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More Paper? CFPB Revamps Disclosure and Delivery Requirements for Valuations under ECOA

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Come January 2014, creditors will be required to equip borrowers with more information on how the value of the borrower's home is determined, even if the creditor doesn't use that information in making its lending decision. How borrowers will use this additional information and its concomitant effect on creditors, appraisers, and appraisal management companies ("AMCs") is yet to be seen.

The Consumer Financial Protection Bureau ("CFPB" or "Bureau") issued a final rule amending Regulation B on January 18, 2013, implementing an Equal Credit Opportunity Act ("ECOA")[1] amendment under the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act"). On the same day, the CFPB and the other banking agencies[2] issued a joint rule implementing a related reform, a Truth-in-Lending Act ("TILA") amendment regarding appraisals for higher-priced mortgage loans ("HPML Rule"). This alert provides an overview of how the changes to Regulation B will affect creditors; a separate alert will address the HPML Rule. The CFPB's final rule amending Regulation B will become effective for applications received by a creditor on or after January 18, 2014.

The CFPB's final rule amends Regulation B by requiring creditors to provide applicants in credit transactions secured by a first lien with a copy of all appraisals and other written valuations, including automated valuation models ("AVMs") and broker price opinions ("BPOs"), developed in connection with a credit application, *as a matter of course*, irrespective of whether the creditor uses the valuation in making the credit decision.[3] Since 1991, ECOA and Regulation B have required creditors to provide credit applicants for both first- and subordinate-lien loans, *upon written request*, with copies of appraisal reports used in connection with applications for a loan secured by real property in order to make it easier for loan applicants to determine whether a loan was denied due to discrimination.[4] According to the CFPB, the new rule will provide information to borrowers of first-lien loans that will enhance their understanding of how creditors estimated the value of their homes and enable borrowers to better detect if there was any unlawful discrimination involved in the loan process, consistent with the purposes of ECOA.

While the CFPB's final rule does not require a creditor to obtain an appraisal or other written valuation, if one is obtained in connection with a first-lien loan, the CFPB attempts to promote transparency of the loan process by requiring that a creditor:

- Must notify an applicant of his or her right to receive a copy of all written appraisals of the property within three days of receiving an application;
- Must provide an applicant a copy of each appraisal and other written valuation developed in connection with an application for credit promptly upon completion or three business days prior to loan consummation (for closed-end loans) or account opening (for open-end loans), whichever is earlier;

- May permit an applicant to waive the timing requirement for providing a copy of the appraisal or valuation materials unless otherwise prohibited by law (but the creditor still must provide the copy no later than at consummation or account opening); and
- Must not charge a borrower for a copy of any appraisal or written valuation, but may charge an applicant a reasonable fee to recover the cost of the appraisal or valuation.

Loans Covered Under the Rule

Consistent with ECOA's broad scope, the rule applies to an application for credit that is secured by a first lien on a dwelling, whether the loan is for business or consumer purposes. Open-end loans and reverse mortgages are within the scope of the rule. In accordance with the Dodd-Frank Act, the appraisal rules in Regulation B no longer apply to subordinate-lien loans.[5]

"Dwelling" is defined as "a residential structure that contains one to four units whether or not that structure is attached to real property. The term includes, but is not limited to, an individual condominium or cooperative unit, and a mobile or other manufactured home."[6] The CFPB clarified that the term "dwelling" does not extend to motor vehicles – "a term that includes boats, motor homes, recreational vehicles . . ."[7]

In response to industry inquiries about the scope of the new rule, the CFPB clarified that a creditor must provide an applicant with a copy of an appraisal and other written valuations developed in connection with an application for a renewal of credit unless the creditor uses an appraisal or valuation that was previously developed in connection with a prior extension of credit to evaluate the request.

