RESCINDED

Office of the Comptroller of the Currency
U.S. Department of the Treasury

OCC BULLETIN 2012-32

Subject: Appraisals for Higher-Risk Mortgage Loans
Date: October 15, 2012

To: Chief Executive Officers of National Banks and Federal Savings Associations, Department and Division Heads, All Examining Personnel, and Other Interested Parties

Description: Notice of Proposed Rulemaking

Transmittal - see News Release 2013-11

Summary

The Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Consumer Financial Protection Bureau, the Federal Deposit Insurance Corporation, the Federal Housing Finance Agency, and the National Credit Union Administration issued a joint notice of proposed rulemaking on August 15, 2012. The proposal would implement new appraisal requirements for higher-risk mortgage loans under the Truth in Lending Act. These requirements were imposed by the Dodd–Frank Wall Street Reform and Consumer Protection Act of 2010.[1]

Background

The proposal implements new Truth in Lending Act requirements, which prohibit a creditor from extending credit in the form of a higher-risk mortgage loan to any consumer without first

- obtaining a written appraisal performed by a certified or licensed appraiser who conducts a physical property visit of the interior of the property.
- obtaining a second appraisal from a different certified or licensed appraiser if the purpose of the higher-risk mortgage loan is to finance the acquisition of a property from a seller within 180 days of the acquisition of that property by that seller at a price that was lower than the current price of the property. The second appraisal must include an analysis of the difference in acquisition prices, changes in market conditions, and any improvements made to the property between the date of the previous acquisition and the current acquisition.
- providing the applicant, at the time of the initial mortgage application, with a statement that the appraisal prepared for the mortgage is for the sole use of the creditor and that the applicant may choose to have a separate appraisal conducted by an appraiser of the applicant's choosing at the applicant's expense.
- providing the applicant with one copy of each appraisal conducted in accordance with these requirements without charge, at least three days prior to the transaction closing date.

A higher-risk mortgage loan is a residential mortgage loan secured by a consumer's principal dwelling with an annual percentage rate that exceeds the average prime offer rate for a comparable transaction as of the date the interest rate for the mortgage is set

- by 1.5 or more percentage points, for a first-lien residential mortgage loan with an original principal obligation amount that does not exceed the conforming loan amount in effect as of the date the interest rate is set;
- by 2.5 or more percentage points, in the case of a first-lien residential mortgage loan having an original principal obligation amount that exceeds the conforming loan amount in effect as of the date the interest rate is set; and
- by 3.5 or more percentage points for a subordinate lien residential mortgage loan.

Several exclusions from the definition of "higher-risk mortgage" are explained in the proposed rule. The proposed rule would implement the requirements of the statute. It would apply to national banks, federal savings associations, and their respective subsidiaries that originate higher-risk mortgage loans. The notice of the proposed rule was published in the *Federal Register* on September 5, 2012, at 77 Fed. Reg. 54722. Comments are due by October 15, 2012.

Further Information

Contact Robert L. Parson, Appraisal Policy Specialist, (202) 649-6423; Carolyn B. Engelhardt, Bank Examiner (Risk Specialist–Credit), (202) 649-6404; Charlotte M. Bahin, Senior Counsel, (202) 649-6281 or Mitchell Plave, Special Counsel, Legislative & Regulatory Activities Division, (202) 649-6285; or Krista LaBelle, Counsel, Community and Consumer Law, (202) 649-6221.

Daniel P. Stipano
Acting Chief Counsel

[1] Pub. L. 111-203, 124 Stat. 1376, at Section 1471, creating new section 129H of the Truth in Lending Act.

Related Link

- Notice of Proposed Rulemaking (PDF)

RESCINDED

FEDERAL REGISTER

Vol. 77 Wednesday,

No. 172 September 5, 2012

Part III

Department of the Treasury

Office of the Comptroller of the Currency

12 CFR Parts 34 and 164

Board of Governors of Federal Reserve System

12 CFR Part 226

National Credit Union Administration

12 CFR Part 722

Bureau of Consumer Financial Protection

12 CFR Part 1026

Federal Housing Finance Agency

12 CFR Part 1222

Appraisals for Higher-Risk Mortgage Loans; Proposed Rule

DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

12 CFR Parts 34 and 164

[Docket No. OCC–2012–0013]

RIN 1557–AD62

BOARD OF GOVERNORS OF FEDERAL RESERVE SYSTEM

12 CFR Part 226

[Docket No. R–1443]

RIN 7100–AD90

NATIONAL CREDIT UNION ADMINISTRATION

12 CFR Part 722

RIN 3133–AE04

BUREAU OF CONSUMER FINANCIAL PROTECTION

12 CFR Part 1026

[Docket No. CFPB–2012–0031]

RIN 3170–AA11

FEDERAL HOUSING FINANCE AGENCY

12 CFR Part 1222

RIN 2590–AA58

Appraisals for Higher-Risk Mortgage Loans

AGENCIES: Board of Governors of the Federal Reserve System (Board); Bureau of Consumer Financial Protection (Bureau); Federal Deposit Insurance Corporation (FDIC); Federal Housing Finance Agency (FHFA); National Credit Union Administration (NCUA); and Office of the Comptroller of the Currency, Treasury (OCC).

ACTION: Proposed rule; request for public comment.

SUMMARY: The Board, Bureau, FDIC, FHFA, NCUA, and OCC (collectively, the Agencies) are proposing to amend Regulation Z, which implements the Truth in Lending Act (TILA), and the official interpretation to the regulation. The proposed revisions to Regulation Z would implement a new TILA provision requiring appraisals for ''higher-risk mortgages'' that was added to TILA as part of the Dodd-Frank Wall Street Reform and Consumer Protection Act. For mortgages with an annual percentage rate that exceeds the average prime offer rate by a specified percentage, the proposed rule would require creditors to obtain an appraisal or appraisals meeting certain specified standards, provide applicants with a notification regarding the use of the appraisals, and give applicants a copy of the written appraisals used.

DATES: Comments must be received on or before October 15, 2012, except that comments on the Paperwork Reduction Act analysis in part VIII of the Supplementary Information must be received on or before November 5, 2012.

ADDRESSES: Interested parties are encouraged to submit written comments jointly to all of the Agencies. Commenters are encouraged to use the title ''Appraisals for Higher-Risk Mortgage Loans'' to facilitate the organization and distribution of comments among the Agencies. Commenters also are encouraged to identify the number of the specific question for comment to which they are responding. Interested parties are invited to submit written comments to:

Board: You may submit comments, identified by Docket No. R–1443 or RIN 7100–AD90, by any of the following methods:

- *Agency Web Site: http://www.federalreserve.gov.* Follow the instructions for submitting comments at *http://www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm.*
- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Email: regs.comments@federalreserve.gov.* Include the docket number in the subject line of the message.
- *Fax:* (202) 452–3819 or (202) 452–3102.
- *Mail:* Address to Robert deV. Frierson, Secretary, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue NW., Washington, DC 20551.

All public comments will be made available on the Board's Web site at *http://www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm* as submitted, unless modified for technical reasons. Accordingly, comments will not be edited to remove any identifying or contact information. Public comments may also be viewed electronically or in paper in Room MP–500 of the Board's Martin Building (20th and C Streets, NW.) between 9:00 a.m. and 5:00 p.m. on weekdays.

Bureau: You may submit comments, identified by Docket No. CFPB–2012–0031 or RIN 3170–AA11, by any of the following methods:

- *Electronic: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Mail:* Monica Jackson, Office of the Executive Secretary, Bureau of Consumer Financial Protection, 1700 G Street NW., Washington, DC 20552.
- *Hand Delivery/Courier in Lieu of Mail:* Monica Jackson, Office of the Executive Secretary, Bureau of Consumer Financial Protection, 1700 G Street NW., Washington, DC 20552.

All submissions must include the agency name and docket number or Regulatory Information Number (RIN) for this rulemaking. In general, all comments received will be posted without change to *http://www.regulations.gov.* In addition, comments will be available for public inspection and copying at 1700 G Street NW., Washington, DC 20552, on official business days between the hours of 10 a.m. and 5 p.m. Eastern Time. You can make an appointment to inspect the documents by telephoning (202) 435–7275.

All comments, including attachments and other supporting materials, will become part of the public record and subject to public disclosure. Sensitive personal information, such as account numbers or social security numbers, should not be included. Comments will not be edited to remove any identifying or contact information.

FDIC: You may submit comments by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Agency Web site: http://www FDIC.gov/regulations/laws/federal/propose.html*
- *Mail:* Robert E. Feldman, Executive Secretary, Attention: Comments/Legal ESS, Federal Deposit Insurance Corporation, 550 17th Street NW., Washington, DC 20429.
- *Hand Delivered/Courier:* The guard station at the rear of the 550 17th Street Building (located on F Street), on business days between 7:00 a.m. and 5:00 p.m.
- *Email: comments@FDIC.gov.*

Comments submitted must include ''FDIC'' and ''Truth in Lending Act (Regulation Z).'' Comments received will be posted without change to *http://www.FDIC.gov/regulations/laws/federal/propose.html,* including any personal information provided.

FHFA: You may submit your comments, identified by regulatory information number (RIN) 2590–AA58, by any of the following methods:

- *Email:* Comments to Alfred M. Pollard, General Counsel, may be sent by email to *RegComments@fhfa.gov.* Please include ''RIN 2590–AA58'' in the subject line of the message.

• *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments. If you submit your comment to the Federal eRulemaking Portal, please also send it by email to FHFA at *RegComments@fhfa.gov* to ensure timely receipt by the Agency. Please include ''RIN 2590–AA58'' in the subject line of the message.

• *Hand Delivered/Courier:* The hand delivery address is: Alfred M. Pollard, General Counsel, Attention: Comments/RIN 2590–AA58, Federal Housing Finance Agency, Eighth Floor, 400 Seventh Street SW., Washington, DC 20024. The package should be logged in at the Guard Desk, First Floor, on business days between 9 a.m. and 5 p.m.

• *U.S. Mail, United Parcel Service, Federal Express, or Other Mail Service:* The mailing address for comments is: Alfred M. Pollard, General Counsel, Attention: Comments/RIN 2590–AA58, Federal Housing Finance Agency, Eighth Floor, 400 Seventh Street SW., Washington, DC 20024.

Copies of all comments will be posted without change, including any personal information you provide, such as your name, address, and phone number, on the FHFA Internet Web site at *http://www.fhfa.gov.* In addition, copies of all comments received will be available for examination by the public on business days between the hours of 10 a.m. and 3 p.m., Eastern Time, at the Federal Housing Finance Agency, Eighth Floor, 400 Seventh Street SW., Washington, DC 20024. To make an appointment to inspect comments, please call the Office of General Counsel at (202) 649–3804.

NCUA: You may submit comments, identified by RIN 3133–AE04, by any of the following methods (Please send comments by one method only):

• *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.

• *NCUA Web Site: http://www.ncua.gov/Legal/Regs/Pages/PropRegs.aspx.* Follow the instructions for submitting comments.

• *Email:* Address to *regcomments@ncua.gov.* Include ''[Your name] Comments on Appraisals for High Risk Mortgage Loans'' in the email subject line.

• *Fax:* (703) 518–6319. Use the subject line described above for email.

• *Mail:* Address to Mary Rupp, Secretary of the Board, National Credit Union Administration, 1775 Duke Street, Alexandria, Virginia 22314–3428.

• *Hand Delivery/Courier in Lieu of Mail:* Same as mail address.

You can view all public comments on NCUA's Web site at *http://www.ncua.gov/Legal/Regs/Pages/PropRegs.aspx* as submitted, except for those we cannot post for technical reasons. NCUA will not edit or remove any identifying or contact information from the public comments submitted. You may inspect paper copies of comments in NCUA's law library at 1775 Duke Street, Alexandria, Virginia 22314, by appointment weekdays between 9:00 a.m. and 3:00 p.m. To make an appointment, call (703) 518–6546 or send an email to *OGCMail@ncua.gov.*

OCC: Because paper mail in the Washington, DC area and at the OCC is subject to delay, commenters are encouraged to submit comments by the Federal eRulemaking Portal or email, if possible. Please use the title ''Appraisals for Higher-Risk Mortgage Loans'' to facilitate the organization and distribution of the comments. You may submit comments by any of the following methods:

• *Federal eRulemaking Portal—''regulations.gov'':* Go to *http://www.regulations.gov.* Click ''Advanced Search''. Select ''Document Type'' of ''Proposed Rule'', and in ''By Keyword or ID'' box, enter Docket ID ''OCC–2012–0013'', and click ''Search''. If proposed rules for more than one agency are listed, in the ''Agency'' column, locate the notice of proposed rulemaking for the OCC. Comments can be filtered by Agency using the filtering tools on the left side of the screen. In the ''Actions'' column, click on ''Submit a Comment'' or ''Open Docket Folder'' to submit or view public comments and to view supporting and related materials for this rulemaking action. Click on the ''Help'' tab on the Regulations.gov home page to get information on using Regulations.gov, including instructions for submitting or viewing public comments, viewing other supporting and related materials, and viewing the docket after the close of the comment period.

• *Email: regs.comments@occ.treas.gov.*

• *Mail:* Office of the Comptroller of the Currency, 250 E Street SW., Mail Stop 2–3, Washington, DC 20219.

• *Fax:* (202) 874–5274.

• *Hand Delivery/Courier:* 250 E Street SW., Mail Stop 2–3, Washington, DC 20219.

You must include ''OCC'' as the agency name and ''Docket ID OCC–2012–0013'' in your comment. In general, OCC will enter all comments received into the docket and publish them on the Regulations.gov Web site without change, including any business or personal information that you provide such as name and address information, email addresses, or phone numbers. Comments received, including attachments and other supporting materials, are part of the public record and subject to public disclosure. Do not enclose any information in your comment or supporting materials that you consider confidential or inappropriate for public disclosure.

You may review comments and other related materials that pertain to this notice of proposed rulemaking by any of the following methods:

• *Viewing Comments Electronically:* Go to *http://www.regulations.gov.* Click ''Advanced Search''. Select ''Document Type'' of ''Public Submission'', and in ''By Keyword or ID'' box enter Docket ID ''OCC–2012–0013'', and click ''Search''. If comments from more than one agency are listed, the ''Agency'' column will indicate which comments were received by the OCC. Comments can be filtered by Agency using the filtering tools on the left side of the screen.

• *Viewing Comments Personally:* You may personally inspect and photocopy comments at the OCC, 250 E Street SW., Washington, DC. For security reasons, the OCC requires that visitors make an appointment to inspect comments. You may do so by calling (202) 874–4700. Upon arrival, visitors will be required to present valid government-issued photo identification and to submit to security screening in order to inspect and photocopy comments.

You may also view or request available background documents and project summaries using the methods described above.

FOR FURTHER INFORMATION CONTACT:

Board: Lorna Neill or Mandie Aubrey, Counsels, Division of Consumer and Community Affairs, at (202) 452–3667, or Carmen Holly, Supervisory Financial Analyst, Division of Banking Supervision and Regulation, at (202) 973–6122, Board of Governors of the Federal Reserve System, Washington, DC 20551.

Bureau: Michael Scherzer or John Brolin, Counsels, or William W. Matchneer, Senior Counsel, Division of Research, Markets, and Regulations, Bureau of Consumer Financial Protection, 1700 G Street NW., Washington, DC 20552, at (202) 435–7000.

FDIC: Beverlea S. Gardner, Senior Examination Specialist, Risk Management Section, at (202) 898–3640, Sumaya A. Muraywid, Examination Specialist, Risk Management Section, at (573) 875–6620, Glenn S. Gimble, Senior Policy Analyst, Division of Consumer Protection, at (202) 898–6865, Mark Mellon, Counsel, Legal Division, at (202) 898–3884, or Kimberly Stock, Counsel, Legal Division, at (202) 898–3815, or 550 17th St NW., Washington, DC 20429.

FHFA: Susan Cooper, Senior Policy Analyst, (202) 649–3121, Lori Bowes, Policy Analyst, Office of Housing and Regulatory Policy, (202) 649–3111, or Ming-Yuen Meyer-Fong, Assistant General Counsel, Office of General Counsel, (202) 649–3078, Federal Housing Finance Agency, 400 Seventh Street SW., Washington, DC 20024.

NCUA: Chrisanthy Loizos and Pamela Yu, Staff Attorneys, or Frank Kressman, Associate General Counsel, Office of General Counsel, at (703) 518–6540, or Vincent Vieten, Program Officer, Office of Examination and Insurance, at (703) 518–6360, or 1775 Duke Street, Alexandria, Virginia 22314.

OCC: Robert L. Parson, Appraisal Policy Specialist, (202) 874–5411, Carolyn B. Engelhardt, Bank Examiner (Risk Specialist—Credit), (202) 874–4917, Charlotte M. Bahin, Senior Counsel or Mitchell Plave, Special Counsel, Legislative & Regulatory Activities Division, (202) 874–5090, Krista LaBelle, Counsel, Community and Consumer Law, (202) 874–5750.

