



**The Consumer Financial Protection Bureau
Provides Regulatory Clarity in Support of Essential
Lender-Funded Housing Counseling Programs**

April 12, 2017

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Executive Summary

To our Housing Counseling Partners and Stakeholders:

I am pleased to report that the Consumer Financial Protection Bureau (CFPB) recently provided clear guidance on how nonprofit housing counseling agencies (HCAs) can structure lender-funded pre-purchase counseling programs in compliance with Section 8(a) of the Real Estate Settlement Procedures Act (RESPA).

The CFPB acknowledged at a March 2017 meeting that pre-purchase housing counseling is “essential,” especially for high-cost loans. The meeting was hosted by the CFPB and attended by representatives from prominent HCAs, the lending industry, and the law firm of Buckley Sandler. CFPB staff also repeatedly emphasized the importance of sustaining lender-funded housing counseling programs across the country.

CFPB staff acknowledged concerns about the application of RESPA to lender-funded housing counseling programs but emphasized that such programs were permissible if properly structured. To help ensure that pre-purchase counseling programs remain available to serve consumers in the future, CFPB staff provided a list of guidelines for lenders and HCAs to consider when creating funding agreements and implementing these programs.

The following summary of the CFPB meeting, prepared by HPF’s counsel at Buckley Sandler, outlines all of the CFPB’s guidance. Most of these guidelines are pragmatic rules of the road to help lenders and HCAs ensure compliance with RESPA Section 8(a) without the need to rely on the “fee for services” provision in Section 8(c)(2).

For instance, funding agreements should not include exclusivity provisions, and should not require HCAs to steer consumers toward a specific lender or product. Additionally, HCAs should establish funding relationships with multiple lenders and avoid practices that disproportionately promote one lender over another.

The CFPB also emphasized that HCAs need to implement their counseling programs to ensure that, wherever possible, consumers are presented with multiple mortgage products that meet their individual needs.

By following the CFPB’s guidelines, HCAs and lenders can move forward with assurance, knowing that a lender’s decision to fund essential nonprofit housing counseling for consumers should not be considered an inappropriate payment for referrals under RESPA Section 8(a).



I would like to thank the CFPB staff for providing clarity on this issue, minimizing potential regulatory hurdles that may have limited essential lender funding for pre-purchase housing counseling programs. This will help ensure that independent, nonprofit resources will be available to help consumers find sustainable mortgages.

I would also like to acknowledge the *pro bono* assistance provided by the legal team at Buckley Sandler, led by Ben Olson and Brandy Hood. They were instrumental in advocating on HPF's behalf throughout this process, going above and beyond to clarify the issues for CFPB staff, arrange the CFPB meeting, and clearly memorialize the CFPB's guidance.

Sincerely,

David Berenbaum
Chief Executive Officer
Homeownership Preservation Foundation
dberenbaum@HPFhome.org



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MEMORANDUM

David Berenbaum, Chief Executive Officer
To: Kent T. Schoen, General Counsel
Homeownership Preservation Foundation
From: Benjamin K. Olson and Brandy A. Hood
Re: CFPB Meeting Regarding Lender-Funded Housing Counseling
Date: April 11, 2017

This memorandum summarizes a meeting hosted by the Consumer Financial Protection Bureau (“CFPB” or “Bureau”) on March 29, 2017. The meeting was held at the request of Homeownership Preservation Foundation and a consortium of other housing counseling agencies (collectively, the “HCAs”), which asked the CFPB to address concerns that lender-funded housing counseling provided consistent with requirements established by the U.S. Department of Housing and Urban Development (“HUD”) could be viewed as violating the prohibition on “kickbacks” in Section 8 of the Real Estate Settlement Procedures Act (“RESPA”).ⁱ Participating in the meeting were representatives from the HCAs,ⁱⁱ the lending industry,ⁱⁱⁱ various CFPB offices and divisions,^{iv} and Buckley Sandler.^v

CFPB staff expressed their support for housing counseling and their belief that lender-funded counseling programs can be structured to comply with Section 8 of RESPA. Rather than adopting HUD’s RESPA standards for such programs, however, CFPB staff provided a list of factors that should be applied to individual programs to minimize the risk of a Section 8 violation.

I. GENERAL CFPB STATEMENTS ON HOUSING COUNSELING, GUIDANCE, AND RESPA ENFORCEMENT

CFPB staff repeatedly expressed support for housing counseling programs and stated that they viewed housing counseling as “essential,” particularly for high-cost loans. Staff also expressed their desire to find ways to support HCAs and the lender-funded aspect of their programs, recognizing that HCAs would not be able to continue without lender funding. However, staff also noted that, because HCAs are in a position to influence a consumer’s selection of a mortgage lender, the Bureau was providing guidance to assist HCAs and lenders in structuring lender-funded counseling programs in a manner that minimizes the risk that referrals will be provided in exchange for compensation in violation of Section 8.

CFPB staff noted that the Bureau takes its responsibilities under the Administrative Procedures Act (“APA”)^{vi} seriously and that the guidance provided during the meeting was therefore informal. Consistent with past informal CFPB guidance, staff explained that its guidance on lender-funded housing counseling had not gone through the formal rulemaking process required by the APA and therefore was not binding on the CFPB or any other person.

A representative from the CFPB’s Office of Enforcement stated that the Bureau allocates what it views as its scarce enforcement resources to areas that the CFPB believes is most likely to cause consumer harm. As a result, the CFPB is highly unlikely to spend those resources looking for RESPA violations in connection with lender-funded nonprofit housing counseling, particularly when such counseling follows the Bureau’s informal guidance.

II. CFPB GUIDANCE ON LENDER-FUNDED HOUSING COUNSELING

CFPB staff read from a prepared statement and answered limited questions. At the outset, staff noted that their guidance focused on the application Section 8(a) of RESPA to lender-funded housing counseling programs. Section 8(a) prohibits any person from 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 involving a federally related mortgage loan shall be referred to any person.”^{vii}

There are four elements of Section 8(a), all of which must be met to violate this prohibition: (1) a payment or acceptance of a “fee, kickback or thing of value”; (2) a “referral” of business; (3) the business referred is incident to or part of a “real estate settlement service” involving a federally related mortgage loan; and (4) an “agreement or understanding” that the payment of the thing of value is for the referral.^{viii} CFPB staff noted in particular that Section 8(a) is not violated if there is no “referral,” which is defined to include “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,” and that an “agreement or understanding” can be established by a “practice, pattern or course of conduct.”^{ix} Much of the Bureau’s guidance discussed below focuses on whether the HCA has “affirmatively influenced” the borrower’s selection of a lender.