Yet despite industry requests for clarification on whether loss mitigation activities (such as loan modifications, short sales, and deed-in-lieu transactions) are covered (or excluded) under the final rule, the CFPB declined to provide concrete guidance. Instead, in the preamble to the final rule it stated that "questions on coverage of these types of transactions are best addressed with reference to existing provisions of Regulation B. To the extent a loss mitigation transaction is covered by Regulation B, the transaction is covered by the final rule, including the requirement of providing copies of appraisals and other written valuations."[8] The CFPB does affirm, however, that some loss modifications are subject to the provisions of Regulation B.[9]

The Bureau also did not exclude temporary loans (such as construction or bridge loans) from the final requirements as it did in regulations under other mortgage-related statutes (such as TILA and the Real Estate Settlement Procedures Act ("RESPA")).

Providing Appraisals and Other Valuations

Prior to the Dodd-Frank amendments, Regulation B required a creditor to furnish an applicant with a copy of an appraisal used in connection with the application *upon request*. The final rule, retaining the language in the Dodd-Frank Act, now requires a creditor to automatically provide a copy of any appraisals and "other written valuation materials developed in connection with an application," whether credit is extended or denied or the application is incomplete or withdrawn. Notwithstanding the ECOA requirement to provide a copy of an appraisal *upon request*, many creditors have been providing copies of appraisals based on requirements of government-sponsored enterprises ("GSEs") Home Valuation Code of Conduct and Appraiser Independence Requirements ("AIR").

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What is a Valuation?

The CFPB acknowledges the importance of creditors being able to easily distinguish between documents that are and are not required to be provided to applicants.[10] Unfortunately, the CFPB's attempt to clearly delineate what constitutes a "valuation" falls somewhat short. The CFPB considers "any estimate of the value of a dwelling developed in connection with an application of credit" to be a "valuation."[11] This includes not only appraisals but also AVMs and BPOs. A comment to the final rule also clarifies that the term "valuation" includes any attachments or exhibits that are part of an integrated valuation report. The Bureau recognizes that "many documents prepared in the course of a mortgage transaction may contain information regarding the value of a dwelling, but are not themselves an appraisal or other written valuation"[12] and, thankfully, the final rule (as compared to its proposed form) no longer includes "written comments and other documents submitted to the creditor in support of" the estimate within the definition.

The final rule provides examples of what the Bureau considers to be "valuations" as follows:

- A report prepared by a licensed or unlicensed appraiser that includes the appraiser's estimate or opinion of the property's value;
- A report prepared by the creditor's staff that assigns value to the property;
- A report approved by a GSE for describing to the applicant the estimate of the property's value developed pursuant to the proprietary methodology or mechanism of the GSE;
- A report generated by use of an AVM to estimate the property's value;[13] and
- A BPO prepared by a real estate broker, agent, or salesperson to estimate a property's value.[14]

The final rule also provides several examples of what the CFPB believes are "documents that discuss the valuation of the applicant's property" but which nonetheless are *not* considered valuations:

- Internal documents that merely restate the estimated value of the dwelling contained in an appraisal or written valuation being provided to the applicant (*i.e.*, according to the preamble to the final rule, quality checks, fraud checks, automated underwriting determinations that do not estimate the value of the dwelling, or expressions of criticism of a valuation);[15]
- Government agency statements of appraised value that are publicly available;
- Publicly available lists of valuations including published sales prices, tax assessments, and retail price ranges;
- Manufacturers' invoices for manufactured homes; and
- Reports reflecting property inspections that do not provide an estimate or opinion of the value of the property and are not used to develop an estimate or opinion of the value of the property.[16]

There is no clear reason why some of these "exceptions" would not be considered "valuations" as the term is defined in the final rule. This delineation only leads to more questions, such as whether a creditor must provide documents created during a pre-funding appraisal review that support an appraisal. To this point, the CFPB stresses that ultimately the definition of "valuation" controls and the creditor must make its own determination of whether the documentation meets that definition.