SUPPLEMENTARY INFORMATION:

I. Overview

The Truth in Lending Act (TILA), 15 U.S.C. 1601 *et seq.,* seeks to promote the informed use of consumer credit by requiring disclosures about its costs and terms. TILA requires additional disclosures for loans secured by consumers' homes and permits consumers to rescind certain transactions that involve their principal dwelling. For most types of creditors, TILA directs the Bureau to prescribe regulations to carry out the purposes of the law and specifically authorizes the Bureau, among other things, to issue regulations that contain such classifications, differentiations, or other provisions, or that provide for such adjustments and exceptions for any class of transactions, that in the Bureau's judgment are necessary or proper to effectuate the purposes of TILA, or prevent circumvention or evasion of TILA.[1] 15 U.S.C. 1604(a). TILA is implemented by the Bureau's Regulation Z, 12 CFR part 1026, and the Board's Regulation Z, 12 CFR part 226. Official Interpretations provide guidance to creditors in applying the rules to specific transactions and interprets the requirements of the regulation. *See* 12 CFR parts 226, Supp. I, and 1026, Supp. I.

On July 21, 2010, the Dodd-Frank Wall Street Reform and Consumer Protection Act (the Dodd-Frank Act)[2] was signed into law. Section 1471 of the Dodd-Frank Act establishes a new TILA section 129H, which sets forth appraisal requirements applicable to ''higher-risk mortgages.'' Specifically, new TILA section 129H does not permit a creditor to extend credit in the form of a higher-risk mortgage loan to any consumer without first:

- Obtaining a written appraisal performed by a certified or licensed appraiser who conducts a physical property visit of the interior of the property.
- Obtaining an additional appraisal from a different certified or licensed appraiser if the purpose of the higher-risk mortgage loan is to finance the purchase or acquisition of a mortgaged property from a seller within 180 days of the purchase or acquisition of the property by that seller at a price that was lower than the current sale price of the property. The additional appraisal must include an analysis of the difference in sale prices, changes in market conditions, and any improvements made to the property between the date of the previous sale and the current sale.
- Providing the applicant, at the time of the initial mortgage application, with a statement that any appraisal prepared for the mortgage is for the sole use of the creditor, and that the applicant may choose to have a separate appraisal conducted at the applicant's expense.
- Providing the applicant with one copy of each appraisal conducted in accordance with TILA section 129H without charge, at least three (3) days prior to the transaction closing date.

New TILA section 129H(f) defines a ''higher-risk mortgage'' with reference to the annual percentage rate (APR) for the transaction. A higher-risk mortgage is a ''residential mortgage loan'' secured by a principal dwelling with an APR that exceeds the average prime offer rate (APOR) for a comparable transaction as of the date the interest rate is set—

- By 1.5 or more percentage points, for a first lien residential mortgage loan with an original principal obligation amount that does not exceed the amount for the maximum limitation on the original principal obligation of a mortgage in effect for a residence of the applicable size, as of the date of such interest rate set, pursuant to the sixth sentence of section 305(a)(2) of the Federal Home Loan Mortgage Corporation Act (12 U.S.C. 1454);
- By 2.5 or more percentage points, for a first lien residential mortgage loan having an original principal obligation amount that exceeds the amount for the maximum limitation on the original principal obligation of a mortgage in effect for a residence of the applicable size, as of the date of such interest rate set, pursuant to the sixth sentence of section 305(a)(2) of the Federal Home Loan Mortgage Corporation Act (12 U.S.C. 1454); and
- By 3.5 or more percentage points for a subordinate lien residential mortgage loan.

The definition of ''higher-risk mortgage'' expressly excludes qualified mortgages, as defined in TILA section 129C, as well as reverse mortgage loans that are qualified mortgages as defined in TILA section 129C.

New TILA section 103(cc)(5) defines the term ''residential mortgage loan'' as any consumer credit transaction that is secured by a mortgage, deed of trust, or other equivalent consensual security interest on a dwelling or on residential real property that includes a dwelling, other than a consumer credit transaction under an open-end credit plan. 15 U.S.C. 1602(cc)(5).

New TILA section 129H(b)(4)(A) requires the Agencies to jointly prescribe regulations to implement the property appraisal requirements for higher-risk mortgages. 15 U.S.C. 1639h(b)(4)(A). Section 1400 of the Dodd-Frank Act requires that final regulations to implement these provisions be issued by January 21, 2013.

II. Summary of the Proposed Rule

The Agencies issue this proposal to implement the appraisal requirements for extensions of credit for ''higher-risk mortgage loans'' required by the Dodd-Frank Act, Title XIV, Subtitle F (Appraisal Activities). As required by the Act, this proposal was developed jointly by the Board, the Bureau, the FHFA, the FDIC, the NCUA, and the OCC. The Act generally defines a ''higher-risk mortgage'' as a closed-end consumer credit transaction secured by a principal dwelling with an APR exceeding certain statutory thresholds. These rate thresholds are substantially similar to rate triggers currently in Regulation Z for ''higher-priced mortgage loans,'' a category of loans to which special consumer protections

[1] For motor vehicle dealers as defined in section 1029 of the Dodd-Frank Act, TILA directs the Board to prescribe regulations to carry out the purposes of TILA and authorizes the Board to issue regulations that contain such classifications, differentiations, or other provisions, or that provide for such adjustments and exceptions for any class of transactions, that in the Board's judgment are necessary or proper to effectuate the purposes of TILA, or prevent circumvention or evasion of TILA. 15 U.S.C. 5519; 15 U.S.C. 1604(a).

[2] Public Law 111–203, 124 Stat. 1376.

apply.[3] In general, loans are ''higher-risk mortgage loans'' under this proposed rule if the APR exceeds the APOR by 1.5 percent for first-lien loans, 2.5 percent for first-lien jumbo loans, and 3.5 percent for subordinate-lien loans.[4]

Consistent with the statute, the proposal would exclude ''qualified mortgages'' from the definition of higher-risk mortgage loan. The Bureau will define ''qualified mortgage'' when it finalizes the proposed rule issued by the Board to implement the Dodd-Frank Act's ability-to-repay requirements in TILA section 129C. 15 U.S.C. 1639c; 76 FR 27390, May 11, 2011 (2011 ATR Proposal). In addition, the Agencies propose to rely on exemption authority granted by the Dodd-Frank Act to exempt the following additional classes of loans: (1) reverse mortgage loans; and (2) loans secured solely by residential structures, such as many types of manufactured homes.

Consistent with the statute, the proposal would allow a creditor to make a higher-risk mortgage loan only if the following conditions are met:

- The creditor obtains a written appraisal;
- The appraisal is performed by a certified or licensed appraiser;
- The appraiser conducts a physical property visit of the interior of the property;
- At application, the applicant is provided with a statement regarding the purpose of the appraisal, that the creditor will provide the applicant a copy of any written appraisal, and that the applicant may choose to have a separate appraisal conducted at the expense of the applicant; and
- The creditor provides the consumer with a free copy of any written appraisals obtained for the transaction at least three (3) business days before closing.

In addition, as required by the Act, the proposal would require a higher-risk mortgage loan creditor to obtain an additional written appraisal, at no cost to the borrower, under the following circumstances:

- The higher-risk mortgage loan will finance the acquisition of the consumer's principal dwelling;
- The seller is selling what will become the consumer's principal dwelling acquired the home within 180 days prior to the consumer's purchase agreement (measured from the date of the consumer's purchase agreement); and
- The consumer is acquiring the home for a higher price than the seller paid, although comment is requested on whether a threshold price increase would be appropriate.

The additional written appraisal, from a different licensed or certified appraiser, generally must include the following information: an analysis of the difference in sale prices (*i.e.,* the sale price paid by the seller and the acquisition price of the property as set forth in the consumer's purchase agreement), changes in market conditions, and any improvements made to the property between the date of the previous sale and the current sale.

The proposal also includes a request for comments to address a proposed amendment to the method of calculation of the APR that is being proposed as part of other mortgage-related proposals issued for comment by the Bureau. In the Bureau's proposal to integrate mortgage disclosures (2012 TILA–RESPA Proposal), the Bureau is proposing to adopt a more simple and inclusive finance charge calculation for closed-end credit secured by real property or a dwelling.[5] As the finance charge is integral to the calculation of the APR, the Agencies believe it is possible that a more inclusive finance charge could increase the number of loans covered by this rule. The Agencies note that the Bureau currently is seeking data to assist in assessing potential impacts of a more inclusive finance charge in connection with the 2012 TILA–RESPA Proposal and its proposal to implement the Dodd-Frank Act provision related to ''high-cost mortgages'' (2012 HOEPA Proposal).[6]

The Agencies also note that the Bureau is seeking comment on whether replacing APR with an alternative metric may be warranted to determine whether a loan is covered by the 2012 HOEPA Proposal,[7] as well as by the proposal to implement the Dodd-Frank Act's escrow requirements in TILA section 129D. 15 U.S.C. 1639d; 76 FR 11598, March 2, 2011 (2011 Escrow Proposal). The alternative metric would also have implications for the 2011 ATR Proposal. One possible alternative metric discussed in those proposals is the ''transaction coverage rate'' (TCR), which would exclude all prepaid finance charges not retained by the creditor, a mortgage broker, or an affiliate of either.[8] The new rate triggers for both ''high-cost mortgages'' and ''higher-risk mortgages'' under the Dodd-Frank Act are based on the percentage by which the APR exceeds APOR. Given this similarity, the Agencies also seek comment as to whether a modification should be considered for this rule as well, and if so, what type of modification. Accordingly, higher-risk mortgage loan is defined in the alternative as calculated by either the TCR or APR, with comment sought on both approaches. As explained further below in the section-by-section analysis of the Supplementary Information, the Agencies are relying on their exemption authority under section 1471 of the Dodd-Frank Act to propose an alternative definition of higher-risk mortgage. TILA section 129H(b)(4)(B), 15 U.S.C. 1639h(b)(4)(B).

III. Legal Authority

As noted above, TILA section 129H(b)(4)(A), added by the Dodd-Frank Act, requires the Agencies to jointly prescribe regulations implementing section 129H. 15 U.S.C. 1639h(b)(4)(A). In addition, TILA section 129H(b)(4)(B), grants the Agencies the authority to jointly exempt, by rule, a class of loans from the requirements of TILA section 129H(a) or section 129H(b) if the Agencies determine that the exemption is in the public interest and promotes the safety and soundness of creditors. 15 U.S.C. 1639h(b)(4)(B).

IV. Section-by-Section Analysis

For ease of reference, the Supplementary Information refers to the section numbers of the rules that would be published in the Bureau's Regulation Z at 12 CFR 1026.XX. As explained further in the section-by-section analysis of § 1026.XX(e), the rules would be published separately by the Board, the Bureau and the OCC. No substantive difference among the three sets of rules is intended. The NCUA and FHFA propose to adopt the rules as published in the Bureau's Regulation Z at 12 CFR 1026.XX, by cross-referencing these rules in 12 CFR 722.3 and 12 CFR part 1222, respectively. The FDIC proposes to not cross-reference the Bureau's Regulation Z at 12 CFR 1026.XX.

[3] Added to Regulation Z by the Board pursuant to the Home Ownership and Equity Protection Act of 1994 (HOEPA), the ''higher-priced mortgage loan'' rules address unfair or deceptive practices in connection with subprime mortgages. See 73 FR 44522, July 30, 2008; 12 CFR 1026.35.

[4] The ''higher-priced mortgage loan'' rules apply the 2.5 percent over APOR trigger for jumbo loans only with respect to a requirement to establish escrow accounts. See 12 CFR 1026.35(b)(3)(v).

[5] *See* 2012 TILA–RESPA Proposal, pp. 101–127, 725–28, 905–11 (published July 9, 2012), available at *http://files.consumerfinance.gov/f/201207_cfpb_proposed-rule_integrated-mortgage-disclosures.pdf.*

[6] *See* 2012 HOEPA Proposal, pp. 44, 149–211 (published July 9, 2012), *available at http://files.consumerfinance.gov/f/201207_cfpb_proposed-rule_high-cost-mortgage-protections.pdf.*

[7] *See* 2012 HOEPA Proposal at 39–50, 218, 246.

[8] *See* 75 FR 58539, 58660–62 (Sept. 24, 2010); 76 FR 11598, 11609, 11620, 11626 (March 2, 2011).

Section 1026.XX Appraisals for Higher-Risk Mortgage Loans

XX(a) Definitions

Proposed § 1026.XX(a) sets forth four definitions, discussed below, for purposes of § 1026.XX. The Agencies request comment on whether additional terms should be defined for purposes of this rule, and how best to define those terms in a manner consistent with TILA section 129H.

XX(a)(1) Certified or Licensed Appraiser

TILA section 129H(b)(3) defines ''certified or licensed appraiser'' as a person who ''(A) is, at a minimum, certified or licensed by the State in which the property to be appraised is located; and (B) performs each appraisal in conformity with the Uniform Standards of Professional Appraisal Practice and title XI of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, and the regulations prescribed under such title, as in effect on the date of the appraisal.'' 15 U.S.C. 1639h(b)(3). Consistent with the statute, proposed § 1026.XX(a)(1) would define ''certified or licensed appraiser'' as a person who is certified or licensed by the State agency in the State in which the property that secures the transaction is located, and who performs the appraisal in conformity with the Uniform Standards of Professional Appraisal Practice (USPAP) and the requirements applicable to appraisers in title XI of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, as amended (FIRREA title XI) (12 U.S.C. 3331 *et seq.*), and any implementing regulations, in effect at the time the appraiser signs the appraiser's certification.

Proposed § 1026.XX(a)(1) generally mirrors the statutory language in TILA section 129H(b)(3) regarding State licensing and certification. However, the proposed definition uses the defined term ''State agency'' to clarify that the appraiser must be certified or licensed by a State agency that meets the standards of FIRREA title XI. Specifically, proposed § 1026.XX(a)(4) defines the term ''State agency'' to mean a ''State appraiser certifying and licensing agency'' recognized in accordance with section 1118(b) of FIRREA title XI (12 U.S.C. 3347(b)) and any implementing regulations.[9] *See also* section-by-section analysis of § 1026.XX(a)(4), below.

Uniform Standards of Professional Appraisal Practice (USPAP)

Proposed § 1026.XX(a)(1) uses the term ''Uniform Standards of Professional Appraisal Practice.'' Proposed comment XX(a)(1)–1 clarifies that USPAP refers to the professional appraisal standards established by the Appraisal Standards Board of the ''Appraisal Foundation,'' as defined in FIRREA section 1121(9). 12 U.S.C. 3350(9). The Agencies believe that this terminology is appropriate for consistency with the existing definition in FIRREA title XI.

TILA section 129H(b)(3) would require that the appraisal be performed in conformity with USPAP ''as in effect on the date of the appraisal.'' 15 U.S.C. 1639h(b)(3). The proposed definition of ''certified or licensed appraiser'' and proposed comment XX(a)(1)–1 clarify that the ''date of appraisal'' is the date on which the appraiser signs the appraiser's certification. Thus, the relevant edition of USPAP is the one in effect at the time the appraiser signs the appraiser's certification.

Appraiser's certification. Proposed comment XX(a)(1)–2 clarifies that the term ''appraiser's certification'' refers to the certification that must be signed by the appraiser for each appraisal assignment as specified in USPAP Standards Rule 2–3.[10]

FIRREA and Implementing Regulations

As previously noted, TILA section 129H(b)(3) defines ''certified or licensed appraiser'' as a person who is certified or licensed as an appraiser and ''performs each appraisal in accordance with [USPAP] and title XI of [FIRREA], and the regulations prescribed under such title, as in effect on the date of the appraisal.'' 15 U.S.C. 1639h(b)(3). Proposed § 1026.XX(a)(1) provides that the relevant provisions of FIRREA title XI and its implementing regulations are those selected portions of FIRREA title XI requirements ''applicable to appraisers,'' in effect at the time the appraiser signs the appraiser's certification. As discussed in more detail below, proposed comment XX(a)(1)–3 clarifies that the relevant standards ''applicable to appraisers'' are found in regulations prescribed under FIRREA section 1110 (12 U.S.C. 3339) ''that relate to an appraiser's development and reporting of the appraisal,'' but not those that relate to the review of the appraisal under paragraph (3) of FIRREA section 1110.

Section 1110 of FIRREA directs each Federal financial institutions regulatory agency (*i.e.,* each Federal banking agency[11]) to prescribe ''appropriate standards for the performance of real estate appraisals in connection with federally related transactions under the jurisdiction of each such agency or instrumentality.'' 12 U.S.C. 3339. These standards must require, at a minimum—(1) that real estate appraisals be performed in accordance with generally accepted appraisal standards as evidenced by the appraisal standards promulgated by the Appraisal Standards Board of the Appraisal Foundation; and (2) that such appraisals shall be written appraisals. 12 U.S.C. 3339(1) and (2). The Dodd-Frank Act added a third standard—that real estate appraisals be subject to appropriate review for compliance with USPAP—for which the Federal banking agencies must prescribe implementing regulations. FIRREA section 1110(3), 12 U.S.C. 3339(3). FIRREA section 1110 also provides that each Federal banking agency may require compliance with additional standards if the agency determines in writing that additional standards are required to properly carry out its statutory responsibilities. 12 U.S.C. 3339. Accordingly, the Federal banking agencies have prescribed appraisal regulations implementing FIRREA title XI that set forth, among other requirements, minimum standards for the performance of real estate appraisals in connection with ''federally related transactions,'' which are defined as real estate-related financial transactions that a Federal banking agency engages in, contracts for, or regulates, and that require the services of an appraiser.[12] 12 U.S.C. 3339, 3350(4).