CFPB staff explained that, because of the broad scope of Section 8(a), there is no bright line safe harbor other than no engagement at all between HCAs and lenders, which staff recognized was neither practical nor beneficial. Staff provided a list of factors that may be considered when determining, in the context of a lender-funded housing counseling program, whether an HCA has made a “referral” of mortgage lending business to a lender and whether the HCA and the lender have an “agreement or understanding” that the lender’s payments to the HCA are provided in exchange for referrals rather than counseling or other services.

Staff stated that, by applying these factors, HCAs and lenders should be able to avoid violations of Section 8(a). Staff emphasized, however, that the factors must be applied to the individual facts and circumstances of the program and the actual practices of the HCAs and lenders, that the list of factors is not exhaustive, and that no single factor would definitively establish the presence or absence of a violation of Section 8(a).

CFPB staff noted that, even if all four elements of a Section 8(a) violation are present, the analysis would not stop there. Instead, one would next need to determine whether payments are permitted under Section 8(c) of RESPA. In particular, it may be possible to establish that, notwithstanding the violation of Section 8(a), the payment is permitted under Section 8(c)(2), which states that “[n]othing in [Section 8] 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.”^x However, due to the on-going litigation in *CFPB v. PHH Corp.*, staff emphasized that their guidance could not address whether lender-funded housing counseling programs could also be permissible under Section 8(c)(2). Therefore, staff suggested that HCAs and lenders discuss these issues with an attorney and that the parties carefully review their agreements and practices in light of the following guidance.

The CFPB’s list of factors focused on two general areas: Agreements between HCAs and lenders and general practices under those agreements. In certain cases, this summary re-categorizes and reorders aspects of the staff guidance for clarity without altering the substance.

A. Content of Agreements between HCAs and Lenders

CFPB staff described a number of provisions that would be relevant in determining whether a lender-funded housing counseling program is consistent with Section 8(a). Note that, in almost all cases, staff stated that the actual practices of the HCA and the lender under the agreement were also relevant. Therefore, the factors related to the language of the agreements, which are discussed in this section, should be read in conjunction with the factors related to the performance under those agreements, which are discussed in the following section.

1. Agreements should not contain an exclusivity provision.

CFPB staff stated that agreements between HCAs and lenders should not contain provisions prohibiting the HCA from entering into lender-funded housing counseling agreements with other lenders or requiring the HCA to provide information exclusively to a lender. For example, a provision stating that the lender will pay for the HCA’s services but the HCA can only direct consumers to that lender may create the inference that the payments under the agreement are being provided in exchange for referrals.

Notwithstanding their general statement that no single factor is determinative, CFPB staff indicated that this is the single most important factor. Staff also suggested that the presence of an exclusivity clause may trigger the presumption of a payment for a referral even if no other factor is present.

2. Agreements should include non-exclusivity provisions that expressly allow the HCA to provide information on multiple lenders and products.

Staff stated that, when an HCA provides consumers with specific loan or lender options, “the more options [presented to the consumer] the better.”

- 3. Agreements should not include provisions requiring the HCA to include the lender on every list of options provided to a consumer.*

Staff stated that provisions requiring the HCA to include the lender on every list of loan options given to a consumer could create the appearance of an agreement to pay for referrals.

- 4. Agreements should not require the HCA to direct a consumer referred by a lender for counseling back to that same lender once counseling is complete.*

In response to concerns from representatives from HCAs and lenders, staff stated that the HCA could notify the lender that counseling is complete so that the lender can make contact with the consumers. Staff also noted that the consumer may decide on his or her own to go back to the lender that referred the consumer for counseling.

Staff further stated that the practice of affirmatively directing a consumer back to the lender that referred the consumer for counseling may look less like an agreement to pay for referrals if the HCA provides the consumer with a list of lenders. Staff also stated that, because no single factor is determinative, a RESPA violation has not necessarily occurred if the HCA directs the consumer back to the lender that referred the consumer for counseling; instead, this factor would be evaluated along with the others to determine whether all the elements of a RESPA Section 8(a) violation are present.

- 5. Agreements should not include provisions requiring the HCA to promote the lender.*

Staff stated that a provision requiring the HCA to promote the lender would be particularly problematic if the agreement prohibited the HCA from promoting other lenders.

- 6. Agreements should not condition the lender's payments on referrals.*

Staff did not specifically define when a payment would be conditioned on a referral. However, staff specifically noted that it was permissible to include provisions stating that the lender will pay the HCA for counseling when a loan closes as long as the payments are not conditioned on the HCA referring the consumer to the lender.

In response to a question, staff stated that they were less familiar with the provision in the HUD Model Funding Agreement stating that the lender will pay the HCA a specific amount for each lender "contact" resulting from the HCA's counseling services and then an additional amount for each completed transaction; however, staff reiterated that payments are permissible if they are not tied to a "referral," as that term is defined under Section 8(a).

In response to a question about the appropriate amount of payments for services, staff noted that the fact that payments are for the fair market value of the counseling services could be evidence that the payments were not for referrals.^{xi}

B. HCA Practices

CFPB staff also described a number of HCA practices that could create the appearance of referral and/or a payment in exchange for a referral, notwithstanding the language in the agreement.

- 1. HCAs should avoid the practice of providing the names or products of only those lenders with whom the HCA has a funding agreement.*

Staff declined to endorse HUD's previous guidance that providing a list of three lenders was sufficient to avoid a RESPA violation. Instead, CFPB staff noted that a list of three lenders, all of whom have lender-funded housing counseling agreements with the HCA, could still support an inference that the HCA is providing referrals in exchange for payments from lenders.

Representatives from HCAs and lenders expressed a number of concerns with this factor, including that: (1) HCAs may purposefully enter into agreements with the lenders that offer the most suitable products for the communities served by the HCA because those are lenders that are actively trying to develop products for the community; (2) for these same reasons, counselors making recommendations based on each consumer's individual needs may be more likely to recommend the products offered by these lenders, which, when evaluated retroactively, could create the appearance of a pattern of referrals; and (3) HCAs will not receive sufficient funding for their operations if they are required to direct consumers to non-funding lenders.

In response to these concerns, CFPB staff stated that its list of factors are intended to be guideposts for minimizing the risk of triggering all four elements of a Section 8(a) violation and that, because no single factor is determinative, the factors should not be viewed as absolutes. Staff further stated that HCAs should document their rationales for why certain lenders and products are recommended so that they can demonstrate why their lists are not referrals in exchange for payments. For example, staff suggested that an HCA could periodically review and evaluate available lender products to show that its recommendations are based on the products that are most suitable for the communities it serves, not on payments from lenders.