To further complicate the determination of what constitutes a valuation, the Dodd-Frank Act amended ECOA to require a creditor to provide valuations "developed in connection with" a credit application; by contrast, the previous requirement applied to appraisals "used" in connection with a credit

application.[17] Thus, even if a creditor does not use an appraisal or other valuation in rendering its credit decision, the creditor must nevertheless provide the valuation to the borrower regardless of whether the creditor relied on it or viewed the valuation as preliminary. The Bureau reasoned that the provision's intended purpose of "promot[ing] transparency regarding the loan process to assist applicants in determining whether they may be victims of discrimination . . . would be frustrated if creditors could subjectively determine which valuations to provide."[18] To that end, the Bureau concludes that "there is nothing in the final rule that prohibits creditors from providing information to applicants concerning whether a particular valuation was used."[19]

Timing of Providing Valuation Materials

The CFPB declined to adopt a fixed 30-day period, as proposed, for determining whether copies of valuations materials were promptly provided to the applicant. Rather, a creditor must "provide" a copy of the appraisal and other written valuation to the applicant "promptly upon completion," or no later than three business days before consummation (for closed-end credit) or account opening (for open-end credit*), whichever is earlier*. The Bureau reasoned that this timeframe is consistent with other industry standards such as those used by certain GSEs.

The CFPB clarified the "promptly upon completion" standard by explaining it "depends upon the facts and circumstances, including when the creditor receives the appraisal or other written valuation, and when any review or revisions occur."[20] The CFPB further explained that "completion," which was also adopted from the AIR applied by certain GSEs, occurs when the creditor has "reviewed and accepted the appraisal or other written valuation to include any changes or corrections required, or when the creditor receives the last version, whichever is later."[21] The commentary provides several examples of situations of when the "promptly upon completion" standard would or would not be satisfied.

An added level of complexity arises when a creditor receives revisions to the appraisal or other written valuation, in which case the Bureau's "latest version received rule" applies.[22] The rule requires a creditor to provide the borrower with one copy of the latest version received of an appraisal or other written valuation materials, subject to the above timing restrictions. If a creditor provides a version of an appraisal or valuation that is later superseded, the creditor must provide the borrower with a copy of the revised materials. If the creditor receives only one version of an appraisal or other valuation, developed in connection with the applicant's application, then it must provide that version to the applicant.

The Bureau interprets "provide" to mean delivery, which occurs the earlier of three days after mailing or delivering the materials to the last known address of the applicant or obtaining evidence of actual receipt by the borrower. If there is more than one applicant, the written disclosure may be provided to only one applicant but that must be the primary applicant where one is readily apparent. Delivery to and receipt by the borrower may be by electronic means that complies with consumer consent and other provisions of the Electronic Signature in Global and National Commerce Act, 15 U.S.C. §§ 7001 *et seq.*[23]

Although the "promptly upon completion" standard provides less clarity and certainty than the fixed time period, the Bureau acknowledged that ECOA "specifically contemplates a standard that is flexible."[24] Just how flexible will remain to be seen in the courts and CFPB's enforcement of the Regulation B requirements.

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Waiver and Fees

In what may be important in preventing delayed closings, the final rule permits an applicant to waive the timing requirement to receive the valuation materials and agree to receive any copy at or before consummation or account opening, except as otherwise prohibited by law. Loans subject to the HPML Rule would be an example of where a waiver is prohibited by law, because that rule does not include a waiver provision.

The final rule permits two types of waivers from the timing requirement. An applicant can waive the timing requirement (i) if the waiver is obtained at least three business day prior to consummation or account opening or (ii) within three business days of consummation or account opening and the waiver pertains solely to the applicant's receipt of a copy of the valuation that contains only clerical changes from the prior version previously provided to the applicant. The CFPB considers a revision to be "clerical" if it has "no impact on the estimated value" and "no impact on the calculation or methodology used to derive the estimate."[25] The scope of the second waiver is narrow. According to the CFPB, it applies only when the creditor receives a revised version of an appraisal or other valuation that was previously provided to the applicant and the creditor receives revisions to that valuation that (i) are solely to correct clerical errors in that appraisal or valuation; (ii) have no impact on the estimated value; (iii) have no impact on the calculation or methodology to derive the estimate of value; and (iv) are provided to the applicant as a revised appraisal or valuation at or prior to consummation or account opening.[26]

The form of waiver was adopted from Fannie Mae and Freddie Mac's AIR to permit creditors to maintain existing practices for obtaining waivers for providing a copy of an appraisal to a borrower.[27] Whether the waiver is in the form of an oral or written statement, both forms should be appropriately documented.[28] If the applicant provides a waiver and the transaction is not consummated, the creditor must provide copies to the applicant no later than 30 days after the creditor determinates that the loan will not be made.