The Agencies are proposing to interpret the ''certified or licensed appraiser'' definition in TILA section 129H(b)(3) to incorporate provisions of the Federal banking agencies' requirements in FIRREA title XI and implementing regulations ''applicable to appraisers,'' which the Agencies have clarified through proposed comment XX(a)(1)–3 as the regulations that ''relate to an appraiser's development and reporting of the appraisal.'' While the Federal banking agencies' requirements, pursuant to this authority

[9] If the Appraisal Subcommittee of the Federal Financial Institutions Examination Council issues certain written findings concerning, among other things, a State agency's failure to recognize and enforce FIRREA title XI standards, appraiser certifications and licenses issued by that State are not recognized for purposes of title XI and appraisals performed by appraisers certified or licensed by that State are not acceptable for federally-related transactions. 12 U.S.C. 3347(b).

[10] *See* Appraisal Standards Bd., Appraisal Fdn., Standards Rule 2–3, USPAP (2012–2013 ed.) at U–29, *available at http://www.uspap.org.*

[11] The Federal banking agencies are the Board, the FDIC, the OCC, and the NCUA.

[12] *See* OCC: 12 CFR part 34, Subpart C; FRB: 12 CFR part 208, subpart E, and 12 CFR part 225, subpart G; FDIC: 12 CFR part 323; and NCUA: 12 CFR part 722.

and their authority to establish safety and soundness regulations, apply to an institution's ordering and review of an appraisal, the Agencies propose that the definition of ''certified or licensed appraiser'' incorporate only FIRREA title XI's minimum standards related to the appraiser's performance of the appraisal.

The Agencies propose this interpretation on the grounds that it is consistent with TILA section 129H. 15 U.S.C. 1639h. Congress included language requiring that appraisals be performed in conformity with FIRREA within the definition of ''certified or licensed appraiser'' under TILA section 129H(b)(3). 15 U.S.C. 1639h(b)(3). Thus, the Agencies believe that Congress intended to limit FIRREA's requirements to those that apply to the *appraiser's* performance of the appraisal, rather than the FIRREA requirements that apply to a creditor's ordering and review of the appraisal.

Proposed comment XX(a)(1)–3 would also clarify that the requirements of FIRREA section 1110(3) that relate to the ''appropriate review'' of appraisals are not relevant for purposes of whether an appraiser is a certified or licensed appraiser under proposed § 1026.XX(a)(1). The Agencies do not propose to interpret ''certified or licensed appraiser'' to include regulations related to appraisal review under FIRREA section 1110(3) because these requirements relate to an institution's responsibilities after receiving the appraisal, rather than to how the certified or licensed appraiser performs the appraisal.

The Agencies recognize that FIRREA title XI applies by its terms to ''federally related transactions'' involving a narrower category of institutions than the group of lenders that fall within TILA's definition of ''creditor.'' [13] However, by cross-referencing FIRREA in the definition of ''certified or licensed appraiser,'' the Agencies believe that Congress intended all creditors that extend higher-risk mortgage loans, such as independent mortgage banks, to obtain appraisals from appraisers who conform to the standards in FIRREA related to the development and reporting of the appraisal.

Question 1: The Agencies invite comment on this interpretation. For example, do commenters believe that Congress intended that FIRREA title XI requirements would only apply to the subset of higher-risk mortgage loans that are already covered by FIRREA (*i.e.,* federally related transactions with a transaction value greater than $250,000 not otherwise exempted from FIRREA's appraisal requirements [14])? If so, do commenters believe the longstanding existence of USPAP Advisory Opinion 30 lends support to this approach? [15]

The Agencies have not identified specific FIRREA regulations that relate to the appraiser's development and reporting of the appraisal. The Federal banking agencies' regulations implementing title XI of FIRREA include ''minimum standards'' requiring, for example, that the appraisal be based on the definition of market value in their regulations,[16] and that appraisals be performed by State-licensed or certified appraisers in accordance with their FIRREA regulations. The Federal banking agencies' regulations also include standards on ''appraiser independence,'' including that the appraiser not have a direct or indirect interest, financial or otherwise, in the property being appraised.

Question 2: The Agencies request comment on whether a final rule should address any particular FIRREA requirements applicable to appraisers related to the development and reporting of the appraisal.

''Certified'' versus ''licensed'' appraiser. Neither TILA section 129H nor the proposed rule defines the individual terms ''certified appraiser'' and ''licensed appraiser,'' or specifies when a certified appraiser or a licensed appraiser must be used. Instead, the proposed rule, consistent with paragraphs (b)(1) and (b)(2) of TILA section 129H, would require that creditors obtain an appraisal performed by ''a certified or licensed appraiser.'' *See* proposed § 1026.XX(a)(1); 15 U.S.C. 1639h(b)(1), (b)(2). Certified and licensed appraisers generally differ based on the examination, education, and experience requirements necessary to obtain each credential. Existing State and Federal law and regulations require the use of a certified appraiser rather than a licensed appraiser for certain types of transactions. For example, the Federal banking agencies' FIRREA appraisal regulations define ''State certified appraiser'' [17] and ''State licensed appraiser,'' [18] and specify the use of a certified appraiser based on the complexity of the residential property and the dollar amount of the transaction.[19] Several State agencies do not issue licensed appraiser credentials and issue different certified appraiser credentials (*i.e.,* a certified residential appraiser and a certified general appraiser) based on the type of property.

Question 3: The Agencies request comment on whether the rule should address the issue of when a creditor must use a certified appraiser rather than a licensed appraiser.

Further, the proposed rule does not specify competency standards. In selecting an appraiser for a particular appraisal assignment, creditors typically consider an appraiser's experience, knowledge, and educational background to determine the individual's competency to appraise a particular property and in a particular market. The Competency Rule in USPAP requires appraisers to determine, prior to accepting an assignment, that they can perform the assignment competently.

[13] TILA section 103(g), 15 U.S.C. 1602(g) (implemented by § 1026.2(a)(17)).

[14] Under title XI of FIRREA, the Federal banking agencies were granted the authority to identify categories of real estate-related financial transactions that do not require the services of an appraiser to protect Federal financial and public policy interests or to satisfy principles of safe and sound lending (e.g., transactions with a transaction value equal to or less than $250,000 do not require the services of an appraiser under the Federal banking agencies' regulations). For a discussion of these regulatory exemptions, see Interagency Appraisal and Evaluation Guidelines, 75 FR 77450, 77465–68 (Dec. 10, 2010).

[15] USPAP Advisory Opinion 30 is a long-standing advisory opinion issued by the Appraisal Standards Board of the Appraisal Foundation, which holds that USPAP creates an obligation for appraisers to recognize and adhere to applicable assignment conditions, including, for federally related transactions, FIRREA title XI and the regulations prescribed under such title. *See* Appraisal Standards Bd., Appraisal Fdn., Advisory Op. 30, *available at http://www.uspap.org.*

[16] The Federal banking agencies' appraisal regulations define ''market value'' to mean the most probable price which a property should bring in a competitive and open market under all conditions requisite to a fair sale, the buyer and seller each acting prudently and knowledgeably, and assuming the price is not affected by undue stimulus. See OCC: 12 CFR 34.42(g); FDIC: 12 CFR 323.2(g); FRB: 12 CFR 225.62(g); and NCUA: 12 CFR 722.2(g). Implicit in this definition is the consummation of a sale as of a specified date and the passing of title from seller to buyer under conditions whereby—(1) buyer and seller are typically motivated; (2) both parties are well informed or well advised, and acting in what they consider their own best interest; (3) a reasonable time is allowed for exposure in the open market; (4) payment is made in terms of cash in U.S. dollars or in terms of financial arrangements comparable thereto; and (5) the price represents the normal consideration for the property sold unaffected by special or creative financing or sales concessions granted by anyone associated with the sale. *Id.*

[17] *See* OCC: 12 CFR 34.42(j); FDIC: 12 CFR 323.2(j); FRB: 12 CFR 225.62(j); and NCUA: 12 CFR 722.2(j).

[18] *See* OCC: 12 CFR 34.42(k); FDIC: 12 CFR 323.2(k); FRB: 12 CFR 225.62(k); and NCUA: 12 CFR 722.2(k).

[19] For example, the Federal banking agencies' appraisal regulations require that a ''State certified appraiser'' be used for ''[a]ll federally related transactions having a transaction value of $1,000,000 or more'' and for ''[a]ll complex 1-to 4 family residential property appraisals rendered in connection with federally related transactions * * * if the transaction value is $250,000 or more.'' See, e.g., OCC: 12 CFR 34.43(d).

See USPAP, Competency Rule.[20] The Federal banking agencies' FIRREA appraisal regulations provide that a State certified or licensed appraiser may not be considered competent solely by virtue of being certified or licensed.[21]

Question 4: The Agencies request comment on whether the rule should address the issue of appraiser competency.

The Agencies acknowledge that creditors not otherwise subject to FIRREA title XI may have questions about how to comply with the requirement to obtain an appraisal from a ''certified or licensed appraiser'' who performs an appraisal in conformity with the requirements applicable to appraisers in title XI of FIRREA and any implementing regulations. The Agencies also note that all creditors, including those already subject to FIRREA, may have questions about how FIRREA regulations relating to the development and reporting of the appraisal may be interpreted for purposes of applying TILA's civil liability provisions, *see* TILA section 139, 15 U.S.C. 1640, including the liability provision for willful failures to obtain an appraisal as required by TILA section 129H. *See* TILA section 129H(e), 15 U.S.C. 1639h(e). To address these concerns, the Agencies are proposing a safe harbor for compliance with TILA section 129H at § 1026.XX(b)(2). See the section-by-section analysis of proposed § 1026.XX(b)(2), below.

XX(a)(2) Higher-Risk Mortgage Loans

New TILA section 129H(f) defines a ''higher-risk mortgage'' as a residential mortgage loan secured by a principal dwelling with an APR that exceeds the APOR for a comparable transaction by a specified percentage as of the date the interest rate is set. 15 U.S.C. 1639(f). New TILA section 103(cc)(5) defines the term ''residential mortgage loan'' as any consumer credit transaction that is secured by a mortgage, deed of trust, or other equivalent consensual security interest on a dwelling or on residential real property that includes a dwelling, other than a consumer credit transaction under an open-end credit plan. 15 U.S.C. 1602(cc)(5).

Proposed § 1026.XX(a)(2) would define the term ''higher-risk mortgage loan'' for purposes of § 1026.XX. Consistent with TILA sections 129H(f) and 103(cc)(5), proposed § 1026.XX(a)(2)(i) provides that a ''higher-risk mortgage loan'' is a closed-end consumer credit transaction secured by the consumer's principal dwelling with an APR that exceeds the APOR for a comparable transaction as of the date the interest rate is set by a specified percentage depending on the type of transaction. The proposed rule uses the phrase ''a closed-end consumer credit transaction secured by the consumer's principal dwelling'' in place of the statutory term ''residential mortgage loan'' throughout § 1026.XX(a)(2). The Agencies have elected to incorporate the substantive elements of the statutory definition of ''residential mortgage loan'' into the proposed definition of ''higher-risk mortgage loan'' rather than using the term itself to avoid inadvertent confusion of the term ''residential mortgage loan'' with the term ''residential mortgage transaction,'' which is an established term used throughout Regulation Z and defined in § 1026.2(a)(24). *Compare* 15 U.S.C. 1602(cc)(5) (defining ''residential mortgage loan'') *with* 12 CFR 1026.2(a)(24) (defining ''residential mortgage transaction''). Accordingly, the proposed regulation text differs from the express statutory language, but with no intended substantive change to the scope of TILA section 129H.

Principal Dwelling

Proposed comment XX(a)(2)(i)–1 clarifies that, consistent with other sections of Regulation Z, under proposed § 1026.XX(a)(2)(i) a consumer can have only one principal dwelling at a time. Proposed comment XX(a)(2)(i)–1 states that the term ''principal dwelling'' has the same meaning as in § 1026.2(a)(24), and expressly cross references existing comment 2(a)(24)–3, which further explains the meaning of the term. Consistent with this comment, a vacation home or other second home would not be a principal dwelling. However, if a consumer buys or builds a new dwelling that will become the consumer's principal dwelling within a year or upon the completion of construction, the proposed comment clarifies that the new dwelling is considered the principal dwelling.

Average Prime Offer Rate

Proposed comment XX(a)(2)(i)–2 would cross-reference existing comment 35(a)(2)–1 for guidance on APORs. Existing comment 35(a)(2)–1 clarifies that APORs are APRs derived from average interest rates, points, and other loan pricing terms currently offered to consumers by a representative sample of creditors for mortgage transactions that have low-risk pricing characteristics. Other pricing terms include commonly used indices, margins, and initial fixed-rate periods for variable-rate transactions. Relevant pricing characteristics include a consumer's credit history and transaction characteristics such as the loan-to-value ratio, owner-occupant status, and purpose of the transaction. Currently, to obtain APORs, the Board, which currently publishes the APORs, uses a survey of creditors that both meets the criteria of § 1026.35(a)(2) and provides pricing terms for at least two types of variable rate transactions and at least two types of non-variable rate transactions. An example of such a survey, and the survey that is currently used to calculate APORs, is the Freddie Mac Primary Mortgage Market Survey.® As of the date of this proposed rule, the table of APORs is published by the Board; however, the Bureau will assume the responsibility for publishing all of the elements of the table in the future.

Comparable Transaction

Proposed comment XX(a)(2)(i)–3 cross-references guidance in existing comments 35(a)(2)–2 and 35(a)(2)–4 regarding how to identify the ''comparable transaction'' in determining whether a transaction meets the definition of a ''higher-risk mortgage loan'' under § 1026.XX(a)(2)(i). As these comments indicate, the table of APORs published by the Bureau will provide guidance to creditors in determining how to use the table to identify which APOR is applicable to a particular mortgage transaction. Consistent with the Board's current practices, the Bureau intends to publish on the internet, in table form, APORs for a wide variety of mortgage transaction types based on available information. For example, the Board publishes a separate APOR for at least two types of variable rate transactions and at least two types of non-variable rate transactions. APORs are APRs derived from average interest rates, points and other loan pricing terms currently offered to consumers by a representative sample of creditors for mortgage transactions that have low-risk pricing characteristics. Currently, the Board calculates an APR, consistent with Regulation Z (*see* 12 CFR 1026.22 *and* appendix J to part 1026), for each transaction type for which pricing terms are available from a survey, and estimates APRs for other types of transactions for which direct survey data are not available based on the loan pricing terms available in the survey and other information. However, data are not available for some types of mortgage transactions, including reverse mortgages. In addition, the Board publishes on the internet the

[20] *See* Appraisal Standards Bd., Appraisal Fdn., Competency Rule, USPAP (2012–2013 ed.) at U–11.

[21] *See* OCC: 12 CFR 34.46(b); FDIC: 12 CFR 323.6(b); FRB: 12 CFR 225.66(b); and NCUA: 12 CFR 722.6(b).

methodology it uses to arrive at these estimates.[22]

Date APR is Set

Proposed comment XX(a)(2)(i)–4 would cross-reference existing comment 35(a)(2)–3 for guidance on the date the APR is set. Existing comment 35(a)(2)–3 clarifies that a transaction's APR is compared to the APOR as of the date the transaction's interest rate is set (or ''locked'') before consummation. The comment notes that sometimes a creditor sets the interest rate initially and then re-sets it at a different level before consummation. Accordingly, under the proposal, for purposes of § 1026.XX(a)(2)(i), the creditor should use the last date the interest rate for the mortgage is set before consummation.

''Higher-Risk Mortgage Loan'' Versus ''Higher-Priced Mortgage Loan''

TILA section 129H(f) defines the term ''higher-risk mortgage'' in a similar manner to the existing Regulation Z definition of ''higher-priced mortgage loan.'' 12 CFR 1026.35(a). However, the statutory definition of higher-risk mortgage differs from the existing regulatory definition of higher-priced mortgage loan in several important respects. First, the statutory definition of higher-risk mortgage expressly excludes loans that meet the definition of a ''qualified mortgage'' under TILA section 129C. In addition, the statutory definition of higher-risk mortgage includes an additional 2.5 percentage point threshold for first-lien jumbo mortgage loans, while the definition of higher-priced mortgage loan contains this threshold only for purposes of applying the requirement to establish escrow accounts for higher-priced mortgage loans. *Compare* TILA section 129H(f)(2), 15 U.S.C. 1639h(f)(2), *with* 12 CFR 1026.35(a)(1) *and* 1026.35(b)(3). The Agencies have concerns that the use of two such similar terms within the same regulation may cause confusion to both consumers and industry. However, given that the definitions of the two terms differ in significant ways, the Agencies are proposing, consistent with the statute, to define and use the term ''higher-risk mortgage loan'' when establishing the scope of proposed § 1026.XX.