Staff stated that there was no particular number of non-funding lenders that an HCA should include on the list to avoid the inference of a payment in exchange for a referral. However, staff affirmatively rejected the suggestion that an HCA must provide a list of ten lenders, only two or three of which provide funding. They also reiterated their previous guidance that, when an HCA provides consumers with specific loan or lender options, "the more options [presented to the consumer] the better."

- 2. HCAs should avoid providing lists of lenders or products that always list the lenders with whom they have an agreement at the top or more prominently than other lenders or products.*

Staff noted that ranking lenders or products may be permissible if the ranking is based on the consumer's needs (such as down payment or closing costs) or the experience of borrowers

previously counseled by the HCA with the lender. However, consistently ranking funding lenders before non-funding lenders would create the appearance of a payment for a referral.

In response to a question about whether the CFPB had prohibited the use of “preferred provider” lists, staff stated that the issue under RESPA is not what the list is called; instead, it is where the list comes from (*i.e.*, how the lenders on the list are selected). The list may create the appearance of a referral if it only lists lenders who have agreed to pay the HCA, but that it is less likely to be problematic if the list provides recommendations based on a review of the best products for the consumer.

3. HCAs should avoid actively recommending or marketing a lender.

CFPB staff stated that HCAs should avoid recommending any single lender. Staff noted that, even if the recommendation was based on an objective analysis of the consumer’s needs, it could still be viewed as a referral so that the parties would then need to analyze whether other elements of a RESPA Section 8(a) violation are present.

In response to questions about whether a recommendation is permissible if only that lender offers a product that fits a particular consumer’s needs, staff stated that the safest approach is to stop short of advising the consumer to go to that lender. Instead, staff suggested that the counselor make objective statements such as: “Based on your needs, here are your options.” However, staff stated that, if the HCA was acting in good faith when recommending lenders or products, it was highly unlikely that the Bureau would view the HCA as violating RESPA.

Staff also cautioned against “non-neutral” displays of lender promotional materials or other information in HCA offices. Staff noted that it would be helpful to display information for multiple lenders and to present that information neutrally to show there is no agreement to market a particular lender. Staff provided as an example of a non-neutral display a wall in an HCA office intended for lenders’ advertisements that contains one large banner advertising a single lender. In contrast, staff noted that co-marketing in newspaper advertisements presents fewer concerns because such advertisements are directed to general public rather than specific counseling customers. Staff also again emphasized that “the more options [presented to the consumer] the better.”

4. HCAs should work with a consortium of lenders offering appropriate products for consumers.

Although not expressly addressed as a separate consideration, Bureau staff also repeatedly suggested that HCAs should ensure they work with a number of lenders so that consumers are presented with a selection of appropriate product offerings to suit their needs. Staff specifically noted that HCAs should not work with only one or two lenders on these programs, and emphasized that evidence that an HCA is working with a consortium of lenders “dramatically reduces” the risk of an inference of a referral in exchange for compensation under RESPA Section 8(a).

ⁱ See Letter from David Berenbaum, Chief Executive Officer, Homeownership Preservation Foundation, to Keo Chea, Assistant Director, Office of Community Affairs, CFPB (Dec. 2, 2016) and the accompanying white paper prepared by Buckley Sandler. These materials are provided in Appendix A to this memorandum.

ⁱⁱ Participating in the meeting on behalf of the Homeownership Preservation Foundation were David Berenbaum, Kent Schoen, and Gene Spencer. The following entities also participated in person or via phone: (1) Minnesota Homeownership Center (Julie Gugin); (2) National Asian American Coalition (Faith Bautista); (3) National Council of La Raza (Lot Diaz); (4) National Housing Resource Center (Bruce Dorpalen, Matthew Goodro); and (5) NeighborWorks America (Marietta Rodriguez, Karen Hoskins).

ⁱⁱⁱ The following entities participated in the meeting: (1) Bank of America (Kathy Cummings, Glenda Gabriel); (2) JPMorgan Chase (Suzanne Garwood); and (3) Wells Fargo (Brad Blackwell, David Kumpe).

^{iv} The following CFPB offices and divisions were represented: (1) Regulations (Diane Thompson, Dan Brown, Paul Ceja, Joan Kayagil, Michael Silver); (2) Enforcement (Veronica Spicer); (3) Supervision Policy (Jennifer Toussaint); (4) Supervision Examinations (Lisa McDowell); (5) Legal (Richard Bennet); (6) Mortgage Markets (Noerena Limon, Julie Vore, Laurie Maggiano); (7) Community Affairs (Brenda Muniz, Keo Chea, Alicia Criado); (8) Financial Institutions and Business Liaison (Dan Smith, Charles Johaneck); (9) Advisory Boards and Councils (Manny Manon); and (10) Intergovernmental Affairs (Jarret Stroman).

^v Ben Olson and Brandy Hood.

^{vi} 5 U.S.C. § 551 *et seq.*

^{vii} 12 U.S.C. § 2607(a).

^{viii} 12 U.S.C. § 2607(a); 12 C.F.R. § 1024.14(b). “Origination of a federally related mortgage loan” is a “settlement service.” 12 C.F.R. § 1024.2.

^{ix} 12 C.F.R. § 1024.14(f)(1).

^x 12 U.S.C. § 2607(c)(2).

^{xi} 12 C.F.R. § 1024.14(g)(2) (“If 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.”).



APPENDIX A

December 2, 2016

VIA ELECTRONIC MAIL

Keo Chea
Community Affairs
Consumer Financial Protection Bureau
Keo.Chea@CFPB.gov

Re: Lender-Funded Nonprofit Housing Counseling and RESPA Section 8

The Homeownership Preservation Foundation ("HPF"), with the support of other leaders in the nonprofit housing counseling community, is requesting that the Consumer Financial Protection Bureau (the "CFPB") issue formal guidance confirming that lender-funded housing counseling provided consistent with requirements established by the U.S. Department of Housing and Urban Development does not violate Section 8 of the Real Estate Settlement Procedures Act of 1974.

The attached white paper, prepared by HPF and its *pro bono* counsel at Buckley Sandler, LLP, provides background on the issue and the rationale underpinning HPF's request for clarification.

As of this date, the following leaders in the nonprofit housing counseling community have all indicated their organizations' support for this request and the positions outlined in the white paper:

- Bruce Dorpalen, **National Housing Resource Center**
- Julie Gugin, **Minnesota Homeownership Center**
- Lot Diaz, **National Council of La Raza**
- Marcia Griffin, **HomeFree USA**

As it is socialized further, we expect that the positions outlined in the white paper will be universally accepted in the housing counseling community, including the Coalition of HUD Housing Counseling Intermediaries.