A creditor must provide the applicant a copy of the appraisal or other written valuation without charge. This means a creditor cannot charge the applicant for photocopy, postage, or other costs incurred in providing a copy of an appraisal or written valuation required by the rule. A creditor may charge the applicant a reasonable fee to reimburse the creditor's costs of the appraisal or valuation unless otherwise prohibited by law (for instance, where the HPML Rule mandates a second appraisal). Because the Bureau recognizes that the Dodd-Frank Act did not intend to prohibit AMC fees, commentary to the final rule specifically provides that the creditor's cost may include an administrative fee charged by an AMC.[29] Recognizing the need of creditors to manage payment risks, the final rule does not prohibit creditors from requesting up-front payment from applicants before appraisals or other written valuations are ordered (although restrictions may arise under other laws).[30] Because the final rule does not require a creditor to provide more than one copy, there is no prohibition in the final rule in charging administrative costs for requests for duplicate or additional copies.

Notice of Right to Receive a Copy of All Written Appraisals

The Dodd-Frank Act amended ECOA to require that "[a]t the time of application, the creditor shall notify an applicant in writing of the right to receive a copy of each appraisal and valuation under this subsection."[31]

This disclosure obligation is similar to the requirement provided for in the HPML Rule. The HPML Rule, also derived from the Dodd-Frank Act, amended Section 129H(d) of TILA to require a creditor

to provide an applicant of a higher-priced mortgage loan with copies of appraisals and to notify applicants of their right to receive a copy of an appraisal. Citing the same statutory basis for the two disclosure requirements, the Bureau exercised its discretionary authority to harmonize the two requirements and deleted the word "valuation" from the final rule reasoning that inclusion of that word would not impact consumer understanding. As such, the Bureau will permit creditors to use the following language (as provided for in Appendix C, Form C-9 of Regulation B) for both requirements;[32]

> We may order an appraisal to determine the property's value and charge you for this appraisal. We will promptly give you a copy of any appraisal, even if your loan does not close. You can pay for an additional appraisal for your own use at your own cost.[33]

A creditor can use the sample form or design its own form or modify the model form to reflect its individual policies and procedures.

Regulation B requires a creditor to mail or deliver to an applicant, not later than the third business day after the creditor receives an application for credit, a notice informing the applicant in writing of the right to receive a copy of all written appraisals developed in connection with the application. The notice timing aligns with the disclosure timing contained in both TILA and RESPA. If a loan application does not involve a first-lien loan at the time of loan application and the creditor later determines that the loan will be secured by a first lien on a dwelling, the creditor must mail or deliver the same notice in writing not later than the third business day after the creditor determines the loan will be secured by a first lien on a dwelling. However, unlike the final rule, the HPML Rule reaches both first- and subordinate-lien loans. Thus, creditors using this disclosure to satisfy the HPML Rule will need to ensure that it is provided at time of application to loans secured by a first- or subordinate-lien.

Conclusion

Although the final rule may seem simple at first glance, its significance should not be underestimated. For each valuation or revision to a valuation the creditor obtains, the creditor will need to determine whether such document is deemed "complete" and subject to disclosure to the applicant. The consequence of failing to disclose or failing to timely disclose could be significant, as the possibility of a private right of action and CFPB enforcement is real.[34] No less significant is the real concern of over-disclosure and how borrowers will use this additional information.

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[1] *See* 15 U.S.C. §§ 1691 *et seq*.; Dodd-Frank Act, Pub. L. No. 111-203, § 1474, 124 Stat. 1376 (2010).

[2] Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation, Office of the Comptroller of the Currency, National Credit Union Administration, and Federal Housing Finance Agency.