Question 5: The Agencies request comment on whether the concurrent use of the defined terms ''higher-risk mortgage loan'' and ''higher-priced mortgage loan'' in different portions of Regulation Z may confuse industry or consumers and, if so, what alternative approach the Agencies could take to implementing the statutory definition of ''higher-risk mortgage loan'' consistent with the requirements of TILA section 129H. 15 U.S.C. 1639h.

In addition, proposed § 1026.XX uses the term ''higher-risk mortgage loan'' instead of the statutory term ''higher-risk mortgage'' for clarity and consistency with § 1026.35, which uses the term ''higher-priced mortgage loan.'' 12 CFR 1026.35(a).

XX(a)(2)(i)(A) and (a)(2)(i)(B)

Trigger for First Lien Loans

Consistent with TILA section 129H(f)(2)(A)–(B), paragraphs (a)(2)(i)(A) and (a)(2)(i)(B) of proposed § 1026.XX set the following thresholds for the amount by which the APR must exceed the applicable APOR for a loan secured by a first lien to qualify as a higher-risk mortgage loan:

- By 1.5 or more percentage points, for a loan with a principal obligation at consummation that does not exceed the limit in effect as of the date the transaction's interest rate is set for the maximum principal obligation eligible for purchase by Freddie Mac.
- By 2.5 or more percentage points, for a loan with a principal obligation at consummation that exceeds the limit in effect as of the date the transaction's interest rate is set for the maximum principal obligation eligible for purchase by Freddie Mac.

Paragraphs (a)(2)(i)(A) and (a)(2)(i)(B) of proposed § 1026.XX include several non-substantive changes from the statutory language for clarity and consistency with § 1026.35(b)(3)(v). For an exemption from the requirement to escrow for property taxes and insurance for ''higher-priced mortgage loans,'' § 1026.35(b)(3)(v) defines a ''jumbo'' loan as: ''[A] transaction with a principal obligation at consummation that exceeds the limit in effect as of the date the transaction's interest rate is set for the maximum principal obligation eligible for purchase by Freddie Mac.'' In particular, the proposal would use the phrase ''for a loan secured by a first lien with'' in place of the statutory phrase ''in the case of a first lien residential mortgage loan having.'' *See* 15 U.S.C. 1639h(f)(2)(A)–(B). As discussed above, all of the elements of the statutory definition of the term ''residential mortgage loan'' are incorporated into proposed § 1026.XX(a)(2)(i). The proposed rule also uses the phrase ''for the maximum principal obligation eligible for purchase by Freddie Mac'' in place of the statutory phrase ''pursuant to the sixth sentence of section 305(a)(2) the Federal Home Loan Mortgage Corporation Act,'' for consistency with § 1026.35(b)(3)(v) and without intended substantive change.

XX(a)(2)(i)(C)

Trigger for Subordinate-Lien Loans

Consistent with TILA section 129H(f)(2)(C), proposed § 1026.XX(a)(2)(i)(C) provides that the APR must exceed the applicable APOR by 3.5 or more percentage points for a loan secured by a subordinate lien to qualify as a higher-risk mortgage loan. In addition, for the reasons discussed above, proposed § 1026.XX(a)(2)(i)(C) uses the phrase ''for a loan secured by a subordinate lien'' in place of the statutory phrase ''for a subordinate lien residential mortgage loan.'' 15 U.S.C. 1639h(f)(2)(C).

Alternative Calculation Method: Transaction Coverage Rate

In the Bureau's 2012 TILA–RESPA Proposal, the Bureau is proposing to adopt a simpler and more inclusive finance charge calculation for closed-end credit secured by real property or a dwelling.[23] The finance charge is integral to the calculation of the APR, which is designed to serve as a benchmark in TILA disclosures for consumers to evaluate the overall cost of credit.

Currently, TILA and Regulation Z allow creditors to exclude various fees or charges from the finance charge, including most real estate-related closing costs. Consumer groups, creditors, and some government agencies have long been dissatisfied with the ''some fees in, some fees out'' approach to the finance charge. The 2012 TILA–RESPA Proposal would maintain TILA's definition of a finance charge as a fee or charge payable directly or indirectly by the consumer and imposed directly or indirectly by the creditor as an incident to the extension of credit. However, the proposal would require the creditor to include in the finance charge most charges by third parties. The Bureau's 2012 TILA–RESPA proposal discusses the potential benefits to consumers of making the APR a more accurate and useful comparison tool and to industry

[22] *See http://www.ffiec.gov/ratespread/newcalchelp.aspx#9.*

[23] *See* 2012 TILA–RESPA Proposal, pp. 101–127, 725–28, 905–11 (July 9, 2012), available at *http://files.consumerfinance.gov/f/201207_cfpb_proposed-rule_integrated-mortgage-disclosures.pdf*). This proposal is similar to the simpler, more inclusive finance charge proposed by the Board in its 2009 proposed amendments to Regulation Z containing comprehensive changes to the disclosures for closed-end credit secured by real property or a consumer's dwelling. *See* 74 FR 43232, 43241–45 (Aug. 26, 2009).

of using simpler calculations to reduce compliance burden and litigation risk.[24]

A simpler and more inclusive finance charge, however, would increase the APR for most mortgage loans. However, the Agencies currently lack sufficient data to model the amount by which this change would increase the APR or how the increase in turn would affect the number of loans that will exceed the statutory threshold for higher-risk mortgages. The Agencies note that the Bureau is seeking data to assist in assessing potential impacts of a more inclusive finance charge in connection with the Bureau's 2012 TILA–RESPA Proposal [25] and its 2012 HOEPA Proposal.[26]

Under TILA section 129H(f), to determine whether a loan is a higher-risk mortgage loan, the loan's APR is measured against the benchmark APOR. 15 U.S.C. 1639h(f). The APOR is not a market wide average of the APR but, instead, is derived from average interest rates, points, and other loan pricing terms such as margins and indices. Currently, the APOR is based on the Freddie Mac Primary Mortgage Market Survey (PMMS) of pricing by a representative sample of creditors on transactions with low-risk pricing characteristics. There are some important differences between the fees and charges used in the calculation of the APR and APOR. In particular, the APOR consistently includes the contract interest rate and ''total points,'' [27] but the reporting of other origination fees is not consistently included. Thus, the APOR derived from such surveys likely understates the actual cost to consumers of the low-risk loans intended to form the benchmark.

By contrast, the finance charge used to calculate the APR currently includes both discount points and origination fees, together with most other charges the creditor retains and certain third-party charges. By including additional creditor and third-party charges, the proposed more inclusive finance charge would widen the disparity between APR and APOR and potentially push more loans into the ''higher-risk mortgage loan'' category, though by how much is uncertain.

As noted, the Bureau, in connection with its 2012 TILA–RESPA Proposal, is proposing a more inclusive finance charge. The Agencies are aware that the more inclusive finance charge has implications for several rulemakings, including this proposal regarding higher-risk mortgage appraisal rules, the Bureau's 2012 HOEPA Proposal,[28] as well as the 2011 ATR Proposal and the 2011 Escrow Proposal. Each of these proposals separately discusses the impacts of the more inclusive finance charge and potential modifications, and the Agencies believe that it is helpful to do so in this proposal as well. This approach permits assessment of the impacts and the merits of any modifications on a rule-by-rule basis.

Question 6: Accordingly, this proposal seeks comment on whether and how to account for the implications of a more inclusive finance charge on the scope of higher-risk mortgage coverage.

If the Bureau adopts a more inclusive finance charge, one way potentially to reduce the disparity between the resulting APR and the APOR for purposes of different regulatory thresholds would be to modify the numeric threshold that triggers coverage. The Bureau sought comment on such an approach in the 2012 HOEPA proposal, as one of two alternatives, but lacked the data necessary to propose a specific numeric modification. The Agencies similarly lack such data for higher-risk mortgages. However, unlike the Bureau's authority to adjust the threshold triggers in HOEPA, TILA section 129H does not give the Agencies express authority to revise the numeric threshold triggers for purposes of determining which loans are higher-risk mortgage loans. 15 U.S.C. 1639h. *See also* TILA section 103(bb)(2)(A) and (B), 15 U.S.C. 1639h(bb)(2)(A) and (B).

An alternative approach would be to use a ''transaction coverage rate'' (TCR) for the APR as the metric for determining whether a closed-end loan is a higher-risk mortgage loan subject to § 1026.XX. This is the other alternative on which the Bureau seeks comment in the 2012 HOEPA Proposal.[29] Under this approach, the TCR would be calculated in a manner similar to how the APR is calculated, except that the prepaid finance charge used for the TCR calculation would include only charges retained by the creditor, a mortgage broker, or an affiliate of either.[30] The TCR would not reflect other closing costs that would be included in the broader finance charge for purposes of calculating the APR that would be disclosed to consumers. For example, the APR resulting from the proposed more inclusive finance charge would reflect third-party charges such as title insurance premiums, but the TCR would not. *See* 75 FR 58539, 58661; 76 FR 11598, 11626. Thus, a creditor would calculate the TCR to determine coverage, but the new APR would be used for consumer disclosures.

If the Bureau adopts a more inclusive finance charge, the Agencies will consider whether to adopt the TCR in this rule. This alternative would allow creditors to exclude some fees from the ''rate'' used to determine if a loan is a ''higher-risk mortgage loan.'' By excluding these fees, it is possible fewer loans would be covered by the rule. Accordingly, to adopt the TCR, the Agencies would rely on their authority to exempt a class of loans from the requirements of the rule if the Agencies determine the exemption is in the public interest and promotes the safety and soundness of creditors. TILA section 129H(b)(4)(B), 15 U.S.C. 1639h(b)(4)(B). The Agencies believe that use of the TCR could have both advantages and disadvantages with respect to being in the public interest and promoting the safety and soundness of creditors. One advantage would be that loans that Congress may not have intended to be treated as higher-risk mortgage loans would remain not covered by the higher-risk mortgage appraisal requirements. On the other hand, some loans that Congress intended to be treated as higher-risk mortgages might end up not being covered by the higher-risk mortgage

[24] *See* 2012 TILA–RESPA Proposal at 101–27, 600–08.

[25] *See* 2012 TILA–RESPA Proposal at, *e.g.,* 101–12.

[26] *See* 2012 HOEPA Proposal, pp. 44, 149–211 (July 9, 2012), *available at http://files.consumerfinance.gov/f/201207_cfpb_proposed-rule_high-cost-mortgage-protections.pdf.*

[27] Freddie Mac defines ''total points'' to include both ''discount [points] and origination fees that have historically averaged around one point.'' *See http://www freddiemac.com/pmms/abtpmms.htm.* The Agencies understand that it is not clear that survey respondents are consistent in their reporting or in including origination fees not expressed as a point.

[28] *See* 2012 HOEPA Proposal (July 9, 2012), available at *http://files.consumerfinance.gov/f/201207_cfpb_proposed-rule_high-cost-mortgage-protections.pdf.*

[29] *See* 2012 HOEPA Proposal at 39–50, 218, 246. The transaction coverage rate has been proposed previously by the Board for substantially similar reasons in a proposal related to mortgages in 2010, *see* 75 FR 58539, 58660–62, Sept. 24, 2010 (2010 Mortgage Proposal), and 2011 Escrow Proposal, *see* 76 FR 11598, 11609, 11620, 11626, March 2, 2011.

[30] *See* 2012 HOEPA Proposal at 46–47. The wording of the Board's proposed definition of ''transaction coverage rate'' varied slightly between the 2010 Mortgage Proposal and the 2011 Escrow Proposal as to treatment of charges retained by mortgage broker affiliates. In its 2012 HOEPA Proposal, the Bureau proposes to use the 2011 Escrow Proposal version, which would include charges retained by broker affiliates. The Agencies believe that this approach is consistent with the rationale articulated by the Board in its earlier proposals and with certain other parts of the Dodd-Frank Act that distinguish between charges retained by the creditor, mortgage broker, or affiliates of either company. *See, e.g.,* Dodd-Frank Act section 1403.

appraisal requirements. This is because the TCR as proposed would exclude some third-party fees that are currently included in the finance charge, such as upfront mortgage guaranty insurance premiums paid to independent third-party providers. The Agencies expect to analyze the potential differential as data become available.

Another potential disadvantage is that adopting a TCR for determining coverage would require a creditor to make an additional calculation to determine whether a loan is subject to TILA section 129H. Creditors would continue to be required to calculate the APR to provide required disclosures to the consumer. Additionally, creditors would have to calculate the TCR to determine whether the loan is subject to the requirements of this rule. On the other hand, if the Bureau adopts both the more inclusive finance charge and the TCR modification in a final rule pursuant to the 2012 HOEPA Proposal and 2011 Escrow Proposal, adopting the TCR modification in the higher-risk mortgage rule could ensure consistency across rules.

Question 7: Comments are invited on both the potential for TCR to introduce additional complexity in enforcement and litigation contexts [31] and any possible additional burden for the industry.

In light of the uncertainty regarding whether the Bureau will adopt a more inclusive finance charge and the potential impact of that change, the Agencies have proposed two alternative versions of § 1026.XX(a)(2)(i), similar to those proposed by the Bureau in connection with the 2012 HOEPA Proposal. Alternative 1 would define the threshold for higher-risk mortgages based on APR. Alternative 2 would use TCR. The Agencies would not adopt Alternative 2 if the Bureau does not change the definition of finance charge. As noted above, if the Agencies were to adopt Alternative 2, the Agencies would rely on their exemption authority set forth in TILA section 129H(b)(4)(B). 15 U.S.C. 1639h(b)(4)(B). The Agencies would reference the definition of ''transaction coverage rate'' provided in the Board's proposed § 226.45(a)(2)(i), proposed by the Bureau to be codified in § 1026.35(a)(2)(i), along with the guidance provided in its associated commentary. The Agencies also would reference the definition of ''average prime offer rate'' proposed by the Bureau to be codified in § 1026.35(a)(2)(ii). This is the approach to defining TCR (and APOR) that the Bureau is proposing in the 2012 HOEPA Proposal. *See* 2012 HOEPA Proposal at 46–47, 218.[32]

Again, the Agencies do not currently have sufficient data to model the impact of the more inclusive finance charge on coverage of the higher-risk mortgage loan requirements.[33] Similarly, the Agencies lack data to assess whether the benefits and costs of those requirements are significantly different as to the loans that would be affected by the more inclusive finance charge.

Question 8: The Agencies therefore seek comment on the impacts the proposed more inclusive finance charge would have on application of the higher-risk mortgage loan requirements, and whether it would be in the public interest and promote the safety and soundness of creditors to modify the triggers for higher-risk mortgage loans to approximate more closely the coverage levels under the finance charge and APR as currently calculated.

Question 9: If potential modifications are warranted, the Agencies also seek comment on what methods may be appropriate, including use of the TCR in lieu of APR, or other methods commenters may suggest. The appraisal provisions of the Dodd-Frank Act are intended to protect lenders, consumers and investors against fraudulent and inaccurate appraisals. With this in mind, commenters are invited to address the relative costs and benefits of any modification in the context of the higher-risk mortgage loan appraisal proposal, including any potential impact on the market. Where possible, comments should include supporting data. In particular, data regarding the amount of charges currently considered prepaid finance charges and the amount of charges currently excluded from the finance charge would enable the Agencies to make an informed assessment of the impacts a more inclusive finance charge would have on the higher-risk mortgage loan rule, and may be useful as well to the Bureau in considering other affected rules.

XX(a)(2)(ii)

Exclusions from the Definition of Higher-Risk Mortgage Loan

Consistent with the express language of TILA section 129H(f) and pursuant to the Agencies' general exemption authority set forth in TILA section 129H(b)(4)(B), the proposed rule would expressly exclude certain classes of consumer credit transactions from the definition of higher-risk mortgage loan. 15 U.S.C. 1639h(b)(4)(B) and (f). Specifically, proposed § 1026.XX(a)(2)(ii)) excludes from the definition of higher-risk mortgage loan the following:

- Any loan that is a qualified mortgage loan as defined in § 1026.43(e);
- A reverse-mortgage transaction as defined in § 1026.33(a).
- A loan secured solely by a residential structure.

Each of these proposed exclusions from the definition of higher-risk mortgage loan is discussed in more detail below.

