Marketing and Social Media Compliance for Lenders

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Agenda

• CFPB Examination Process
• Marketing Issues
  – Joint Marketing
  – Enforcement Actions
    • MSAs/JVs
- Social Media Guidance
• Who gets examined and why?
  – Exams, horizontal reviews, CIDs (complaints, vendors, affiliations)

• Standards of Review
  – Risk assessment
    • Inherent risk, internal controls, residual risk, expected change or direction of risk
  – 9 areas of examination: (i) organizational structure; (ii) training; (iii) quality control; (iv) advertising and marketing; (v) loan disclosures and terms; (vi) appraisals and originator compensation; (vii) closing practices; (viii) fair lending practices; and (ix) privacy practices
  – Compliance Management System
Keys to an Effective Compliance Management System

- Compliance Officer/Compliance Department
- Written policies, procedures and controls
- Monitoring
- Compliance Training
Compliance Pitfalls

- Fair lending analysis
  - Pricing trends
  - Underwriting trends
- Loan Originator Compensation
  - Agreements
  - Accounting records do not match agreements
  - Expanded definition of loan originator activity
- Marketing/Advertising
  - Lack of compliance controls
Marketing Issues

• Joint Marketing
• Enforcement Actions
  – MSAs / JVs
• Social Media Guidance
Joint Marketing & Working with Realtors

• Joint Marketing
  – Open house flyers; sponsorship opportunities; website advertisements; preferred lender designations
  – “No person shall give and no person shall accept any fee, kickback or other thing of value pursuant to any agreement or understanding, oral or otherwise, that business incident to or part of a settlement service involving a federally related mortgage loan shall be referred to any person.” RESPA Section 8
  – Must pay for your pro rata share of advertisement
RESPA Enforcement – MSAs & JVs

- RESPA Section 8 prohibition on kick-backs
  
  "No person shall give and no person shall accept any fee, kickback or other thing of value pursuant to any agreement or understanding, oral or otherwise, that business incident to or part of a settlement service involving a federally related mortgage loan shall be referred to any person."

- Enforcement in late 2013-2014
  - CFPB v. Borders & Borders
  - Carter v. Wells Bowen
  - Baehr v. The Creig Northrop Team
  - Fidelity Mortgage
MSAs

• An agreement between lender and marketing partner to provide the lender market exposure to marketing partner’s customers

• RESPA exception for actual services provided

• Marketing opportunity is key
Compliance & MSAs

• Direct marketing
• Exclusivity
• Fair market value
  – *Baehr v. Creig Northrop Team class action*
  – Desk rentals – *Fidelity Mortgage*
• Fee adjustments
  – *Edwards v. The First American Corp.*
MSA Procedures

• Negotiation and review

• Third party due diligence
  – Unlicensed origination activities

• Monthly monitoring
  – Compliance v. production
  – Evidence
  – Compliance approval before accounting

• Fee adjustments
JVs

• Joint Venture
  – Example: mortgage lender and real estate broker form a mortgage brokerage

• Issue: sham relationships designed to mask payments for referrals/kick-back schemes
1. **Services**
2. Staff
3. Initial capital/net worth
4. Business management
5. Employees
6. Internal functions
7. Contracted services
8. Payment to contracted third parties
9. Competing in market place
10. Referrals
• *Carter v. Wells Bowen Realty*, November 2013 Sixth Circuit decision
  – RESPA exception for Affiliated Business Arrangement upheld regardless of HUD 10 point test
    • AfBa disclosure
    • No required use
    • Return on ownership interest
CFPB Enforcement and Interpretation Cont’d…

• **CFPB v. Borders & Borders, October 2013 complaint**
  • Disguising kickbacks through profit sharing with mortgage broker and lender joint ventures
  • No advertising to attract other business
  • No substantial services other than to funnel referrals

• Sixth Circuit decision?

• HUD 10 factors settlements in 2013—Paul Taylor Homes May 2013
2014 Approach to JVs

• Proceed with caution
• Clear 10 factor test prior to structuring JV
• Ensure appropriate disclosures and profit flow
Social Media

• Medium: Blogs, Websites, Facebook, Google Plus, Twitter, Yelp, YouTube, LinkedIn, FarmVille

• Use: Advertising/Marketing, Applications, Loan Pricing, Leads, Complaints
• Fair Lending – ECOA and FHA
  – Content
  – Adverse action notifications
  – Cannot collect inappropriate information (no data mining)
• Truth in Lending Act
  – Trigger terms
  – Clear and conspicuous (examples on different pages)
• Real Estate Settlement Procedures Act
  – Joint advertising with realtors/builders
  – Application timing requirements
• Fair Debt Collection Practices Act
  – Contacting consumers regarding debt online
• Unfair, Deceptive, or Abusive Acts or Practices
  – Accurate information
• Mortgage Acts and Practices rules prohibiting misrepresentation
  – Loan officer/mortgage team branding
• Community Reinvestment Act
  – Comments related to meeting community credit needs
• Graham-Leach-Bliley Act
  – Privacy statements
  – Sharing consumer information
  – Security of sites
• Record Retention
Social Media Safeguards

• What is your policy?
  – Acknowledgement of policy
• Managing third party relationships in social media
• Training
• Monitoring
  – Searching for unauthorized use
  – Corporate ownership of company websites
  – Complaints – specify a channel by which consumers must direct communication with lender
Q&A

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