

SPECIAL ALERT: BANKING AGENCIES ADOPT FINAL RULE REQUIRING APPRAISALS FOR HIGHER-PRICED MORTGAGE LOANS

On January 18, the Federal Reserve Board, Consumer Financial Protection Bureau (CFPB), Federal Deposit Insurance Corporation, Federal Housing Finance Agency, National Credit Union Administration, and Office of the Comptroller of the Currency (together, the Joint Agencies) issued a [final rule](#) amending Regulation Z to implement certain requirements from the Dodd-Frank Wall Street Reform and Consumer Protection Act (the Dodd-Frank Act) that require creditors to obtain appraisals for a subset of loans called Higher-Priced Mortgage Loans (HPMLs) and to notify consumers who apply for these loans of their right to a copy of the appraisal. The requirements of this rule (the Final Rule) are effective on January 18, 2014, giving creditors a year to implement.

While the Dodd-Frank Act statutory language required these provisions to cover “higher-risk mortgage loans,” the Final Rule adopted the HPML terminology that already exists in the Truth in Lending Act (TILA) and Regulation Z. By doing so, the Joint Agencies expanded slightly the definition of HPML in two substantive ways: (i) by incorporating an additional rate threshold for jumbo loans (discussed below), and (ii) by adding the qualification that an HPML is a closed-end consumer credit transaction.

HPMLs are now defined as closed-end residential mortgage loans secured by the consumer’s principal dwelling with an APR that exceeds the average prime offer rate (APOR) for comparable transactions by the following thresholds:

- 1.5 percentage points for a first lien conforming residential mortgage loan;
- 2.5 percentage points for a first lien jumbo residential mortgage loan; and
- 3.5 percentage points for a subordinate lien residential mortgage loan.

The Final Rule adopts the express statutory exemptions from coverage under the definition of HPMLs set forth in the Dodd-Frank Act for “qualified mortgages” (as that term is defined in the [separate rulemaking](#) by the CFPB) and for reverse mortgage transactions (subject to existing TILA provisions on reverse mortgages located at 12 C.F.R. § 1026.33). The Joint Agencies also exercised their exemption authority in TILA to include other classes of loans as exempt from the definition of HPMLs, and therefore exempt them from coverage under these new appraisal requirements: (i) loans secured by new manufactured homes; (ii) loans secured by mobile homes, boats, or trailers; (iii) new construction loans; and (iv) bridge loans.

The Final Rule requires creditors to take certain steps before extending credit in the form of an HPML. Before a creditor originates a non-exempt HPML, the creditor must:

- obtain a written appraisal performed by a certified or licensed appraiser who has conducted a physical visit of the interior of the property;
- provide the applicant, within three business days of receiving the initial application, with a statement that any appraisals prepared for the mortgage loan are for the sole use of the

creditor, and that the applicant may have a separate appraisal conducted at his or her own expense; and

- provide the applicant with one copy of each appraisal report, without charge, at least three days before the closing date (or if the loan is not consummated, no later than 30 days after the determination that the loan will not be consummated).

The creditor must also provide the applicant with a disclosure, within three business days of receiving the application for a HPML, that the creditor will give the consumer a copy of any appraisal report, even if the loan does not close. Notably, compliance with the notice requirement set forth in [a separate rule for appraisals under the Equal Credit Opportunity Act](#) will constitute compliance with this notice.

The Final Rule does include a safe harbor provision that lays out affirmative steps a creditor may take to ensure that it has satisfied its obligations to provide an appraisal for an HPML. In order to avail itself of the safe harbor, the creditor must:

- order the appraiser to perform the appraisal in conformity with the Uniform Standards of Professional Appraisal Practice (USPAP) and Title XI of the Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA);
- verify through the National Registry database of certified and licensed appraisers that the appraiser holds a valid appraisal license or certification within the state where the property is located;
- confirm that the written appraisal addresses certain elements specified in the Appendix to the Final Rule (such as that the appraisal identifies the creditor who ordered the appraisal, indicates whether the contract price was analyzed, addresses neighborhood conditions, includes a signed certification from the appraiser, etc.); and
- have no knowledge that the facts or certifications within the appraisal are false.

If the creditor chooses to follow these steps, it will be deemed to have obtained a written appraisal that meets the statutory requirements.

The Final Rule includes special appraisal requirements in connection with certain HPMLs where the security property has been resold within a 180 day period. If an HPML is being extended for a property acquired within the previous 180 days and is being resold at a higher price, the creditor may not extend the loan unless it obtains, prior to consummation, an additional appraisal, under certain conditions. In implementing this requirement, the Joint Agencies adopted a more lenient approach than set forth in the proposed rule in an effort to balance the stated concerns regarding property flipping or fraudulent transactions with lenience for legitimate transactions.

The Joint Agencies adopted an approach that only requires the second appraisal when the resale price exceeds the seller's acquisition price by more than 10 percent if the resale is within 90 days of acquiring the property or if the resale price exceeds the seller's acquisition price by more than 20 percent if the property is being resold within 91 to 180 days of the acquisition date. In addition to the applicability triggers, the Final Rule includes full exemptions for situations where the property is being acquired from: (i) a local, state, or federal government agency; (ii) a person who acquired the property through a foreclosure, deed-in-lieu, or other similar procedure as a result of the person's rights as a holder of a defaulted mortgage loan; (iii) certain non-profit agencies; (iv) a person who acquired title by inheritance, dissolution of marriage, or partition of marital assets; (v) an employer in connection with the relocation of an employee; (vi) a servicemember who received deployment or permanent change of station orders after

his acquisition of the property; (vii) federal disaster areas; and (viii) “rural” counties, as defined by the CFPB.

When a second appraisal is required in connection with a HPML under the circumstances described above, the creditor must obtain the second appraisal from a different certified or licensed appraiser. The Joint Agencies considered the question of whether the two appraisals could be ordered through the same Appraisal Management Company (AMC) and still meet the separation standard, and stated only that if the appraisals come from the same AMC, their independence will be determined on a case by case basis. While this does not bar the usage of an AMC to order both appraisals, it does suggest that an additional level of oversight and protection by the creditor would be prudent to ensure proper separation and independence. Also, the appraisal must contain an analysis of the difference in sale prices, changes in market conditions, and any improvements made to the property by the seller. When an additional appraisal is required, the creditor may only charge the customer for one of the appraisals.

Finally, there are a number of additional topics addressed in the section-by-section analysis in the Final Rule regarding the additional appraisal requirement, including the level of reasonable diligence required in determining if an additional appraisal is required, whether previous appraisals can satisfy the new appraisal requirements, how to determine what date to use as the previous acquisition date and what to do if the creditor is unable to determine such date, and the potential distribution of costs associated with the additional appraisal, among others.

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Questions regarding the matters discussed in this Alert may be directed to the lawyers listed below, or to any other BuckleySandler attorney with whom you have consulted in the past.

- Jeffrey P. Naimon, (202) 349-8030, jnaimon@buckleysandler.com
- John P. Kromer, (202) 349-8040, jkromer@buckleysandler.com
- Joseph M. Kolar, (202) 349-8020, jkolar@buckleysandler.com