XX(a)(2)(ii)(A)

Qualified Mortgage Loans

TILA section 129H(f) expressly excludes from the definition of higher-risk mortgage any loan that is a qualified mortgage as defined in TILA section 129C and a reverse mortgage loan that is a qualified mortgage as defined in TILA section 129C. 15 U.S.C. 1639(f). Rather than implement one exclusion for qualified mortgages and a separate exclusion for any reverse mortgage loans that may be defined by the Bureau as qualified mortgages, proposed § 1026.XX(a)(2)(ii) would exclude a qualified mortgage loan as defined in § 1026.43(e) which would cover all qualified mortgages as defined by TILA section 129C as implemented in regulations of the Bureau. The Agencies believe that this single broad exclusion promotes clarity because the broader term ''qualified mortgage'' as defined in § 226.43(e) of the 2011 ATR Proposal, includes any reverse mortgage loan that the Bureau may define by regulation as a qualified mortgage.

The Agencies note that as of the date of this proposal, the Bureau has not yet

[31] Agency examiners and enforcement staff, as well as consumers seeking to determine whether they are entitled to the higher-risk mortgage protections, would have to know how to determine and calculate the TCR and how to verify a creditor's TCR calculation to ascertain whether the appraisal protections should apply to a given transaction.

[32] In the Board's 2010 Mortgage Proposal, the definition of ''transaction coverage rate'' was proposed in § 226.35(a)(2)(i), and the definition of ''average prime offer rate'' in existing § 226.35(a)(2) would have been redesignated as § 226.35(a)(2)(ii) for organizational purposes. The Board's 2011 Escrow Proposal contained parallel provisions, although they were set forth in a proposed new § 226.45(a)(2)(i) and (ii).

[33] In its 2009 mortgage proposal, the Board relied on a 2008 survey of closing costs conducted by Bankrate.com that contains data for hypothetical $200,000 loans in urban areas. *See* 74 FR 43232, 43244 (Aug. 26, 2009). Based on that data, the Board estimated that 3 percent of loans would be reclassified as ''higher-priced loans'' (which are similar to ''higher-risk mortgages'') if the definition of finance charge was expanded. See id. The Agencies are considering the 2010 version of that survey; however, the data being sought by the Bureau in its 2012 TILA–RESPA Proposal and 2012 HOEPA Proposal as described above would provide more representative information regarding closing and settlement costs that would allow for a more refined analysis of the proposals.

issued final rules implementing TILA section 129C's definition of ''qualified mortgage.'' Prior to the transfer of authority regarding TILA section 129C to the Bureau under the Dodd-Frank Act, the Board issued the 2011 ATR Proposal, which, among other things, would have defined a ''qualified mortgage'' in a new subsection 12 CFR 226.43(e). *See* 76 FR 27390, 27484–85 (May 11, 2011). The Bureau expects to issue a final rule implementing, among other things, the definition of ''qualified mortgage,'' based on the 2011 ATR Proposal.[34]

XX(a)(2)(ii)(B)

Reverse Mortgage Transactions

Proposed § 1026.XX(a)(2)(ii)(B) would exclude reverse mortgage transactions as defined in § 1026.33(a) from the definition of ''higher-risk mortgage loan.'' TILA section 129H(b)(4)(B) authorizes the Agencies to jointly exempt, by rule, a class of loans from the requirements of TILA sections 129H(a) or 129H(b) if the Agencies determine that the exemption is in the public interest and promotes the safety and soundness of creditors. 15 U.S.C. 1639h(b)(4)(B).

Today, the vast majority of reverse mortgage transactions made in the United States are insured by the Federal Housing Administration (FHA) as part of the U.S. Department of Housing and Urban Development's (HUD) Home Equity Conversion Mortgage (HECM) Program.[35] To originate reverse mortgage transactions under HUD's HECM program, a lender must adhere to specific standards, including appraisal requirements similar to those required under proposed § 1026.XX.[36] Moreover, the FHA's HECM program provides protections to both the lender and the borrower. Lenders are guaranteed that they will be repaid in full when the home is sold, regardless of the loan balance or home value at repayment.[37] Borrowers are guaranteed that they will be able to access their authorized loan funds in the future (subject to the terms of the loan), even if the loan balance exceeds the value of the home or if the lender experiences financial difficulty.[38] Borrowers or their estates are not liable for loan balances that exceed the value of the home at repayment—FHA insurance covers this risk.[39]

Another reason that the Agencies propose to exclude reverse mortgage transactions from the definition of higher-risk mortgage loan is that a methodology for determining APORs for reverse mortgage transactions does not currently exist. As explained in the discussion of proposed § 1026.XX(a)(2)(i) above, determining whether a given transaction constitutes a ''higher-risk mortgage loan'' requires lenders to compare a transaction's APR with a published APOR. *See* comments 35(a)(2)–2 and 35(a)(2)–4. The Board currently publishes APORs for types of mortgage transactions potentially subject to proposed § 1026.XX. However, the Board does not currently publish APORs for reverse mortgages because reverse mortgages are exempt from the rules applicable to ''higher-priced mortgage loans'' in § 1026.35, for which the APOR was designed. *See* § 1026.35(a)(2)–(3) .

The Agencies are concerned that providing a permanent exemption for reverse mortgage transactions that are not qualified mortgages would eliminate the consumer protections provided by this rule to populations that rely on such products. Reverse mortgages are complex products that present consumers with a number of issues to evaluate that are different from a typical mortgage transaction, and the potential for reemergence of private reverse mortgage products in the market warrants careful evaluation from a consumer protection standpoint. However, the Agencies believe that exempting reverse mortgage transactions until the Agencies have additional time to study reverse mortgages is in the public interest and promotes the safety and soundness of creditors. The Agencies believe that this exemption is in the public interest because, without a clear way to determine whether a given reverse mortgage is a ''higher-risk mortgage loan,'' creditors face legal uncertainty that may impact credit availability. In addition, the costs associated with legal uncertainty could negatively impact a creditor's safety and soundness.

The Agencies request comment on the appropriateness of this exemption. Additionally, the Agencies seek comment on whether available indices exist that track the APR for reverse mortgages and could be used by the Bureau to develop and publish an APOR for these transactions, or whether such an index could be developed. For example, HUD publishes information on HECMs, including the contract rate.[40] The contract rate does not cover closing costs and insurance associated with reverse mortgages and included in a reverse mortgage APR, but nonetheless may be a starting point for developing a ''higher-risk mortgage loan'' threshold for reverse mortgages similar to the APOR metric used for forward mortgages.

Question 10: The Agencies request comment on whether this approach could be used to develop an index that tracks reverse mortgages. The Agencies also seek specific suggestions for other approaches to developing an index for reverse mortgages.

XX(a)(2)(ii)(C)

Loans Secured Solely by a Residential Structure

The Agencies propose in § 1026.XX(a)(2)(ii)(C) to exclude from the definition of higher-risk mortgage loan any loan secured solely by a residential structure. The Agencies believe that TILA section 129H was intended to apply only to loans secured at least in part by real estate. 15 U.S.C. 1639h. TILA section 129H requires appraisals for higher-risk mortgage loans that conform with, among other provisions, FIRREA title XI. *Id.;* 12 U.S.C. 3331 *et seq.* FIRREA title XI governs appraisals that involve real estate related transactions.[41] Additionally, TILA section 129H requires that appraisals be performed by a ''certified or licensed appraiser.'' TILA section 129H(b)(1), 15 U.S.C. 1639h(b)(1). The term ''certified or licensed appraiser'' has historically been used in Federal regulations to refer to appraisers who are credentialed to appraise real estate.[42]

Further, the Agencies believe that excluding any loan secured solely by a residential structure from the definition of higher-risk mortgage loan is appropriate pursuant to the exemption authority under TILA section 129H(b)(4)(B). The Agencies understand

[34] The cross-reference in the proposed regulation text assumes that the Bureau's final rule regarding qualified mortgages will use the same numbering as in the 2011 ATR Proposal (updated to reflect that the Bureau's Regulation Z is set forth in 12 CFR 1026 rather than 12 CFR 226). If the numbering of the Bureau's final rule regarding qualified mortgages differs from the 2011 ATR Proposal, the Agencies will update the numbering of the cross-reference to the definition of ''qualified mortgage'' when finalizing this proposal.

[35] *See* CFPB, *Reverse Mortgages: Report to Congress* 14, 70–99 (June 28, 2012), available at *http://www consumerfinance.gov/reports/reverse-mortgages-report.*

[36] *See* 24 CFR 206.1 et seq., and HUD Handbooks 4235.1 and 4330.1 (chapter 13).

[37] *See, e.g.,* CFPB, *Reverse Mortgages: Report to Congress* 18.

[38] *Id.*

[39] *Id.*

[40] *See http://portal.hud.gov/hudportal/HUD?src=/program_offices/housing/rmra/oe/rpts/hecm/hecmmenu* (''Home Equity Conversion Mortgage Characteristics'').

[41] 12 U.S.C. 3331.

[42] *See, e.g.,* 12 CFR 225.63. Under the regulations implementing FIRREA title XI, ''real estate'' is defined in part as ''an identified parcel or tract of land, with improvements. * * *'' 12 CFR 225.62(h).

that loans secured solely by a residential structure, such as a manufactured home, typically more closely resemble titled vehicle loans. For example, manufactured housing industry representatives indicated during outreach calls with the Agencies that traditional real estate appraisals performed by a ''certified or licensed appraiser,'' as defined in TILA section 129H(b)(3) and proposed § 1026.XX(a)(1), are not appropriate or feasible for the majority of manufactured home financing transactions. They indicated that, typically, for new manufactured homes, the home value is based on the sales price listed on the manufactured home's wholesale invoice to the retailer. The wholesale invoice details the cost of the home at the point of manufacture, adding proprietary allowances and calculations to arrive at a ''maximum sales price.'' The manufacturer certifies the authenticity of the invoice and the accuracy of the price paid by the retailer. For used manufactured homes, the home value is most commonly based on the price guides published by trade journals for manufactured homes. Certain variations exist, depending on a number of factors, such as whether the used home is being moved.

In addition, the sales price solely for a manufactured home, but not the land to which it is attached, is typically lower than the cost of both a manufactured home and the land to which it is attached. This may make requiring appraisals with interior property visits extremely expensive relative to the cost of the manufactured home. Taken together, these factors could significantly increase costs for consumers and industry and constrain lending in this area of the housing market. Therefore, the Agencies believe that excluding such transactions from the definition of higher-risk mortgage loan is in the public interest and promotes the safety and soundness of creditors.

At the same time, the Agencies understand based on informal outreach that, for manufactured home loans secured by both a manufactured home and the land to which the home is attached, appraisals performed by certified or licensed appraisers are feasible and that many creditors order such appraisals in underwriting these transactions. Therefore, the Agencies propose to exclude from the rule only loans secured ''solely'' by a residential structure.[43] Accordingly, proposed comment XX(a)(2)(ii)(C)–1 clarifies that, under § 1026.XX(a)(2)(ii)(C), loans secured solely by a residential structure cannot be ''higher-risk mortgage loans.'' Thus, for example, a loan secured by a manufactured home and the land on which it is sited could be a ''higher-risk mortgage loan.'' By contrast, a loan secured solely by a manufactured home cannot be a ''higher-risk mortgage loan.''

Question 11: The Agencies request comment on whether this proposed exclusion is appropriate, and if not, reasonable methods by which creditors could comply with the requirements of this proposed rule when providing loans secured solely by a residential structure. In particular, the Agencies request comment on whether, rather than an appraisal performed by a certified or licensed appraiser, some alternative standards for valuing residential structures securing higher-risk mortgage loans might be feasible and appropriate to include as part of the final rule.

Other Exclusions from the Definition of Higher-Risk Mortgage Loan

Construction loans. In construction loan transactions, an interior visit of the property securing the loan is generally not feasible because construction loans provide financing for homes that are proposed to be built or are in the process of being built. At the same time, the Agencies recognize that construction loans that meet the pricing thresholds for higher-risk mortgage loans may pose many of the same risks to consumers as other types of loans meeting those thresholds.

Question 12: The Agencies request comment on whether to exclude construction loans from the definition of higher-risk mortgage loan. If not, the Agencies seek comment on whether any additional compliance guidance is needed for applying TILA section 129H's appraisal rules to construction loans. Alternatively, the Agencies request comment on whether construction loans should be exempt only from the requirement to conduct an interior visit of the property, and be subject to all other appraisal requirements under the proposed rule.

Bridge loans. Bridge loans are short-term loans typically used when a consumer is buying a new home before selling the consumer's existing home. Usually secured by the existing home, a bridge loan provides financing for the new home (often in the form of the downpayment) or mortgage payment assistance until the consumer can sell the existing home and secure permanent financing. Bridge loans normally carry higher interest rates, points and fees than conventional mortgages, regardless of the consumer's creditworthiness.

The Agencies are concerned about the burden to both creditors and consumers of imposing TILA section 129H's heightened appraisal requirements on short-term financing of this nature. As noted, the Agencies recognize that rates on bridge loans are often higher than on long-term home mortgages, so bridge loans may be more likely to meet the ''higher-risk mortgage loan'' triggers. However, these loans may be useful and even necessary for many consumers. Higher-risk mortgage loans under TILA section 129H would generally be a credit option for less creditworthy consumers, who may be more vulnerable than others and in need of enhanced consumer protections, such as TILA section 129H's special appraisal requirements. However, a bridge loan consumer could be subject to rates that would exceed the higher-risk mortgage loan thresholds even if the consumer would qualify for a non-higher-risk mortgage loan when seeking permanent financing. It is unclear that Congress intended TILA section 129H to apply to loans simply because they have higher rates, regardless of the consumer's creditworthiness or the purpose of the loan.

Question 13: For these reasons, the Agencies request comment on whether to exclude bridge loans from the definition of higher-risk mortgage loan. If not, the Agencies seek comment on whether any additional compliance guidance is needed for applying TILA section 129H's appraisal rules to bridge loans.

Question 14: The Agencies also request comment on whether other classes of loans should be excluded from the definition of higher-risk mortgage loan.

XX(a)(3) National Registry

As discussed in more detail below, to qualify for the safe harbor provided in proposed § 1026.XX(b)(2)(iii) a creditor must verify through the ''National Registry'' that the appraiser is a certified or licensed appraiser in the State in which the property is located as of the date the appraiser signs the appraiser's certification. Under FIRREA section 1109, the Appraisal Subcommittee of

[43] The Agencies are proposing to exclude from the definition of ''higher-risk mortgage loan'' any loans secured solely by a ''residential structure,'' as that term is used in Regulation Z's definition of ''dwelling.'' *See* 12 CFR 1026.2(a)(19). The provision excludes loans that are not secured in whole or in part by land. Thus, for example, loans secured by manufactured homes that are not also secured by the land on which they are sited are excluded from the definition of higher-risk mortgage loan, regardless of whether the manufactured home itself is deemed to be personal property or real property under applicable state law.

the Federal Financial Institutions Examination Council (FFIEC) is required to maintain a registry of State certified and licensed appraisers eligible to perform appraisals in connection with federally related transactions. 12 U.S.C. 3338. For purposes of qualifying for the safe harbor, the proposed rule would require that a creditor must verify that the appraiser holds a valid appraisal license or certification through the registry maintained by the Appraisal Subcommittee. Thus, proposed § 1026.XX(a)(3) would provide that the term ''National Registry'' means the database of information about State certified and licensed appraisers maintained by the Appraisal Subcommittee of the FFIEC.

XX(a)(4) State Agency

TILA section 129H(b)(3)(A) provides that, among other things, a certified or licensed appraiser means a person who is certified or licensed by the ''State'' in which the property to be appraised is located. 15 U.S.C. 1639h(b)(3)(A). As discussed above, proposed § 1026.XX(a)(1) would further clarify that, among other things, a certified or licensed appraiser means a person certified or licensed by the ''State agency'' in the State in which the property that secures the transaction is located. Under FIRREA section 1118, the Appraisal Subcommittee of the FFIEC is responsible for recognizing each State's appraiser certifying and licensing agency for the purpose of determining whether the agency is in compliance with the appraiser certifying and licensing requirements of FIRREA title XI. 12 U.S.C. 3347. In addition, FIRREA section 1120(a) prohibits a financial institution from obtaining an appraisal from a person the financial institution knows is not a State certified or licensed appraiser in connection with a federally related transaction. 12 U.S.C. 3349(a). Accordingly, § 1026.XX(a)(4) would define the term ''State agency'' as a ''State appraiser certifying and licensing agency'' recognized in accordance with section 1118(b) of FIRREA and any implementing regulations.

XX(b) Appraisals Required for Higher-Risk Mortgage Loans

XX(b)(1) In General

Consistent with TILA section 129H(a) and (b)(1), proposed § 1026.XX(b)(1) provides that a creditor shall not extend a higher-risk mortgage loan to a consumer without obtaining, prior to consummation, a written appraisal performed by a certified or licensed appraiser who conducts a physical visit of the interior of the property that will secure the transaction. 15 U.S.C. 1639h(b)(1).

XX(b)(2) Safe Harbor

TILA section 129H(b)(1) requires that appraisals mandated by section 129H be performed by ''a certified or licensed appraiser'' who conducts a physical property visit of the interior of the mortgaged property. 15 U.S.C. 1639h(b)(1). TILA section 129H(b)(3) goes on to define a ''certified or licensed'' appraiser in some detail. 15 U.S.C. 1639h(b)(3). The statute, however, is silent as to how creditors should determine whether the written appraisals they have obtained comply with the statutory requirements under TILA section 129H(b)(1) and (b)(3). To address compliance uncertainties discussed in more detail below, the Agencies are proposing a safe harbor in § 1026.XX(b)(2) that establishes affirmative steps that creditors may follow to satisfy their statutory obligations under TILA section 129H.

