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CFPB's First Consent Order of 2014 Addresses RESPA Section 8(a) Kickback Scheme

Authors: Kevin A. Stine
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The Consumer Financial Protection Bureau (CFPB) issued its first enforcement order of 2014 against a St. Louis mortgage lender, Fidelity Mortgage Corporation (FMC), and its president, Mark Figert. The January 16 consent order resolves CFPB's *threatened* administrative proceeding against the two Respondents stemming from its investigation of the alleged "kickback" scheme between FMC's predecessor, Fidelity Financial Mortgage Corporation (Fidelity), and an unnamed Missouri bank.

According to CFPB, the Missouri bank began outsourcing its residential mortgage lending business in early 2010 to Fidelity, which at that time was owned and managed by Figert. Under their outsourcing arrangement, the bank referred to Fidelity all of its customers who were seeking a residential mortgage loan. Fidelity leased office space within the bank's facility to handle the referrals and all referrals were originated for the bank. In lieu of a fixed rent payment for use of the bank's office space, Fidelity's "rent" was tied to the volume of loans that Fidelity closed from the bank's referrals; i.e., the higher the volume of new loan originations, the higher the "rent" payable to the bank.

For the nine-month period from March 2012 through November 2012, CFPB found that Fidelity's "rent" payments averaged $1,350 per month as compared to market rent of $600-900 per month for the same or similar office space. Thus, using CFPB's figures, Fidelity paid the bank on average between 150% and 225% of the true market rent for use of the bank's office space, with excess rent amounting to a "kickback" for mortgage loan referrals in violation of Section 8(a) of the Real Estate Settlement Procedures Act (RESPA).

RESPA Section 8(a) prohibits the payment of any "fee, kickback, or thing of value" in return for the referral of business related to real estate settlement services.[1] Violations are subject to both criminal and civil penalties. There are specific exceptions in Section 8(c), including one for "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."[2] Here, however, CFPB drew from a June 1996 policy statement from the Department of Housing and Urban Development to determine that a significant portion of Fidelity's "rent" was merely a "disguised referral fee" in an attempt to circumvent Section 8(a).

CFPB Director Richard Cordray describes this type of arrangement as "hampering fair market competition" and "unnecessarily increasing the cost of getting a mortgage." Under the consent order, Fidelity and Figert agreed to pay $81,076 for their roles in the scheme.[3] This sum includes disgorgement of $27,076 in origination fees that Fidelity earned from the kickback scheme plus a $54,000 civil penalty. Additionally, Figert and Fidelity agreed to a broad injunction prohibiting them from violating RESPA Section 8 in the future, subject to additional monetary penalties.

The Bank of Sullivan acquired Fidelity's assets in 2012 and now owns FMC. The Bank of Sullivan's President and CEO, Mike Hoffman, discussed the consent order in a recent press release: "The cost of defending a claim made by the Federal government is too much for a small financial institution to afford. Therefore we decided that it was in the best interests of Fidelity to settle the claim."[4]

In a press release associated with the January 16 consent order, Cordray commented that "[t]he Consumer Financial Protection Bureau will continue to take action against schemes that steer consumers to lenders through unscrupulous and illegal business practices." CFPB's January 16 consent order and the related press releases reveal several economic realities for banks and other financial institutions in the mortgage lending arena. On the one hand, CFPB continues to demonstrate its commitment to investigating and pursuing potential violations of consumer finance laws regardless of scope or magnitude. Still, those institutions that become targets of a CFPB investigation may often choose a consent order over protracted litigation as the less expensive and less time-consuming alternative, particularly when an adverse result in litigation may include severe penalties.

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[1] 12 U.S.C. § 2607(a).

[2] 12 U.S.C. § 2607(c)(2) (emphasis added).

[3] Fidelity is ordered to pay the entire sum. Figert is jointly liable for the $54,000 penalty.

[4] Lisa Brown, Fidelity Mortgage Fined Over Referral Arrangement, Jan. 17, 2014, http://www.stltoday.com/business/local/fidelity-mortgage-fined-over-referral-arrangement/article_86abc20a-45dd-542f-9042-409a9fb6f0c7.html