Please distribute this letter and the white paper to appropriate members the CFPB team involved in this issue.

We appreciate the CFPB's willingness to engage with the housing counseling community on this urgent issue, and we look forward to working together towards a solution that will ensure the availability of independent housing counseling for more consumers across the country.

Sincerely,

A handwritten signature in black ink, appearing to read "David Berenbaum".

David Berenbaum
Chief Executive Officer
Homeownership Preservation Foundation

homeownershippreservation.org

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To Kent T. Schoen, General Counsel
Homeownership Preservation Foundation

From Benjamin K. Olson, Brandy A. Hood & Andrew S. Lim

Re **Lender-Funded HUD Housing Counseling**

Date November 30, 2016

This white paper is intended to support the request by the Homeownership Preservation Foundation (“HPF”) that the Consumer Financial Protection Bureau (the “CFPB” or the “Bureau”) issue an interpretive rule, statement of policy, or other formal guidance confirming that lender-funded housing counseling provided consistent with requirements established by the U.S. Department of Housing and Urban Development (“HUD”) does not violate Section 8 of the Real Estate Settlement Procedures Act of 1974 (“RESPA”).¹ For purposes of this white paper, “lender-funded HUD housing counseling” refers to an arrangement whereby a lender makes a payment to a housing counseling agency (“HCA”) that participates in HUD’s Housing Counseling program under an agreement similar to HUD’s Model Funding Agreement.

For decades, lender-funded HUD housing counseling has, with HUD’s blessing, co-existed with RESPA Section 8 and provided a demonstrated benefit to traditionally underserved populations, such as low- and moderate-income (“LMI”) borrowers, minority communities, and individuals with limited English proficiency. However, uncertainty surrounding the application of RESPA Section 8 following transfer of authority from HUD to the CFPB has caused many lenders to either terminate their existing agreements with HCAs or to refuse to enter into new ones. Specifically, lenders have expressed concern that, when an HCA refers a borrower that has completed HUD housing counseling to a lender consistent with HUD guidelines, the CFPB would view the lender’s payment to the HCA for that counseling as an impermissible kickback under RESPA Section 8. As a result, lenders have moved away from these arrangements, significantly reducing the resources available to HCAs to provide counseling services to their communities.

HPF has no desire to wade into the larger debate surrounding the CFPB’s interpretation of RESPA Section 8, nor is it necessary for the Bureau to do so to address this discrete issue. Instead, for the reasons explained below, we believe that lender-funded HUD housing counseling remains consistent with RESPA Section 8 regardless of the ultimate disposition in *PHH Corp. v.*

¹ BuckleySandler LLP is honored to represent HPF in this matter on a *pro bono* basis.

CFPB and related matters.² While we understand that the CFPB may be reluctant to address RESPA Section 8 at this particular time, there is an urgent need for clarity so that HCAs can continue to provide counseling to at-risk consumers. Therefore, HPF respectfully requests that the CFPB issue formal public guidance as soon as possible. We are happy to assist with this effort in any way possible.

I. BACKGROUND

A. HUD's Housing Counseling Program

As authorized by Section 106 of the Housing and Urban Development Act of 1968, HUD created the Housing Counseling program to contract with public and private organizations to provide counseling and advice to homeowners with respect to property maintenance, financial management, and such other matters as may be appropriate to assist them in improving their housing conditions and in meeting the responsibilities of homeownership.³ As stated in HUD Handbook 7610.1 (the "HUD Housing Counseling Handbook"):

This program supports the delivery of a wide variety of housing counseling services to homebuyers, homeowners, low- to moderate-income renters and the homeless. The primary objective of the program is to educate families and individuals in order to help them make smart decisions regarding improving their housing situation and meeting the responsibilities of tenancy and homeownership. Counselors also help borrowers avoid inflated appraisals, unreasonably high interest rates, unaffordable repayment terms and other conditions that can result in a loss of equity, increased debt, default and possible foreclosure. . . . The Housing Counseling Program is instrumental to achievement of HUD's mission. The Program's far-reaching effects support numerous departmental programs, including Federal Housing Administration (FHA) single family housing programs.⁴

The Housing Counseling program is primarily governed by a statute (12 U.S.C. § 1701x), regulations (24 C.F.R. Part 214), the HUD Housing Counseling Handbook, and various other HUD guidance documents, especially the HUD Office of Housing Counseling's Model Funding Agreements and Fee Structures (the "HUD Model Funding Agreements and Fee Structures").⁵

This white paper only addresses counseling provided by HCAs under HUD's Housing Counseling program, which means that the HCA is a private or public nonprofit organization that is: (1) exempt from taxation under section 501(a), pursuant to section 501(c), of the Internal

² *PHH Corporation, et al. v. Consumer Financial Protection Bureau*, No. 15-1177, 2016 WL 5898801 (D.C. Cir. Oct. 11, 2016).

³ 12 U.S.C. § 1701x(a)(1)(iii); 24 C.F.R. § 214.1.

⁴ HUD Housing Counseling Handbook, § 1-2.

⁵ The HUD Model Funding Agreements and Fee Structures is available at <https://www.hudexchange.info/resources/documents/Housing-Counseling-Model-Funding-Agreements-Fee-Structures.pdf>.

Revenue Code of 1996; and (2) approved by HUD, in accordance with applicable regulations, to provide housing counseling services to clients either directly or through its affiliates or branches.⁶

B. How Do Consumers Benefit from Pre-Purchase Housing Counseling?

Pre-purchase homeownership and financial counseling provides numerous benefits to participating consumers, which are well-accepted throughout the financial services industry and have been documented through numerous empirical case studies. For instance, the Federal Reserve Bank of Philadelphia published a report in 2014 assessing the effectiveness of one-on-one pre-purchase homeownership and financial management counseling for first-time homebuyers, and found that consumers who participated in such counseling improved their credit scores, significantly reduced their overall debt balances, and generally exhibited lower rates of delinquency.⁷

Similarly, a 2013 Freddie Mac working paper on pre-purchase homeownership counseling found a 29% reduction in delinquency rates for first-time homebuyers who participated in such counseling. The paper also found that the estimated dollar value of reduced delinquency costs was substantially greater than the costs of counseling.⁸

Furthermore, NeighborWorks America and HUD published studies in 2013 and 2012, respectively, which also noted reductions in delinquency rates for homeowners who participated in pre-purchase housing counseling.⁹

C. Why Do Lenders Pay for a Borrower's Counseling?

It is our understanding that lenders are willing to pay for pre-purchase counseling for several reasons. First, as noted above, pre-purchase counseling has been shown to significantly reduce borrowers' delinquency rates, improve their credit scores, and help reduce their overall debt loads. In other words, housing counseling helps consumers become better, more reliable borrowers, which results in lower delinquency costs for lenders.