TILA section 129H(b)(3) defines a ''certified or licensed appraiser'' as a person who is (1) certified or licensed by the State in which the property to be appraised is located, and (2) performs each appraisal in conformity with USPAP and the requirements applicable to appraisers in FIRREA title XI, and the regulations prescribed under such title, as in effect on the date of the appraisal. 15 U.S.C. 1639h(b)(3). These two elements of the definition of ''certified or licensed appraiser'' are discussed in more detail below.

Certified or Licensed in the State in Which the Property is Located

State certification and licensing of real estate appraisers has become a nationwide practice largely as a result of FIRREA title XI. Pursuant to FIRREA title XI, entities engaging in certain ''federally related transactions'' involving real estate are required to obtain written appraisals performed by an appraiser who is certified or licensed by the appropriate State. 12 U.S.C. 3339, 3341. As noted, to facilitate identification of appraisers meeting this requirement, the Appraisal Subcommittee of the FFIEC maintains an on-line National Registry of appraisers identifying all federally recognized State certifications or licenses held by U.S. appraisers.[44] 12 U.S.C. 3332, 3338.

Performs Appraisals in Conformity With USPAP and FIRREA

Again, TILA section 129H(b)(3) also defines ''certified or licensed appraiser'' as a person who performs each appraisal in accordance with USPAP and FIRREA title XI, and the regulations prescribed under such title, in effect on the date of the appraisal. 15 U.S.C. 1639h(b)(3). USPAP is a set of standards promulgated and interpreted by the Appraisal Standards Board of the Appraisal Foundation, providing generally accepted and recognized standards of appraisal practice for appraisers preparing various types of property valuations.[45] USPAP provides guiding standards, not specific methodologies, and application of USPAP in each appraisal engagement involves the application of professional expertise and judgment.

FIRREA title XI and the regulations prescribed thereunder regulate entities engaging in real estate-related financial transactions that are engaged in, contracted for, or regulated by the Federal banking agencies. *See* 12 U.S.C. 3339, 3350. Pursuant to FIRREA title XI, the Federal banking agencies have issued regulations requiring insured depository institutions and their affiliates, bank holding companies and their affiliates, and insured credit unions to obtain written appraisals prepared by a State certified or licensed appraiser in accordance with USPAP in connection with federally related transactions, including loans secured by real estate, exceeding certain dollar thresholds.[46] Specifically, the banking agencies have issued regulations exempting most federally related transactions with a transaction value of $250,000 or less from the requirement to obtain an appraisal.[47] In addition, the Federal banking agencies have issued a number of guidelines providing formal supervisory guidance on implementation and application of these appraisal requirements.[48]

The scope of creditors subject to FIRREA title XI is narrower than the scope of creditors subject to TILA, and FIRREA title XI and the rules issued

[44] The Agencies are proposing to interpret the state certification or licensing requirement under TILA section 129H(b)(3) to mean certification or licensing by a state agency that is recognized for purposes of credentialing appraisers to perform appraisals required for federally related transactions pursuant to FIRREA title XI.

[45] *See* Appraisal Standards Bd., Appraisal Fdn., USPAP (2012–2013 ed.) available at *http://www.uspap.org.*

[46] *See* OCC: 12 CFR Part 34, Subpart C; FRB: 12 CFR part 208, subpart E, and 12 CFR part 225, subpart G; FDIC: 12 CFR part 323; and NCUA: 12 CFR part 722.

[47] *See* OCC: 12 CFR 34.43(a)(1); FDIC: 12 CFR 323.3(a)(1); FRB: 12 CFR 225.63(a)(1); and NCUA: 12 CFR 722.3(a)(1) (implementing FIRREA section 1113, 12 U.S.C. 3342).

[48] *See, e.g.,* Interagency Appraisal and Evaluation Guidelines, 75 FR 77450 (Dec. 10, 2010).

thereunder do not by their terms directly regulate the conduct of appraisers. However, the Agencies are proposing to interpret TILA section 129H(b)(3)(B) to expand the applicability of certain FIRREA title XI requirements to cover creditors providing higher-risk mortgage loans, pursuant to the mandates of TILA section 129H. 15 U.S.C. 1639h(b)(3)(B). Similarly, the Agencies are proposing to interpret the statute to expand the applicability of these FIRREA title XI requirements to cover higher-risk mortgage loans that are otherwise exempt from the FIRREA title XI appraisal requirements, such as higher-risk mortgage loans of $250,000 or less.

The statute does not specifically address Congress's intent in referencing USPAP and FIRREA title XI. Congress could have amended FIRREA title XI directly to expand the scope of the statute to subject all creditors to its requirements. Instead, Congress inserted language into TILA requiring that the appraisers who perform appraisals in connection with higher-risk mortgage loans comply with USPAP and FIRREA title XI. However, the statute is silent as to the extent of creditors' obligations under the statute to evaluate appraisers' compliance.

Practically speaking, a creditor seeking to determine to a certainty whether an appraiser complied with USPAP for a residential appraisal would face an almost insurmountable challenge. An appraisal performed in accordance with USPAP represents an expert opinion of value. Not only does USPAP require extensive application of professional judgment, it also establishes standards for the scope of inquiry and analysis to be performed that cannot be verified absent substantially re-performing the appraisal. Conclusive verification of FIRREA title XI compliance (which itself incorporates USPAP) poses similar problems. On an even more basic level, it may not be possible for a creditor to determine conclusively whether the appraiser actually performed the interior visit required by TILA section 129H(a). Moreover, TILA subjects creditors to significant liability and risk of litigation, including private actions and class actions for actual and statutory damages and attorneys' fees. 15 U.S.C. 1640. If TILA section 129H is construed to require creditors to assume liability for the appraiser's compliance with these obligations, the Agencies are concerned that it would unduly increase the cost and restrict the availability of higher-risk mortgage loans. Absent clear language requiring such a construction, the Agencies do not believe that the statute should be construed to intend this result.

Accordingly, the Agencies are proposing a safe harbor, described in more detail below, for creditors to ensure compliance with proposed § 1026.XX(b)(1) (implementing TILA section 129H(a) and (b)(1), 15 U.S.C. 1639h(a) and (b)(1)) when the appraiser certifies compliance with USPAP and applicable FIRREA title XI requirements. The Agencies note that a certification of USPAP compliance is already an element of the Uniform Residential Appraisal Report (URAR) form used as a matter of practice in the industry.

The Agencies believe that the safe harbor will be particularly useful to consumers, industry, and courts with regard to the statutory requirement that the appraisal be obtained from a "certified or licensed appraiser" who conducts each appraisal in compliance with USPAP and FIRREA title XI. While determining whether an appraiser is licensed or certified by a particular State is straightforward, USPAP and FIRREA provide a broad set of professional standards and requirements. The appraisal process involves the application of subjective judgment to a variety of information points about individual properties; thus, application of these professional standards is often highly context-specific.

The Agencies believe the safe harbor requirements provide reasonable protections to consumers and compliance guidance to creditors. Specifically, under the safe harbor in proposed § 1026.XX(b)(2), a creditor is deemed to have obtained a written appraisal that meets the requirements of § 1026.XX(b)(1) if the creditor:

- Orders that the appraiser perform the appraisal in conformity with USPAP and FIRREA title XI, and any implementing regulations, in effect at the time the appraiser signs the appraiser's certification (§ 1026.XX(b)(2)(i));
- Verifies through the National Registry that the appraiser who signed the appraiser's certification holds a valid appraisal license or certification in the State in which the appraised property is located (§ 1026.XX(b)(2)(ii));
- Confirms that the elements set forth in appendix N to part 1026 are addressed in the written appraisal (§ 1026.XX(b)(2)(iii)); and
- Has no actual knowledge to the contrary of facts or certifications contained in the written appraisal (§ 1026.XX(b)(2)(iv)).

Proposed comment XX(b)(2)–1 clarifies that a creditor that satisfies the conditions in § 1026.XX(b)(2)(i)–(iv) will be deemed to have complied with the appraisal requirements of § 1026.XX(b)(1). In addition, the proposed comment further clarifies that a creditor that does not satisfy the conditions in § 1026.XX(b)(2)(i)–(iv) does not necessarily violate the appraisal requirements of § 1026.XX(b)(1).

Proposed appendix N to part 1026 provides that, to qualify for the safe harbor provided in § 1026.XX(b)(2), a creditor must check to confirm that the written appraisal:

- Identifies the creditor who ordered the appraisal and the property and the interest being appraised.
- Indicates whether the contract price was analyzed.
- Addresses conditions in the property's neighborhood.
- Addresses the condition of the property and any improvements to the property.
- Indicates which valuation approaches were used, and includes a reconciliation if more than one valuation approach was used.
- Provides an opinion of the property's market value and an effective date for the opinion.
- Indicates that a physical property visit of the interior of the property was performed.
- Includes a certification signed by the appraiser that the appraisal was prepared in accordance with the requirements of USPAP.
- Includes a certification signed by the appraiser that the appraisal was prepared in accordance with the requirements of FIRREA title XI, as amended, and any implementing regulations.

Other than the certification for compliance with FIRREA title XI, the items in appendix N are derived from the URAR form used as a matter of practice in the residential mortgage industry. Compliance with the appendix N safe harbor review would require the creditor to check the key elements of the written appraisal and the appraiser's certification on its face for completeness and internal consistency. The proposed rule would not require the creditor to make any independent judgment about or perform any independent analysis of the conclusions and factual statements in the written appraisal. As discussed above, imposing such obligations on the creditor would effectively require it to re-appraise the property. Accordingly, proposed comment XX(b)(2)(iii) clarifies that a creditor need not look beyond the face of the written appraisal and the appraiser's certification to confirm that the elements in appendix N are included in the written appraisal.

However, if the creditor has actual knowledge to the contrary of facts or certifications contained in the written appraisal, the safe harbor does not apply.

Question 15: The Agencies request comment on the appropriateness of the safe harbor, the list of requirements a creditor must satisfy to receive the safe harbor under § 1026.XX(b)(2) and appendix N, and whether the proposed safe harbor should be included in the rule. In addition, the Agencies request comment on whether particular types of transactions exist for which certain information in proposed appendix N would be especially difficult for an appraiser to include in the written appraisal. If so, in these cases, the Agencies seek comment on what alternative information, if any, might be appropriate to require creditors to confirm is included in the appraisal.

XX(b)(3) Additional Appraisal for Certain Higher-Risk Mortgage Loans

XX(b)(3)(i) In General

Under TILA section 129H(b)(2), a creditor must obtain a ''second appraisal'' from a different certified or licensed appraiser if the higher-risk mortgage loan will ''finance the purchase or acquisition of the mortgaged property from a seller within 180 days of the purchase or acquisition of such property by the seller at a price that was lower than the current sale price of the property.'' 15 U.S.C. 1639h(b)(2)(A). The Agencies have implemented this requirement through proposed § 1026.XX(b)(3). The Agencies have interpreted ''second appraisal'' to mean an appraisal in addition to the one required under proposed § 1026.XX(b)(1). Thus, a creditor would be required to obtain two appraisals before extending a higher-risk mortgage loan to finance a consumer's acquisition of the property. This approach is consistent with regulations promulgated by HUD to address property flipping in single-family mortgage insurance programs of the FHA. *See* 24 CFR 203.37a; 68 FR 23370, May 1, 2003; 71 FR 33138, June 7, 2006 (FHA Anti-Flipping Rule, or FHA Rule). In general, under the FHA Anti-Flipping Rule, properties that have been resold within certain recent time periods are ineligible as security for FHA-insured mortgage financing. Specifically, as with TILA section 129H(b)(2) and proposed § 1026.XX(b)(3), the FHA Anti-Flipping Rule requires creditors to determine information about a property's sales history and obtain justification (including, in certain cases, an additional appraisal obtained at no cost to the borrower) supporting an increase in resale price.

When a higher-risk mortgage loan will finance a consumer's acquisition of the property, proposed § 1026.XX(b)(3) would require creditors to apply additional scrutiny to properties being resold for a higher price within a 180-day period. The Agencies believe that the intent of TILA section 129H(b)(2), as implemented in proposed § 1026.XX(b)(3), is to discourage property flipping scams, a practice in which a seller resells a property at an artificially inflated price within a short time period after purchasing it, typically after some minor renovations and frequently relying on an inflated appraisal to support the increase in value.[49] 15 U.S.C. 1639h(b)(2). Consumers who purchase flipped properties at inflated values can be financially disadvantaged if, for example, they incur mortgage debt that exceeds the value of their dwelling. The Agencies recognize that a property may be resold at a higher price within a short timeframe for legitimate reasons, such as when a seller makes valuable improvements to the property or market prices increase. Thus, to ensure the appropriateness of an increased sales price, proposed § 1026.XX(b)(3)(i), implementing TILA section 129H(b)(2)(A), would require an additional appraisal analyzing the property's resale price before a creditor extends a higher-risk mortgage loan to finance the consumer's acquisition of the property. 15 U.S.C. 1639H(b)(2)(A).

The Agencies have replaced the term ''second appraisal'' with ''additional appraisal'' throughout the proposed rule and commentary. The Agencies are proposing this change because the term, ''second,'' may imply that the additional appraisal must be obtained after the first appraisal. Creditors may find it more efficient to order two appraisals at the same time and the Agencies do not intend to imply that, if two appraisals are required under proposed § 1026.XX(b)(3), they must be obtained in any particular order. In addition, creditors may not be able easily to identify which of those two is the ''second appraisal'' for purposes of complying with the prohibition on charging the consumer for any ''second appraisal'' under TILA section 129H(b)(2)(B), as discussed in more detail in the section-by-section analysis of proposed § 1026.XX(b)(3)(v), below. 15 U.S.C. 1639h(b)(2)(B). The Agencies do not believe that using the phrase ''additional appraisal'' would change the substantive requirements of TILA section 129H(b)(2)(A).

Question 16: The Agencies invite comment on this interpretation and whether the phrase, ''additional appraisal,'' should be used in the rule.

Proposed § 1026.XX(b)(3) does not specify which of the two required appraisals a creditor must rely on in extending a higher-risk mortgage loan if the appraisals provide different opinions of value. The Agencies recognize that creditors ordering two appraisals from different certified or licensed appraisers may receive appraisals providing different opinions. However, TILA section 129H does not require that the creditor use any particular appraisal, and the Agencies believe that a creditor should retain discretion to select the most reliable valuation, consistent with applicable safety and soundness obligations and prudential guidance. 15 U.S.C. 1639h. This position is consistent with the interim final rule on valuation independence published by the Board on October 28, 2010,[50] which implemented new requirements in TILA section 129E to ensure the independence of appraisals and other property valuation types for consumer credit transactions secured by the consumer's principal dwelling. 15 U.S.C. 1639e.

Proposed comment XX(b)(3)(i)–1 clarifies that an appraisal previously obtained in connection with the seller's acquisition or the financing of the seller's acquisition of the property cannot be used as one of the two required appraisals under § 1026.XX(b)(3). The Agencies believe that this clarification is consistent with the statutory purpose of TILA section 129H of mitigating fraud on the part of parties to the transaction. 15 U.S.C. 1639h.

Question 17: The Agencies request comment on this proposed clarification.

In addition, proposed § 1026.XX(b)(3)(i) would require that the creditor obtain the additional appraisal prior to consummation of the higher-risk mortgage loan. TILA section 129H(b)(2) does not specifically require that the additional appraisal be obtained

[49] *See* U.S. House of Reps., Comm. on Fin. Servs., *Report on H.R. 1728, Mortgage Reform and Anti-Predatory Lending Act,* No. 111–94, 59 (May 4, 2009) (House Report); Federal Bureau of Investigation, 2010 Mortgage Fraud Report Year in Review 18 (August 2011), available at *http://www.fbi.gov/stats-services/publications/mortgage-fraud-2010/mortgage-fraud-report-2010.*

[50] 75 FR 66554 (Oct. 28, 2010); 12 CFR § 1026.42(c)(3)(iv) (obtaining multiple valuations for the consumer's principal dwelling to select the most reliable valuation does not violate the general prohibitions on coercion of persons preparing valuations or mischaracterizing the value assigned to a consumer's principal dwelling).

prior to consummation of the higher-risk mortgage loan, but the Agencies believe that this proposed timing requirement is necessary to effectuate the statute's policy of requiring creditors to apply greater scrutiny to potentially flipped properties that will secure the transaction. 15 U.S.C. 1639h(b)(2).

Potential Exemptions From the Additional Appraisal Requirement

TILA section 129H(b)(4)(B) permits the Agencies to jointly exempt a class of loans from the additional appraisal requirement if the Agencies determine the exemption ''is in the public interest and promotes the safety and soundness of creditors.'' 15 U.S.C. 1639h(b)(4)(B).