[3] *See* Disclosure and Delivery Requirements for Copies of Appraisals and Other Written Valuations Under the Equal Credit Opportunity Act (Regulation B) ("Final Rule"), 78 Fed. Reg. 7216 (Jan. 21, 2013).

[4] *See* Pub. L. No. 102-242, 105 Stat. 2236 (1991); Final Rule, 78 Fed. Reg. at 7216.

[5] *See* Dodd-Frank Act, Pub. L. No. 111-203, § 1474, 124 Stat. 1376 (2010) ("Each creditor shall furnish to an applicant a copy of any and all written appraisals and valuations developed in connection with the applicant's application for a loan that is secured or would have been secured by a first lien on a dwelling promptly upon completion, but in no case later than 3 days prior to the closing of the loan, whether the creditor grants or denies the applicant's request for credit or the application is incomplete or withdrawn.") (emphasis added).

[6] Final Rule, 78 Fed. Reg. at 7235.

[7] *Id*. at 7237.

[8] *Id*. at 7223.

[9] *See id*.

[10] *See id*. at 7237.

[11] *Id*. at 7248.

[12] *Id*. at 7237.

[13] *See id*. at 7239 (explaining the CFPB's focus on the report generated by the AVM to estimate the property's value as opposed to the AVM methodology. The Bureau is quick to point out that because AVM providers have control over such output, it should be within their control to ensure such output does not reveal proprietary information).

[14] *Id*. at 7250.

[15] *Id*. at 7239.

[16] *Id*. at 7250.

[17] *See id.* at 7222.

[18] *Id*. at 7224.

[19] *Id*. at 7222.

[20] *Id*. at 7225-7226.

[21] *Id*. at 7226.

[22] *See id*. at 7223 (adopting Regulation B comment 14(a)(1)-7 regarding multiple versions of appraisals or valuation).

[23] *Id*. at 7233-7234.

[24] *Id*. at 7226.

[25] *Id*. at 7249.

[26] *Id*. at 7227.

[27] *See* Final Rule, 78 Fed. Reg. at 7226; Fannie Mae, Appraiser Independence Requirements Frequently Asked Questions (Nov. 2010) *available at* http://www.google.com/url?sa=t&rct=j&q=fannie%20mae%20appraiser%20independence%20requirements%20frequently%20asked%20questions&source=web&cd=1&ved=0CC8QFjAA&url=http%3A%2F%2Fwww.orea.ca.gov%2Fpdf%2FFNMA%2520FAQs.pdf&ei=v7EHUaDMay10QHwxIDQAg&usg=AFQjCNGuhHp9gl8IYSXUbXbplcRDUOsLCg (question 45 explaining that Fannie Mae "does not specify what form the waiver must take or whether it be oral or written. In addition, AIR does not prohibit that a waiver, given in a timely manner, be recorded at some later point when the parties are available. Each lender must develop its own policies, procedures, and documentation. For example, a lender may obtain a waiver from a borrower through an e-mail, phone call, or some other means, prior to the three-day period, and then have that waiver recorded in writing at the settlement table or at some other time.").

[28] *See* Final Rule, 78 Fed. Reg. at 7226.

[29] *See id*. at 7232-7233.

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[30] *See, e.g.,* Truth in Lending Act, 15 U.S.C. § 1638(b) (as amended by Mortgage Disclosure Improvement Act of 2008, Pub. L. No. 110-289 (2008)).

[31] 15 U.S.C. § 1691(e)(5); Final Rule, 78 Fed. Reg. at 7228.

[32] *See* Final Rule, 78 Fed. Reg. at 7229 (by complying with the ECOA notice requirement, the creditor would automatically comply with the HPML notice requirement but because the ECOA notice requirement does not apply to subordinate liens the converse is not always true).

[33] *Id*. at 7228 (adopting Form C-9 of Regulation B as the sample disclosure language).

[34] *See* 15 U.S.C. § 1691e (civil penalties under ECOA permit an aggrieved applicant to collect actual damages and punitive damages up to $10,000 in an individual action or up to $500,000 or one percent the net worth of the creditor, whichever is less in a class action, plus attorney's fees).

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