⁶ 12 U.S.C. § 1701x(h)(4); 24 C.F.R. § 214.3.

⁷ Marvin M. Smith, Daniel Hochberg & William H. Greene, Federal Reserve Bank of Philadelphia, *The Effectiveness of Pre-Purchase Homeownership Counseling and Financial Management Skills* 16-17 (2014), available at <https://www.philadelphiafed.org/-/media/community-development/homeownership-counseling-study/2014/homeownership-counseling-study-042014.pdf> (last visited Nov. 28, 2016).

⁸ Gabriela Avila, Hoa Nguyen & Peter Zorn, Freddie Mac, *The Benefits of Pre-Purchase Homeownership Counseling* 21 (2013), available at http://www.freddiemac.com/news/blog/pdf/benefits_of_pre_purchase.pdf (last visited Nov. 28, 2016).

⁹ Neil S. Mayer & Kenneth Temkin, NeighborWorks America, *Pre-Purchase Counseling Impacts on Mortgage Performance: Empirical Analysis of NeighborWorks America's Experience* (2013), available at <http://www.neighborworks.org/researchtracking.aspx?id=17892&nid=3c8914c5-fbdb-4e4e-b405-a9cfff1d236> (last visited Nov. 28, 2016); HUD, *Pre-Purchase Counseling Outcome Study: Research Brief Housing Counseling Outcome Evaluation* (2012), available at https://www.huduser.gov/portal/publications/pdf/pre_purchase_counseling.pdf (last visited Nov. 28, 2016).

Second, this savings in default costs can actually offset the costs of counseling, as noted above in the Freddie Mac working paper. This means that counseling effectively pays for itself over the long run.

Finally, paying for counseling is a key method for lenders to expand the availability of credit to LMI borrowers, minority communities, and consumers with limited English proficiency.

D. How Has Uncertainty Regarding RESPA Section 8 Impacted HCAs?

Previously, HUD had authority over RESPA and its implementing regulation, Regulation X, 24 C.F.R. § 3500.1 *et seq.* The Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203 (the “Dodd-Frank Act”), transferred authority over RESPA to the CFPB on July 21, 2011. The CFPB republished Regulation X under its own chapter of the Code of Federal Regulations, 12 C.F.R. Part 1024, without any substantive changes.¹⁰

As discussed below, lender-funded HUD housing counseling involves lender payments to an HCA for counseling services provided to borrowers that the HCA has referred to the lender. HUD guidance indicates that such arrangements are consistent with RESPA Section 8 if certain conditions are met. Lenders and HCAs have relied on this guidance—including the Model Funding Agreement provided by HUD—in structuring their relationships. However, the CFPB’s application of RESPA and HUD guidance has created uncertainty within the industry as to whether the CFPB would view these lender payments as impermissible kickbacks in exchange for the HCA’s referrals.¹¹

In light of this uncertainty, HCAs are confronting hesitancy from lenders that wish to fund pre-purchase counseling programs but will not do so based on the potential risk of a RESPA violation. Some lenders have even indicated that they may pull their funding support from these programs entirely.

If this perceived risk is not addressed, HCAs will lose key funding sources and will be unable to serve the consumers most in need of counseling, such as LMI borrowers, minority communities, and consumers with limited English proficiency. As a result, these consumers may not receive

¹⁰ 76 Fed. Reg. 78978 (Dec. 20, 2011).

¹¹ For example, the CFPB has warned the industry that arrangements where a referral recipient makes payments to a referral source are presumed to violate RESPA Section 8 even if the payment is ostensibly for some other service. Specifically, the CFPB stated that “any agreement that entails exchanging a thing of value for referrals of settlement service business involving a federally related mortgage loan likely violates RESPA, whether or not [a Marketing Services Agreement] or some related arrangement is part of the transaction.” CFPB Compliance Bulletin 2015-5, at 2 (Oct. 8, 2015). In addition, the CFPB chose not to follow a 1997 HUD letter responding to industry concerns regarding the application of RESPA to captive reinsurance arrangements, concluding that the letter was “not in such a form as to be binding on any adjudicator” and provided “no protection” because it was not an official interpretation published in the Federal Register. Decision of the Director, *In the Matter of PHH Corp.*, File No. 2014-CFPB-0002, at 17-19 (June 4, 2015) (“CFPB PHH Decision”).

any counseling before making the largest purchase of their lives, which, as the studies suggest,¹² could lead to increased default rates.

II. HUD REQUIREMENTS FOR HCAS

A. Requirements for HCAs to Participate in HUD Housing Counseling¹³

To be approved for participation in HUD's Housing Counseling program, an HCA must meet various requirements set forth in the statute, regulations, and the HUD Housing Counseling Handbook, including but not limited to: nonprofit and tax-exempt status, experience, housing counseling resources, knowledge of HUD programs and the local housing market, contracts or agreements to provide eligible housing counseling services, community resources, and a housing counseling work plan.¹⁴

B. Requirements for Lender-Funded HUD Housing Counseling

Although HCAs may receive some funding directly from HUD, it is by no means guaranteed as it is awarded competitively and depends on appropriations from Congress.¹⁵ Thus, HUD recommends that HCAs seek and secure funding from other sources including lenders.¹⁶ HCAs may also, in certain circumstances, charge clients a reasonable and customary fee.¹⁷

HUD's Office of Housing Counseling has provided specific examples of lender-funded housing counseling, which include homeownership counseling, pre-purchase counseling, and down payment assistance counseling.¹⁸ The guidance also sets forth different ways in which a lender may pay an HCA—such as by conditional payments, unconditional payments, tiered payments, partial payments, and upfront payments.¹⁹

¹² See, e.g., Marvin M. Smith, Daniel Hochberg & William H. Greene, Federal Reserve Bank of Philadelphia, *The Effectiveness of Pre-Purchase Homeownership Counseling and Financial Management Skills* 16-17 (2014), available at <https://www.philadelphiafed.org/-/media/community-development/homeownership-counseling-study/2014/homeownership-counseling-study-042014.pdf> (last visited Nov. 28, 2016); Gabriela Avila, Hoa Nguyen & Peter Zorn, Freddie Mac, *The Benefits of Pre-Purchase Homeownership Counseling* 21 (2013), available at http://www.freddie.mac.com/news/blog/pdf/benefits_of_pre_purchase.pdf (last visited Nov. 28, 2016); Neil S. Mayer & Kenneth Temkin, *NeighborWorks America, Pre-Purchase Counseling Impacts on Mortgage Performance: Empirical Analysis of NeighborWorks America's Experience* (2013), available at <http://www.neighborworks.org/researchtracking.aspx?id=17892&nid=3c8914c5-fbdb-4e4e-b405-a9cfffcd236> (last visited Nov. 28, 2016).

