the information presented on the platform, it may violate the Dodd-Frank Act prohibition on UDAAPs.[75] Operators may also be subject to laws and regulations that include, without limitation, 12 CFR part 1026 (Regulation Z); 12 CFR part 1008 (Regulation H) and State laws regarding licensing of mortgage originators; State laws imposing restrictions on referral fees and unearned fees;[76] 12 CFR part 1002 (Regulation B), which implements the Equal Credit Opportunity Act; and the Telemarketing Sales Rule.[77] Additional laws and regulations that may apply include the Federal Trade Commission Act,[78] the Telephone Consumer Protection Act,[79] and applicable Federal and State privacy laws. The CFPB's enforcement activity has also focused on the applicability of the Fair Credit Reporting Act in lead generation scenarios involving trigger leads.[80]

II. Regulatory Matters

This Advisory Opinion is an interpretive rule issued under the CFPB's authority to interpret RESPA and Regulation X, including under section 1022(b)(1) of the Consumer Financial Protection Act of 2010, which authorizes guidance as may be necessary or appropriate

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[75] 12 U.S.C. 5531, 5536(a)(1)(B); *see also* FTC LendEDU Matter; CFPB Bulletin 2022-05: *Unfair and Deceptive Acts or Practices That Impede Consumer Reviews,* 87 FR 17143 (Mar. 28, 2022); Consumer Financial Protection Circular 2022-02: *Deceptive Representations Involving the FDIC's Name or Logo or Deposit Insurance*, 87 FR 35866 (June 14, 2022).
[76] *See generally* 1 Barron 2:59 ("Prohibition against referral fees and unearned fees—State prohibitions against referral fees and unearned fees").
[77] 16 CFR part 310, which was issued under the Telemarketing and Consumer Fraud and Abuse Prevention Act, 15 U.S.C. 6101 *et seq.*
[78] 15 U.S.C. 41 *et seq*.; *see also* FTC LendEDU Matter.
[79] 47 U.S.C. 227.
[80] *See* Planet Home Order, at 6-7.

to enable the CFPB to administer and carry out the purposes and objectives of Federal consumer financial laws.[81]

By operation of RESPA section 19(b), no provision of RESPA or the laws of any State imposing any liability applies to any act done or omitted in good faith in conformity with this interpretive rule, notwithstanding that after such act or omission has occurred, the interpretive rule is amended, rescinded, or determined by judicial or other authority to be invalid for any reason.[82]

The CFPB has determined that this Advisory Opinion does not impose any new or revise any existing recordkeeping, reporting, or disclosure requirements on covered entities or members of the public that would be collections of information requiring approval by the Office of Management and Budget under the Paperwork Reduction Act.[83]

Pursuant to the Congressional Review Act,[84] the CFPB will submit a report containing this interpretive rule and other required information to the United States Senate, the United States House of Representatives, and the Comptroller General of the United States prior to the rule's published effective date. The Office of Information and Regulatory Affairs has designated this interpretive rule as not a "major rule" as defined by 5 U.S.C. 804(2).

Rohit Chopra,

Director, Consumer Financial Protection Bureau.

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[81] 12 U.S.C. 5512(b)(1); *see also* 12 U.S.C. 2617(a).
[82] 12 U.S.C. 2617(b); *see also* 12 CFR 1024.4.
[83] 44 U.S.C. 3501 through 3521.
[84] 5 U.S.C. 801 *et seq.*