Question 18: The Agencies invite commenters to submit data and other information supporting whether exempting any classes of higher-risk mortgage loans from the additional appraisal requirement would be in the public interest and promote the safety and soundness of creditors. Exemptions to be considered may include higher-risk mortgage loans made in rural areas where finding two independent appraisers may be difficult, as well as the types of transactions that are currently exempted from the restrictions on FHA insurance applicable to property resales in the FHA Anti-Flipping Rule, including, among others, sales by government agencies of certain properties, sales of properties acquired by inheritance, and sales by State- and federally-chartered financial institutions. *See, e.g.,* 24 CFR 203.37a(c).

Regarding a potential exemption from the additional appraisal requirement for higher-risk mortgage loans in ''rural'' areas, a number of industry representatives asserted during outreach with the Agencies that creditors making higher-risk mortgage loans in rural areas might have particular difficulty finding two competent appraisers in order to comply with the additional appraisal requirements of TILA section 129H. 15 U.S.C. 1639h; *see also* section-by-section analysis of § 1026.XX(b)(3)(ii) (discussing the requirement that the two appraisals required be performed by two different appraisers), below.

Question 19: Accordingly, the Agencies request comment on whether, in the final rule, the Agencies should rely on the exemption authority in TILA section 129H(b)(4)(B) to exempt higher-risk mortgage loans made in ''rural'' areas from the additional appraisal requirement. 15 U.S.C. 1639h(b)(4)(B). If so, the Agencies request comment on whether the rule should use the same definition of ''rural'' that is provided in the 2011 ATR Proposal.[51] The Agencies also request that commenters provide data or other information to help demonstrate how such an exemption would serve the public interest and promote the safety and soundness of creditors.

Purchase or Acquisition of the Consumer's Principal Dwelling

Under TILA section 129H(b)(2)(A), an additional appraisal would be required ''if the purpose of a higher-risk mortgage loan is to finance the purchase or acquisition of the mortgaged property'' from a person who is reselling the property within 180 days of purchasing or acquiring the property at a price lower than the current sale price. 15 U.S.C. 1639h(b)(2)(A). As discussed in the section-by-section analysis of proposed § 1026.XX(a)(2), higher-risk mortgage loans are defined by TILA section 129H(f) as loans secured by a consumer's principal dwelling. 15 U.S.C. 1639h(f). Thus, the additional appraisal requirement would not apply to refinances, home-equity loans, or subordinate liens that do not finance the consumer's purchase or acquisition of a principal dwelling. Accordingly, proposed § 1026.XX(b)(3)(i) would require an additional appraisal only when the purpose of a higher-risk mortgage loan is to finance the acquisition of the consumer's ''principal dwelling.''

In addition, the proposal does not use the statutory term ''the mortgaged property.'' TILA section 129H(b)(2)(A), 15 U.S.C. 1639h(b)(2)(A). The Agencies have made this change to be consistent with Regulation Z, which elsewhere uses the term ''principal dwelling.'' Although a property that the consumer has not yet acquired will not at that time be the consumer's actual dwelling, existing commentary to Regulation Z explains that the term ''principal dwelling'' refers to properties that will become the consumer's principal dwelling within a year. As noted in the section-by-section analysis of proposed § 1026.XX(a)(2) (defining ''higher-risk mortgage loan''), proposed comment XX(a)(2)(i)–1 cross-references the existing commentary on the meaning of ''principal dwelling.'' When referring to the date on which the seller acquired the ''property,'' however, the Agencies propose to use the term ''property'' rather than ''principal dwelling'' because the subject property may not have been used as a principal dwelling when the seller acquired and owned it. The Agencies intend the term ''principal dwelling'' and ''property'' to refer to the same property.

XX(b)(3)(i)(A)

Criteria for Whether an Additional Appraisal is Required—Date of Acquisition

''Acquisition'' by the seller. To refer to the events in which the seller purchased or acquired the dwelling at issue, proposed § 1026.XX(b)(3) generally uses the term ''acquisition'' instead of the longer statutory phrase ''purchase or acquisition.'' The Agencies are proposing to use the sole term ''acquisition'' because this term, as clarified in proposed comment XX(b)(3)–1, includes acquisition of legal title to the property, including by purchase. The Agencies have defined ''acquisition'' broadly in order to encompass the broad statutory phrase ''purchase or acquisition.'' Thus, as proposed, the additional appraisal rule in § 1026.XX(b)(3) would apply to the sale of a property previously acquired by the seller through a non-purchase acquisition, such as inheritance, divorce, or gift.

The Agencies question, however, whether an additional appraisal should be required for transactions in which the seller may not have the same motive to earn a quick profit on a short-term investment.

Question 20: The Agencies request that commenters who support applying the rule to higher-risk mortgage transactions where the seller acquired the property without purchasing it explain how doing so would be consistent with the statutory goal of addressing flipping scams. Moreover, if the final rule covers sales of properties acquired by the seller through non-purchase acquisitions, the Agencies request comment on how a creditor should calculate the seller's ''acquisition price.'' For example, in a case where the seller acquired the

[51] As of the date of this proposal, the Bureau has not yet issued final rules implementing TILA section 129C. 15 U.S.C. 1639c. Prior to the transfer of authority regarding TILA section 129C to the Bureau pursuant the Dodd-Frank Act, the Board issued a proposed rule on qualified mortgages (2011 ATR Proposal) that, among other things, would have defined the term ''rural'' in a new § 1026.43(f)(2)(i). See 76 FR 27390 (May 11, 2011). The Bureau expects to issue a final rule implementing, among other things, the definition of ''rural'' and ''qualified mortgage'' based on the 2011 ATR Proposal. This proposed rule assumes that the Bureau's final rule regarding qualified mortgages and defining the term rural will use the same numbering as in the 2011 ATR Proposal (updated to reflect that the Bureau's Regulation Z is set forth in 12 CFR 1026 rather than 12 CFR 226). If the numbering of the Bureau's final rule regarding qualified mortgages and defining the term rural differs from the Board's 2011 ATR Proposal, the Agencies will update the numbering of the cross-reference to the definition of ''qualified mortgage'' when finalizing this proposal.

property by inheritance, the ''sale price'' could be ''zero,'' which could make a subsequent sale offered at any price within 180 days subject to the additional appraisal requirement.

''Acquisition'' by the consumer. For consistency throughout the proposal, the Agencies have used the term ''acquisition'' to refer to acquisitions by both the seller and the consumer. However, as noted above with respect to non-purchase acquisitions by the seller, the Agencies acknowledge that the term ''acquisition'' may be over-inclusive in describing the consumer's transaction, because non-purchase acquisitions by the consumer do not readily appear to trigger the additional appraisal requirement. If the consumer acquired the property by means other than a purchase, he or she likely would not seek a higher-risk mortgage loan to ''finance'' the acquisition. Further, TILA section 129H(b)(2) would apply only if a creditor extends a higher-risk mortgage loan to finance the consumer's acquisition of a property from a seller who paid a price lower than the consumer's price. 15 U.S.C. 1639h(b)(2). If the consumer pays a nominal amount to acquire the property, the Agencies question how frequently the additional appraisal requirement would be triggered—because the seller's acquisition price likely would not be lower than the consumer's ''price.''

Question 21: The Agencies invite comment on whether any non-purchase acquisitions by the consumer may implicate the additional appraisal requirement. If the rule covers non-purchase acquisitions by the consumer, the Agencies invite comment on how a creditor should calculate the consumer's ''sale price.''

Question 22: The Agencies also seek comment on whether the term ''acquisition'' should be clarified to address situations in which a consumer previously held a partial interest in the property, and is acquiring the remainder of the interest from the seller. The Agencies do not expect that fraudulent property flipping schemes would likely occur in this context, but request comment on whether additional clarification about partial interests is warranted.

In this regard, the Agencies note that existing commentary in Regulation Z clarifies that a ''residential mortgage transaction'' does not include transactions involving the consumer's principal dwelling when the consumer had previously purchased and acquired some interest in the dwelling, even though the consumer had not acquired full legal title, such as when one joint owner purchases the other owner's joint interest. *See* Regulation Z comments 2(a)(24)–5(i) and –5(ii); *see also* section-by-section analysis of § 1026.XX(a)(X) (defining ''higher-risk mortgage loan'' and discussing the distinctions between the term ''residential mortgage transaction'' in Regulation Z and ''residential mortgage loan'' in the Dodd-Frank Act).

Question 23: In general, the Agencies invite comment on whether the term ''acquisition'' is the appropriate term to use in connection with both the seller and higher-risk mortgage consumer. The Agencies may further clarify the term or use a different term, such as ''purchase.''

Seller. The Agencies have used the term ''seller'' throughout proposed § 1026.XX(b)(3) to refer to the party conveying the property to the consumer. The Agencies have used this term to conform to the reference to ''sale price'' in TILA section 129H(b)(2)(A), but the Agencies recognize that another term may be more appropriate if any categories of non-sale acquisitions by the consumer exist that should appropriately be covered by the rule.

Agreement. In addition, the Agencies have referred to the consumer's ''agreement'' to acquire the property throughout proposed § 1026.XX(b)(3) to reflect that a ''sale price,'' as referenced in TILA section 129H(b)(2)(A), is typically contained in a legally binding agreement or contract between a buyer and a seller. However, the Agencies recognize that an alternate term may be more appropriate if categories of consumer acquisitions not obtained through an ''agreement'' should appropriately be covered by the rule.

180-day acquisition timeframe. TILA section 129H(b)(2)(A) would require creditors to obtain an additional appraisal for higher-risk mortgage loans that will finance the consumer's purchase or acquisition of the mortgaged property if the following two conditions are met: (1) the consumer is financing the purchase or acquisition of the mortgaged property from a seller within 180 days of the seller's purchase or acquisition of the property; and (2) the seller purchased or acquired the property at a price that was lower than the current sale price of the property. 15 U.S.C. 1639h(b)(2)(A).

For a creditor to determine whether the first condition is met, the creditor would compare two dates: the date of the consumer's acquisition and the date of the seller's acquisition. However, TILA section 129H(b)(2)(A) does not provide specific dates that a creditor must use to perform this comparison. 15 U.S.C. 1639h(b)(2)(A). To implement this provision, the Agencies propose in § 1026.XX(b)(3)(i)(B) to require that the creditor compare (1) the date on which the consumer entered into the agreement to acquire the property from the seller, and (2) the date on which the seller acquired the property. Proposed comment XX(b)(3)(i)(A)–1 provides an illustration in which the creditor determines the seller acquired the property on April 17, 2012, and the consumer's acquisition agreement is dated October 15, 2012; an additional appraisal would not be required because 181 days would have elapsed between the two dates.

Date of the consumer's agreement to acquire the property. Regarding the date of the consumer's acquisition, TILA refers to the date on which the higher-risk mortgage loan is to ''finance the purchase or acquisition of the mortgaged property.'' TILA section 129H(b)(2)(A), 15 U.S.C. 1639h(b)(2)(A). The Agencies have interpreted this term to refer to ''the date of the consumer's agreement to acquire the property.'' Proposed comment XX(b)(3)(i)(A)–2 explains that, in determining this date, the creditor should use a copy of the agreement itself provided by the consumer to the creditor, and use the date on which the consumer and the seller signed the agreement. If the two dates are different, the creditor should use the date on which the last party signed the agreement.

The Agencies believe that use of the date on which the consumer and the seller agreed on the purchase transaction best accomplishes the purposes of the statute. This approach is substantially similar to existing creditor practice under the FHA Anti-Flipping Rule, which uses the date of execution of the consumer's sales contract to determine whether the restrictions on FHA insurance applicable to property resales are triggered. *See* 24 CFR 203.37a(b)(1). The Agencies have not interpreted the date of the consumer's acquisition to refer to the actual date of title transfer to the consumer under State law, or the date of consummation of the higher-risk mortgage loan, because it would be difficult if not impossible for creditors to determine, at the time that they must order an appraisal or appraisals to comply with § 1026.XX, when title transfer or consummation will occur. The actual date of title transfer typically depends on whether a creditor consummates financing for the consumer's purchase. Various factors considered in the underwriting decision, including a review of appraisals, will affect whether the creditor extends the loan. In addition, the Agencies are concerned that even if a creditor could identify a date certain by which the loan would be consummated or title would be transferred to the consumer, the creditor could potentially set a date that exceeds the 180-day time period to circumvent the requirements of § 1026.XX(b)(3).

Proposed comment XX(b)(3)(i)(A)–2 clarifies that the date the consumer and the seller agreed on the purchase transaction, as evidenced by the date the last party signed the agreement, may not necessarily be the date on which the consumer became contractually obligated under State law to acquire the property. It may be difficult for a creditor to determine the date on which the consumer became legally obligated under the acquisition agreement as a matter of State law. Using the date on which the consumer and the seller agreed on the purchase transaction, as evidenced by their signature and the date on the agreement, avoids operational and other potential issues because the Agencies expect that this date would be facially apparent from the signature dates on the acquisition agreement.

Question 24: The Agencies seek comment on whether this approach provides sufficient clarity to creditors on how to comply while also providing consumers with adequate protection.

Date the seller acquired the property. Regarding the date of the seller's acquisition, TILA section 129H(b)(2)(A) refers to the date of that person's ''purchase or acquisition'' of the property being financed by the higher-risk mortgage loan. 15 U.S.C. 1639h(b)(2)(A). Accordingly, proposed § 1026.XX(b)(3)(i)(A) refers to the date on which the seller ''acquired'' the property. Proposed comment XX(b)(3)(i)–3 clarifies that this refers to the date on which the seller became the legal owner of the property under State law, which the Agencies understand to be, in most cases, the date on which the seller acquired title. The Agencies have interpreted TILA section 129H(b)(2)(A) in this manner because the Agencies understand that creditors, in most cases, will not extend credit to finance the acquisition of a property from a seller who cannot demonstrate clear title. 15 U.S.C. 1639h(b)(2)(A). Also, as discussed above, the Agencies have proposed to use the single term ''acquisition'' because this term is generally understood to include acquisition of legal title to the property, including by purchase. *See* section-by-section analysis of proposed § 1026.XX(b)(3)(i)(A) (discussing the use of the term ''acquisition'' and ''acquire'' in the proposed rule).

To assist creditors with identifying the date on which the seller acquired title to the property, proposed comment XX(b)(3)(i)(A)–3 explains that the creditor may rely on records that provide information as to the date on which the seller became vested as the legal owner of the property pursuant to applicable State law; as explained in proposed comments XX(b)(3)(vi)(A)–1 and –2 and proposed comment XX(b)(3)(vi)(B)–1, the creditor may determine this date through reasonable diligence, requiring reliance on a written source document. The reasonable diligence standard is discussed further below under the section-by-section analysis of § 1026.XX(b)(3)(vi)(A) and (B).

XX(b)(3)(i)(B)

Criteria for Whether an Additional Appraisal is Required—Acquisition Price

TILA section 129H(b)(2)(A) would require creditors to obtain an additional appraisal if the seller acquired the property ''at a price that was lower than the current sale price of the property'' within the past 180 days. 15 U.S.C. 1639h(b)(2)(A). To determine whether this statutory condition has been met, a creditor would have to compare the current sale price with the price at which the seller acquired the property. Accordingly, proposed § 1026.XX(b)(3)(i)(B) implements this requirement by requiring the creditor to compare the price paid by the seller to acquire the property with the price that the consumer is obligated to pay to acquire with property, as specified in the consumer's agreement to acquire the property. Thus, if the price paid by the seller to acquire the property is lower than the price in the consumer's acquisition agreement by a certain amount or percentage to be determined by the Agencies in the final rule, and the seller acquired the property 180 or fewer days prior to the date of the consumer's acquisition agreement, the creditor would be required to obtain an additional appraisal before extending a higher-risk mortgage loan to finance the consumer's acquisition of the property. *See* section-by-section analysis of § 1026.XX(b)(3)(i)(B) discussing the exemption for ''small'' price increases, below.

Price at which the seller acquired the property. TILA section 129H(b)(2)(A) refers to a property that the seller previously purchased or acquired ''at a price.'' 15 U.S.C. 1639h(b)(2)(A). Proposed § 1026.XX(b)(3)(i)(B) refers to the price at which the seller acquired the property; proposed comment XX(b)(3)(i)(B)–1 clarifies that the seller's acquisition price refers to the amount paid by the seller to acquire the property. The proposed comment also explains that the price at which the seller acquired the property does not include the cost of financing the property. This comment is intended to clarify that the creditor should consider only the price of the property, not the total cost of financing the property.

Question 25: The Agencies invite comment on whether additional clarification is needed regarding how a creditor should identify the price at which the seller acquired the property. See also the section-by-section analysis of proposed § 1026.XX(b)(3)(i)(A) (discussing non-purchase acquisitions by the seller).

