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Fidelity Mortgage Consent Order Sends Strong Message the CFPB Will Enforce Laws, No Matter Size of Violator

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On January 16, 2014, the CFPB issued a Consent Order resolving a claim that Fidelity Mortgage Corporation (Fidelity), a mortgage lender, and its president, Mark Figert, violated RESPA Section 8 by paying illegal kickbacks to a bank in exchange for mortgage loan referrals.

The CFPB found that Fidelity entered into an agreement with a bank in which the bank referred borrowers to Fidelity in exchange for kickbacks disguised as payments made by the lender for renting office space within the bank. Fidelity's president was determined to be a "related person" under the Consumer Financial Protection Act because he had managerial responsibility for Fidelity and materially participated in the conduct of its affairs.

According to the Consent Order, Fidelity's monthly rental payments averaged $1,350 per month compared to market rent of $600-$900 per month for similar bank office space. RESPA Section 8(a) prohibits the payment of any "fee, kickback, or thing of value" in exchange for a referral of business related to a real estate settlement services. 12 U.S.C. § 2607(a). RESPA's implementing regulations provide that "when a thing of value…is connected in any way with the volume or value of the business referred," it is evidence that it was given in exchange "for the referral of business." 12 C.F.R. § 1024.14(e). Section 8(c) of RESPA lists exemptions to the prohibitions, including one that permits "payment for goods or facilities actually furnished or for services actually performed." 12 U.S.C. § 2607(c)(2). The Consent Order references a 1996 Housing and Urban Development (HUD) policy statement that analyzed this exemption in the context of office-rental agreements. The policy statement concluded that in determining whether rent payments were disguised referral fees, HUD would look at the general market value of the rental property, not its value to a settlement service provider. As discussed above, the CFPB found that the average monthly rent paid by Fidelity was substantially more than comparable monthly rents and thus violated Section 8(a) of RESPA.

The Consent Order required Fidelity and Mark Figert to pay $27,076 as disgorgement of origination fees Fidelity collected from loans referred by the bank during the relevant period, plus a $54,000 civil penalty paid to the CFPB.

This Consent Order signals that the CFPB is taking a strong stand in investigating and enforcing possible consumer law violations regardless of the size of the financial institution. It also demonstrates that the CFPB will bring actions against individuals, as well as financial institutions.