¹³ This section only provides a broad overview of HUD's requirements for an HCA to participate in the Housing Counseling program. For further detail, please see the relevant provisions of the statute, regulations, and HUD Housing Counseling Handbook.

¹⁴ 24 C.F.R. §§ 214.100, 214.103, 214.105.

¹⁵ See 24 C.F.R. § 214.311(a).

¹⁶ 24 C.F.R. § 214.311(b).

¹⁷ See 24 C.F.R. § 214.313.

¹⁸ HUD Model Funding Agreements and Fee Structures, p. 4.

¹⁹ See Model Funding Agreements and Fee Structures, pp. 7-8.

With the exception of reverse mortgage counseling, a lender is permitted to pay an HCA for counseling services, through a lump sum or on a case-by-case basis, as long as the payments (1) do not exceed a level that is commensurate with the services provided, (2) are reasonable and customary for the area, and (3) do not violate RESPA.²⁰

Once an HCA has decided to enter into a relationship with a particular lender, HUD requires both parties to enter into a signed Memorandum of Understanding (“MOU”) to formalize the relationship. To this end, HUD has released a Model Funding Agreement for HCAs and lenders to use as reference.²¹

C. HUD Guidance Regarding RESPA Compliance

HUD guidance recognizes that RESPA explicitly prohibits lenders from paying HCAs for providing referrals, and cautions that fees for pre-purchase counseling paid by a mortgage lender to an HCA may not comply with RESPA. Importantly, however, it also states that RESPA does permit lenders to pay fees specifically associated with services.²²

As such, HUD stresses the importance of avoiding a fee structure where an HCA’s compensation is based on the terms, conditions, or size of a mortgage loan transaction, rather than the counseling services provided by the HCA.²³ Specifically, both HUD’s MOU requirements and Model Funding Agreement expressly address this issue by stating that the MOU should outline the terms of the parties’ agreement to ensure compliance with RESPA requirements, and should also include the following terms:

- The client will choose between comparable products from at least three different lenders; and
- The fee income is based on services rendered, not on the amount of the loan.²⁴

HUD’s Model Funding Agreement also contains the following brief RESPA section, which mainly reiterates the HUD guidance above:

This agreement is reached in compliance with 24 CFR Sec. 3500.14 (g) [prior version of Regulation X] which states that Section 8 of RESPA permits:

²⁰ 24 C.F.R. § 214.313(e); HUD Housing Counseling Handbook, § 7-5.

²¹ See HUD Model Funding Agreements and Fee Structures, Appendix A (the “Model Funding Agreement”).

²² HUD Housing Counseling Handbook, § 7-5; Model Funding Agreements and Fee Structures, p. 5.

²³ HUD Model Funding Agreements and Fee Structures, p. 5.

²⁴ HUD Housing Counseling Handbook, § 7-5; HUD Model Funding Agreements and Fee Structures, p. 5; HUD Housing Counseling FAQs, “Do housing counseling agencies need to have a Memorandum of Understanding (MOU) agreement with lenders when lenders provide grants?” (July 2014), *available at* <https://www.hudexchange.info/faqs/2538/do-housing-counseling-agencies-need-to-have-a-memorandum-of-understanding/>.

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.

Any agreement or compensation which is not congruent with the above referenced 24 CFR Sec. 3500.14(g). [*sic*] is excluded from this agreement.

The partner agrees to the following statements and acknowledges the following statements will be disclosed to the mutual client.

1. The client will choose between comparable products from at least 3 different lenders.; [*sic*]
2. The funding derived from this agreement is based on services rendered, NOT [emphasis in original] on the amount, terms or conditions of any mortgage loan or other related transaction.
3. No endorsement, sponsorship or other preferential treatment will be conveyed to the partner for entering into this agreement²⁵

Most importantly, however, the Model Funding Agreement expressly sets forth a tiered lender payment structure, under which HCAs are paid an initial fixed amount for each client that makes contact with the lender, and then an additional fixed amount if the client completes a transaction with the lender:

[Lender] agrees to pay HCA \$XX.XX per each mutual client to whom HCA provides housing counseling services resulting in a contact with [Lender]. [Lender] shall also pay HCA an additional \$XXX.XX for each completed transaction of each customer. Each party shall bear its own expenses in administering this Agreement. Each party shall be responsible for any liability arising from its own conduct and retain immunity and all defenses available to them pursuant to federal and state law.²⁶

III. APPLICATION OF RESPA SECTION 8 TO LENDER-FUNDED HUD HOUSING COUNSELING

While we believe that lender-funded HUD housing counseling is consistent with RESPA Section 8, uncertainty within the industry regarding the current status of HUD's guidance has resulted in significant reductions in funding. Specifically, because the structure of lender-funded HUD housing counseling appears to be inconsistent with RESPA Section 8(a), such funding must qualify as a bona fide fee-for-services arrangement under RESPA Section 8(c)(2) to be permissible. Therefore, CFPB guidance is needed to dispel the notion that lender-funded HUD housing counseling is impermissible under the Bureau's interpretation of Section 8(c)(2).

²⁵ Model Funding Agreement, § II.

²⁶ Model Funding Agreement, § III.

A. Status of Pre-CFPB RESPA Guidance

Although authority for enforcing RESPA has transferred from HUD to the CFPB, HUD's official guidance remains in force. However, the CFPB has made clear that it will set aside non-binding guidance if it is inconsistent with the CFPB's interpretation of Regulation X. Specifically, the CFPB has stated:

[F]or laws with respect to which rulemaking authority will transfer to the CFPB, the official commentary, guidance, and policy statements issued prior to July 21, 2011, by a transferor agency with exclusive rulemaking authority for the law in question (or similar documents that were jointly agreed to by all relevant agencies in the case of shared rulemaking authority) will be applied by the CFPB pending further CFPB action. The CFPB will give due consideration to the application of other written guidance, interpretations, and policy statements issued prior to July 21, 2011, by a transferor agency in light of all relevant factors, including: whether the agency had rulemaking authority for the law in question; the formality of the document in question and the weight afforded it by the issuing agency; the persuasiveness of the document; and whether the document conflicts with guidance or interpretations issued by another agency.²⁷

Similarly, the CFPB's Regulation X states that "only the following constitute a rule, regulation or interpretation of the Bureau [with respect to RESPA]":

- All provisions, including appendices and supplements, of 12 C.F.R. Part 1024. Any other document referred to in this part is not incorporated in this part unless it is specifically set out in this part; and
- Any other document that is published in the Federal Register by the Bureau and states that it is an "interpretation," "interpretive rule," "commentary," or a "statement of policy" for purposes of section 19(a) of RESPA. Except in unusual circumstances, interpretations will not be issued separately but will be incorporated in an official interpretation to this part, which will be amended periodically.²⁸

Regulation X expressly states that a variety of documents are not official interpretations of RESPA, including "any . . . statement or issuance, whether oral or written, by an officer or representative of the Bureau, letter or memorandum by the Director, General Counsel, or other officer or employee of the Bureau, preamble to a regulation or other issuance of the Bureau, Public Guidance Document, report to Congress, pleading, affidavit or other document in litigation, pamphlet, handbook, guide, telegraphic communication, explanation, instructions to

²⁷ 76 Fed. Reg. 43569, 43570 (July 21, 2011).

²⁸ 12 C.F.R. § 1024.4(a)(1); *see also* CFPB PHH Decision at 17-19 (declining to follow a 1997 HUD letter regarding the application of RESPA because it was not an official interpretation published in the Federal Register).

forms, speech or other material of any nature which is not specifically included in [§ 1024.4(a)(1)].”²⁹

To the extent that the RESPA guidance provided by HUD in connection with its counseling program is not an official interpretation of RESPA, we nevertheless believe that it should be adopted by the CFPB as such, for the reasons discussed in this white paper.

B. Application of Section 8(a)

Section 8(a) of RESPA—commonly known as the anti-kickback provision—prohibits the payment or acceptance of any fee, kickback, or thing of value as part of an agreement for a referral of business incident to or part of a real estate settlement service involving a federally related mortgage loan.³⁰ Thus, a violation of Section 8(a) requires four elements: (1) a payment or acceptance of a fee, kickback, or thing of value; (2) a referral of business; (3) the business referred being incident to or part of a real estate settlement service involving a federally related mortgage loan; and (4) an agreement or understanding that the payment of the thing of value is for the referral.³¹

As HUD implicitly acknowledged, lender-funded HUD housing counseling appears to meet all four of these elements:

- **Payment or acceptance of a fee, kickback, or thing of value:** Under the terms of the Model Funding Agreement, the lender pays the HCA a fixed amount for each of the HCA’s clients that contacts the lender, and then an additional amount for each completed transaction between the client and the lender. The payment of money falls squarely within the definition of a “thing of value.”³²
- **Referral of business:** While neither the Model Funding Agreement nor the HUD guidance provides any detail regarding the actual process by which an HCA refers a client to a particular lender, it is very likely that this process entails a “referral” under Regulation X’s broad definition of the term.³³
- **Business referred is incident to or part of a real estate settlement service involving a federally related mortgage loan:** The HCA’s referral of a client to a lender is intended to result in at least the possibility of the client obtaining a mortgage loan from the lender.

²⁹ 12 C.F.R. § 1024.4(a)(2). In addition, “[a]ll informal counsel’s opinions and staff interpretations issued by HUD before November 2, 1992, were withdrawn as of that date. Courts and administrative agencies, however, may use previous opinions to determine the validity of conduct under the previous Regulation X.” 12 C.F.R. § 1024.4(b).

³⁰ 12 U.S.C. § 2607(a).

³¹ 12 C.F.R. § 1024.14(b).

³² See 12 U.S.C. § 2602(2); 12 C.F.R. § 1024.14(d).

³³ See 12 C.F.R. § 1024.14(f)(1).

This makes the referral incident to or part of the origination of a federally related mortgage loan, which is included in Regulation X's definition of "settlement service."³⁴

- **Agreement or understanding that the payment of the thing of value is for the referral:** By HUD's own requirements, the terms of the arrangement between the lender and the HCA must be governed by a written agreement.³⁵

C. Application of Section 8(c)(2)

Section 8(c)(2) 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."³⁶ This has generally been interpreted to mean that, to be permitted under Section 8(c)(2), a payment must be both: (1) bona fide and (2) for services actually performed. For purposes of this white paper, we will assume that an HCA actually performs counseling services consistent with HUD requirements with respect to any client that it refers to a lender. The only remaining question, then, is whether the lender's payment to the HCA is bona fide.

"Bona fide" has historically been interpreted to mean that a payment must bear a reasonable relationship to the market value of the services for which the payment is made.³⁷ As discussed above, HUD's guidance on HCAs appears to incorporate this limitation by requiring lender funding to be based on the counseling services rendered.

However, the CFPB has emphasized that the words "bona fide" also refer to the true purpose of the payments, concluding that a payment is bona fide only if it is "solely for the service actually being provided on its own merits," and noting that it "cannot be a payment that is tied in any way to a referral of business. . . . '[B]ona fide' thus refers to the *purpose* of the payment, not to its amount. . . . [E]ven a reasonable payment may not be 'bona fide' if it is not made solely for the services *but also for a referral*."³⁸

Notwithstanding this distinction, we believe that the CFPB can and should, consistent with its interpretation of "bona fide," adopt HUD's RESPA guidance with respect to lender-funded HUD housing counseling for the reasons set forth below.

First and foremost, the CFPB's concerns that other types of fee-for-service arrangements are a subterfuge to disguise the payment of referral fees should not apply here. Payments under

³⁴ See 12 C.F.R. § 1024.2(b).

³⁵ 12 C.F.R. § 1024.14(e).

³⁶ 12 U.S.C. § 2607(c)(2); *see also* 12 C.F.R. § 1024.14(g)(1)(iv).

³⁷ For example, HUD's Regulation X stated 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. . . . 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." 24 C.F.R. § 3500.14(g)(2). The CFPB restated this provision at 12 C.F.R. § 1024.14(g)(2).

³⁸ CFPB PHH Decision at 17 (emphasis added).

lender-funded HUD housing counseling should be treated as “bona fide” for the simple reason that they are made to HUD-approved non-profit HCAs consistent with requirements designed by HUD to address RESPA concerns in exchange for counseling services that meet HUD requirements. Specifically, as discussed above, HCAs are subject to detailed statutory and regulatory requirements as well as an entire 181-page HUD Handbook, not to mention ongoing HUD reporting and audit requirements. Therefore, the risk of abuse is low and far outweighed by the benefits to consumers.

Furthermore, the protections put in place by HUD to address RESPA concerns are similar to those in official interpretations issued by HUD—and adopted by the CFPB³⁹—permitting payment for counseling services that involve a referral in the context of mortgage brokering. Specifically, although mortgage brokering involves referring mortgage loan business to lenders in exchange for compensation, HUD has issued formal interpretations concluding that these payments to a mortgage broker do not violate RESPA Section 8(a) if: (1) the broker performs “sufficient origination work . . . to justify compensation” ; and (2) the compensation is “reasonably related” to that work (*i.e.*, the payment is “commensurate with that amount normally charged for similar services,” which requires “careful consideration of fees paid in relation to price structures and practices in similar transactions and in similar markets”).⁴⁰

Importantly, where the broker only takes an application and performs counseling activities, HUD expressed “concern[] that a fee for steering a customer to a particular lender could be disguised as compensation for ‘counseling-type’ activities,” so it stated that it “would also look to see that meaningful counseling—not steering—is provided” and would be satisfied that no steering occurred if:

- The borrower is given the opportunity to consider products from *at least three different lenders*;
- The broker receives the same compensation regardless of which products are ultimately selected; and
- The broker’s compensation is reasonably related to the services performed and not based on the amount of loan business referred to a particular lender.⁴¹

In other words, a payment to a broker for counseling services is “bona fide” if it meets certain conditions even though it specifically contemplates a referral.

We note that this discussion of HUD’s policy statements on mortgage brokering is not intended to suggest that housing counseling services are in any way similar to mortgage brokering; to be clear, the lender-funded HUD housing counseling described in this white paper does not include

³⁹ 76 Fed. Reg. at 43570.

⁴⁰ HUD Statement of Policy 1999-1, 64 Fed. Reg. 10080, 10086 (Mar. 1, 1999); *see also* HUD Statement of Policy 2001-1, 66 Fed. Reg. 53052 (Oct. 18, 2001) (collectively, the “Broker Statements of Policy”).

⁴¹ HUD Statement of Policy 1999-1, 64 Fed. Reg. at 10085.

any type of activity that could be construed as part of the mortgage origination process. Instead, HCAs generally refer borrowers who have completed counseling to lenders so that the lender can initiate the origination process.

However, we believe that HUD's guidance regarding lender-funded HUD housing counseling should be given the same weight as its policy statements regarding mortgage brokering because it imposes limitations specifically intended to address RESPA concerns. Specifically, under HUD's requirements:

- The HCAs must perform actual services that educate borrowers—including those who are most vulnerable—and that assist them with the home buying and mortgage process;
- The HCAs cannot direct potential borrowers to a single lender but must instead—like brokers who only take an application and provide counseling services—refer potential borrowers to *at least three lenders*. Although not expressly contemplated in RESPA or Regulation X, this requirement appears to be a key to HUD's conclusion that payments for counseling services that involve a referral are permissible; and
- Payments are subject to a number of limitations that ensure the payment is for services actually performed and not for the referral itself, including:
 - The lender's payment must not exceed a level that is commensurate with the counseling services provided;
 - The lender's payment must be reasonable and customary for the area;
 - The lender's payment must not be based on the terms, conditions, or size of the mortgage loan; and
 - The HCA and the lender must enter into a signed MOU which includes the following terms:
 - The client will choose between comparable products from at least three different lenders; and
 - The fee income is based on services rendered, not on the amount of the loan.⁴²

These factors, when taken together, ensure that a lender's payment is a "bona fide" payment for services actually performed because the payment covers the cost of services that add value to the origination and home buying process and the amount of payments is tied to the value of the services, not the referral. In other words, these are not made-up fees to pad profits. Accordingly,

⁴² 24 C.F.R. § 214.313(e); HUD Housing Counseling Handbook, § 7-5; HUD Model Funding Agreements and Fee Structures, p. 5; Model Funding Agreement.

lender-funded HUD housing counseling that meets all of the above requirements appears to comply with RESPA Section 8(c)(2), as interpreted by the CFPB.

D. Lender Referrals of Clients to HCAs

Although our primary goal is to obtain formal guidance from the CFPB to address lenders' concerns that their payments to HCAs could be considered kickbacks, we also request that the CFPB clarify that lender referrals of borrowers to HCAs for counseling are not considered violations of RESPA Section 8, even if the HCA eventually refers the borrower back to the lender once counseling is complete. Such referrals are an important component of lender-funded HUD housing counseling because lenders often receive applications from underserved borrowers who do not qualify for a loan but may be able to do so after undergoing counseling. Therefore, clarification is necessary to assure all parties that the lender may refer those borrowers to the HCAs with which it has lender-funded HUD housing counseling arrangements without running afoul of RESPA.

We believe this question is easily resolved because housing counseling is not a "settlement service," as defined in Regulation X.⁴³ Specifically, although housing counseling could be considered a "service provided in connection with a prospective . . . settlement," it is not one of the services listed in the definition. Furthermore, it does not fit within the definition's catch-all for "any other services for which a settlement service provider requires a borrower or seller to pay" because the lender does not typically require the borrower to participate in the counseling and, even when counseling is required, the borrower is often not required to pay for it. Therefore, the lender is not referring the borrower to the HCA for a settlement service and RESPA Section 8 does not apply.

Even if the counseling is considered a settlement service in certain circumstances, the lender does not receive any "thing of value" in return for its referral to the HCA, except potentially a referral back to the lender. For the reasons discussed above, however, this sequence of events should be permissible under RESPA Section 8 so long as the HCA's referral is provided consistent with HUD's standards. Otherwise, lenders would be effectively prohibited from directing borrowers to HCAs that it knows comply with HUD's requirements.

IV. CONCLUSION

Lender funding of housing counseling consistent with HUD requirements has long been viewed by HUD and the industry as permissible under Section 8 of RESPA. Such counseling has provided significant benefits across all segments of borrowers, especially to LMI borrowers, minority communities, and individuals with limited English proficiency. We believe that the decision of some lenders to retreat from funding this counseling is an unintended—and unfortunate—result of the CFPB's efforts to ensure robust compliance with RESPA.

⁴³ 12 C.F.R. § 1024.2.

Accordingly, on behalf of HPF, we respectfully ask the CFPB to issue an interpretive rule, statement of policy, or other formal guidance stating that lender-funded HUD housing counseling does not violate RESPA Section 8.



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