Question 26: The Agencies are interested in receiving comment on how a creditor would calculate the price paid by a seller to acquire a property as part of a bulk sale that is later resold to a higher-risk mortgage consumer. The Agencies understand that, in bulk sales, a sales price might be assigned to individual properties for tax or accounting reasons, but the Agencies request comment on whether guidance may be needed for determining the sales price of a such property for purposes of proposed § 1026.XX(b)(3)(i)(B). The Agencies request comment on any operational challenges that might arise for creditors in determining purchase prices for homes purchased as part of a bulk sale transaction. The Agencies also invite commenters' views on whether any challenges presented could impede neighborhood revitalization in any way, and, if so, whether the Agencies should consider an exemption from the additional appraisal requirement for these types of transactions altogether.

Proposed comment XX(b)(3)(i)(B)–1 contains a cross-reference to proposed comment XX(b)(3)(vi)(A)–1, which explains how a creditor should determine the seller's acquisition price through reasonable diligence. Proposed comment XX(b)(3)(i)(B)–1 also contains a cross-reference to proposed comment XX(b)(3)(vi)(B)–1, which explains how a creditor may proceed with the transaction if the creditor is unable to determine the seller's acquisition price following reasonable diligence. These proposed comments are discussed in more detail in the section-by-section analysis of § 1026.XX(b)(3)(vi)(A), below. The Agencies understand that, in some cases, a creditor performing typical underwriting and documentation procedures may have difficulty ascertaining the date and price at which the seller acquired the property being financed through a higher-risk mortgage loan. The Agencies believe that, based on recent data provided by the FHFA, most property resales would not trigger the proposal's conditions requiring an additional appraisal. According to estimates provided by FHFA, approximately five percent of single-family property sales in 2010 reflected situations in which the same property had been sold within a 180-day period.[52] However, in some circumstances, creditors may face obstacles in attempting to determine the necessary transaction date and price information. For example, a creditor may be unable to determine information about the seller's acquisition because of lag times in recording public records. The Agencies also understand that some documents frequently reviewed by creditors as part of their mortgage underwriting procedures may report the date of the seller's acquisition, but report on only nominal amounts of compensation, rather than the actual sales price. Moreover, several ''non-disclosure'' jurisdictions do not make the price at which a seller acquired a property publicly available. In light of these difficulties, the Agencies are proposing a standard of reasonable diligence in determining the seller's acquisition date and price, and are also proposing modifications to the additional appraisal requirement when reasonable diligence does not provide sufficient information about the seller's acquisition date and price. *See* the section-by-section analysis of proposed § 1026.XX(b)(3)(vi)(A) (reasonable diligence) below.

Price the consumer is obligated to pay to acquire the property. TILA section 129H(b)(2)(A) refers to the ''current sale price of the property'' being financed by a higher-risk mortgage loan. 15 U.S.C. 1639h(b)(2)(A). Proposed § 1026.XX(b)(3)(i)(B) refers to ''the price that the consumer is obligated to pay to acquire the property, as specified in the consumer's agreement to acquire the property from the seller.'' Proposed comment XX(b)(3)(i)(B)–2 clarifies that the price the consumer is obligated to pay to acquire the property is the price indicated on the consumer's agreement with the seller to acquire the property that is signed and dated by both the consumer and the seller. Proposed comment XX(b)(3)(i)(B)–2 also explains that the price at which the consumer is obligated to pay to acquire the property from the seller does not include the cost of financing the property to clarify that a creditor should only consider the sale price of the property as reflected in the consumer's acquisition agreement. In addition, the proposed comment refers to proposed comment XX(b)(3)(i)(A)–2 (date of the consumer's agreement to acquire the property) to indicate that this document will be the same document that a creditor may rely on to determine the date of the consumer's agreement to acquire the property. Proposed comment XX(b)(3)(i)(B)–2 explains that the creditor is not obligated to determine whether and to what extent the agreement is legally binding on both parties. The Agencies expect that the price the consumer is obligated to pay to acquire the property will be facially apparent from the consumer's acquisition agreement.

Question 27: The Agencies solicit comment on whether the price at which the consumer is obligated to pay to acquire the property, as reflected in the consumer's acquisition agreement, provides sufficient clarity to creditors on how to comply while providing consumers adequate protection.

Exemption for small price increases. TILA section 129H(b)(2)(A) provides that an additional appraisal is required when the price at which the seller purchased or acquired the property was ''lower'' than the current sale price, but TILA does not define the term ''lower.'' 15 U.S.C. 1639h(b)(2)(A). Thus, as written, the statute would require an additional appraisal for any price increase above the seller's acquisition price. The Agencies do not believe that the public interest or the safety and soundness of creditors would be served if the law is implemented to require an additional appraisal for relatively small increases in price. Accordingly, the Agencies are proposing an exemption to the additional appraisal requirement for relatively small increases in the price. Proposed § 1026.XX(b)(3)(i) contains a placeholder for the amount by which the price at which the seller acquired the property was lower than the resale price: ''The seller acquired the property 180 or fewer days prior to the date of the consumer's agreement to acquire the property from the seller; and [t]he price at which the seller acquired the property was lower than the price that the consumer is obligated to pay to acquire the property, as specified in the consumer's agreement to acquire the property from the seller, by an amount equal to or greater than [XX]''. Although the proposal does not contain a particular price threshold, the Agencies may develop one in the final rule based on public comments received in response to this proposal.

Question 28: The Agencies solicit comment on whether it would be in the public interest and promote the safety and soundness of creditors to include an exemption for transactions that have a sale price that exceeds the seller's purchase price by a particular amount.

The Agencies recognize that there are a variety of ways to determine what constitutes a ''small'' price increase. One approach would be to use a fixed dollar value test. For example, during outreach with the Agencies for this proposal, some consumer advocates suggested requiring an additional appraisal if the resale price is greater than the price at which the seller acquired the property by $1,000.00 or more. A second approach would be to use a fixed percentage test. During informal outreach, different small and regional lender representatives suggested that an exemption for a 10, 15, or 20 percent price increase would be appropriate, with one large lender representative suggesting 25 percent.

Question 29: In light of the diverging views on an appropriate exception, the Agencies have elected to seek public comment on what an appropriate threshold would be rather than provide a particular amount or formula in the proposal. In particular, the Agencies seek comment on whether a fixed dollar amount, a fixed percentage, or some alternate approach[53] should be used to determine an exempt price increase, and what specific price threshold would be appropriate. The Agencies request that commenters support their recommendations with specific data, where possible.

XX(b)(3)(ii) Different Appraisers

Consistent with TILA section 129H(b)(2)(A), proposed § 1026.XX(b)(3)(ii) would require an additional appraisal from a ''different'' certified or licensed appraiser. 15 U.S.C. 1639h(b)(2)(A). Proposed § 1026.XX(b)(3)(ii) provides that the two appraisals that would be required by § 1026.XX(b)(3)(i) may not be performed by the same certified or licensed appraiser. Proposed § 1026.XX(b)(3)(ii) would not impose any additional

[52] Based on county recorder information from select counties licensed to FHFA by DataQuick Information Systems.

[53] The Agencies have considered requiring that creditors use a housing price index as a reference point for normal increases in price due to appreciation in housing values. For example, the rule could require an additional appraisal if the current sale price exceeds the prior sale price by a percentage greater than a percentage change in value of a housing price index for the relevant residential housing market since the date the seller acquired the property. While using a price index would account for natural price fluctuations in a particular market better than the fixed dollar or percentage approaches described above, the Agencies believe such a requirement could be burdensome for industry and provide little benefit to consumers. The movement of an index covering all property sales in a particular market area may not provide accurate or useful information about the proper valuation of a single property, especially if that property is atypical in any significant aspect.

conditions regarding the identity of the appraisers. During informal outreach conducted by the Agencies, some participants suggested that the Agencies impose additional requirements regarding the appraiser performing the second valuation for the higher-risk mortgage loan, such as a requirement that the second appraiser not have knowledge of the first appraisal. Outreach participants indicated that this requirement would minimize undue pressure to value the property at a price similar to the first appraiser. The Agencies have not proposed any additional conditions on what it means to obtain an appraisal from a different certified or licensed appraiser because the Agencies expect that the valuation independence requirements in Regulation Z will be sufficient to ensure that the second appraiser performs an independent valuation.

In 2010 the Board implemented TILA section 129E through an interim final rule, which established new requirements for valuation independence for consumer credit transactions secured by the consumer's principal dwelling. *See* 12 CFR 1026.42; 75 FR 66554 (Oct. 28, 2010). The Board explained that the new requirements in TILA were designed to ensure that real estate appraisals used to support creditors' underwriting decisions are based on the appraiser's independent professional judgment, free of any influence or pressure that may be exerted by parties that have an interest in the transaction. Among other things, the valuation independence requirements generally prohibit:

- Creditors and providers of settlement services from attempting directly or indirectly to cause the value assigned to a consumer's principal dwelling to be based on any factor other than the independent judgment of the person preparing the valuation through coercion, extortion, inducement, bribery, or intimidation of, compensation or instruction to, or collusion with a person that prepares valuations (§ 1026.42(c)(1));
- Persons preparing valuations from materially misrepresenting the value of the consumer's principal dwelling (§ 1026.42(c)(2)(i));
- Persons preparing a valuation or performing valuation management functions for a covered transaction from having a direct or indirect interest, financial or otherwise, in the property or transaction for which the valuation is or will be performed (§ 1026.42(d)(1)(i)); and
- Creditors from extending credit if the creditor knows, at or before consummation, of a violation of § 1026.42(c) or 1026.42(d), unless the creditor documents that it has acted with reasonable diligence to determine that the valuation does not materially misstate or misrepresent the value of the consumer's principal dwelling (§ 1026.42(e)).

Question 30: The Agencies seek comment on whether the rule should include additional conditions on how the creditor must obtain the additional appraisal under § 1026.XX(b)(3)(i). For example, should the rule prohibit the creditor from obtaining the two appraisals from appraisers employed by the same appraisal firm, or from two appraisers who receive the assignments for the two required appraisals from the same appraisal management company?

XX(b)(3)(iii) Relationship to Paragraph (b)(1)

Proposed § 1026.XX(b)(3)(ii) would require that the additional appraisal meet the requirements of the first appraisal, which includes the requirements that the appraisal be performed by a certified or licensed appraiser who conducts a physical visit of the interior of the mortgaged property. The Agencies believe that this approach best effectuates the purposes of the statute. TILA section 129H(b)(1) provides that, ''Subject to the rules prescribed under paragraph (4), an appraisal of property to be secured by a higher-risk mortgage does not meet the requirements of this section unless it is performed by a certified or licensed appraiser who conducts a physical property visit of the interior of the mortgaged property''. 15 U.S.C. 1639h(b)(1). The ''second appraisal'' required under TILA section 129H(b)(2)(A) is ''an appraisal of property to be secured by a higher-risk mortgage'' under TILA section 129H(b)(1). 15 U.S.C. 1639h(b)(1), (b)(2)(A). Therefore, to meet the requirements of TILA section 129H, the additional appraisal would be required to be ''performed by a certified or licensed appraiser who conducts a physical visit of the interior of the property that will secure the transaction.'' TILA section 129H(b)(1), 15 U.S.C. 1639h(b)(1). In addition, under TILA section 129H(b)(2)(A), the additional appraisal must analyze several elements, including ''any improvements made to the property between the date of the previous sale and the current sale.'' 15 U.S.C. 1639h(b)(2)(A). The Agencies believe that the purposes of the statute would be best implemented by requiring the second appraiser to perform a physical interior property visit to analyze any improvements made to the property. Without an on-site visit, the second appraiser would have difficulty confirming that any improvements identified by the seller or the first appraiser were made. Thus, proposed § 1026.XX(b)(3)(iii) provides that if the conditions in proposed § 1026.XX(b)(3)(i) are present, the creditor must obtain an additional appraisal that meets the requirements of the first appraisal, as provided in proposed § 1026.XX(b)(1).

XX(b)(3)(iv) Requirements for the Additional Appraisal

TILA section 129H(b)(2)(A) would require that the additional appraisal ''include an analysis of the difference in sale prices, changes in market conditions, and any improvements made to the property between the date of the previous sale and the current sale.'' 15 U.S.C. 1639h(b)(2)(A). Proposed § 1026.XX(b)(3)(iv)(A) would require that the additional appraisal include an analysis of the difference between the price at which the seller acquired the property and the price the consumer is obligated to pay to acquire the property, as specified in the consumer's acquisition agreement. In addition, proposed § 1026.XX(b)(3)(iv)(B)–(C) would require that the additional appraisal include an analysis of changes in market conditions and improvements made to the property between the date of the seller's acquisition of the property and the date of the consumer's agreement to acquire the property. For consistency with the statute, the Agencies have listed the requirement to analyze the difference in sale prices as an element distinct from the analysis of changes in market conditions and any improvements made to the property.

Question 31: The Agencies invite comment on this interpretation and whether the rule should adopt an alternate approach.

For consistency throughout the proposal, proposed § 1026.XX(b)(3)(iv)(A) uses the terms ''the price at which the seller acquired the property'' and the ''price the consumer is obligated to pay to acquire the property, as specified in the consumer's agreement to acquire the property from the seller'' as the prices that the additional appraisal must analyze. These are the same criteria that a creditor would analyze to determine whether the seller acquired the property at a price lower than the current sale price in proposed § 1026.XX(b)(3)(i)(B). Similarly, paragraphs (b)(3)(iv)(B) and (b)(3)(iv)(C) of proposed § 1026.XX(b)(3)(iv) use the terms ''date the seller acquired the property'' and the ''date of the consumer's agreement to acquire the property'' as the dates the additional appraisal must analyze in considering changes in market conditions and any improvements made to the property. These are the same dates that a creditor would analyze to determine whether the property is being resold within the 180-day period in proposed § 1026.XX(b)(3)(i)(B). Proposed comment XX(b)(3)(iv)–1 contains cross-references to other proposed comments that clarify how a creditor would identify the relevant dates and prices.

Question 32: The Agencies invite comment on this terminology and whether additional clarification of these requirements is necessary.

XX(b)(3)(v) No Charge for the Additional Appraisal

TILA section 129H(b)(2)(B) provides that ''[t]he cost of the second appraisal required under subparagraph (A) may not be charged to the applicant.'' 15 U.S.C. 1639h(b)(2)(B). Proposed § 1026.XX(b)(3)(v) provides that ''[i]f the creditor must obtain two appraisals under paragraph (b)(3)(i) of this section, the creditor may charge the consumer for only one of the appraisals.'' As clarified in proposed comment XX(b)(3)(v)–1, the creditor would be prohibited from imposing a fee specifically for that appraisal or by marking up the interest rate or any other fees payable by the consumer in connection with the higher-risk mortgage loan.

The proposed comment also explains that the creditor would be prohibited from charging the consumer for the ''performance of one of the two appraisals required under § 1026.XX(b)(3)(i).'' This comment is intended to clarify that the prohibition on charging the consumer under § 1026.XX(b)(3)(v) applies to charges for the cost of performing the appraisal, not the cost of providing the consumer with a copy of the appraisal. As implemented by proposed § 1026.XX(d)(4), TILA section 129H(c) would prohibit the creditor from charging the consumer for one copy of each appraisal conducted pursuant to the higher-risk mortgage rule. 15 U.S.C. 1639h(c); *see also* section-by-section analysis of proposed § 1026.XX(d)(4), below. As discussed above, the Agencies have not used the phrase ''second appraisal'' in the proposed rule because, in practice, a creditor ordering two appraisals at the same time may not know which of the two appraisals would be the ''second'' appraisal. The Agencies understand that the additional appraisal could be separately identified because it must contain an analysis of elements in proposed § 1026.XX(b)(3)(iv), but the Agencies also understand that some appraisers may perform such an analysis as a matter of routine, and that it may be difficult to distinguish the two appraisals on that basis.

Question 33: The Agencies invite comment on the proposed approach of permitting the creditor to charge for only one appraisal, and whether other ways to identify the ''second appraisal'' as the one that cannot be charged to the consumer may exist.

In addition, proposed § 1026.XX(b)(3)(ii) prohibits the creditor from charging ''the consumer'' in place of the statutory term, ''applicant.'' The Agencies believe that use of the broader term ''consumer'' is necessary to clarify that the creditor may not charge the consumer for the cost of the additional appraisal after consummation of the loan.

XX(b)(3)(vi) Creditor's Determinations Under Paragraphs (b)(3)(i)(A) and (b)(3)(i)(B) of this Section

XX(b)(3)(vi)(A) Reasonable Diligence

Proposed § 1026.XX(b)(3)(vi)(A) would require the creditor to exercise reasonable diligence to determine whether the criteria in paragraphs (b)(3)(i)(A) and (b)(3)(i)(B) of proposed § 1026.XX and are met—namely, whether the seller acquired the property 180 or fewer days prior to the date of the consumer's agreement to acquire the property from the seller, at a price that was lower than the price the consumer is obligated to pay, as specified in the consumer's agreement to acquire the property from the seller. Although TILA section 129H does not include a diligence standard, the Agencies are proposing one to implement the statute's requirement that the creditor obtain an additional appraisal. To determine whether an additional appraisal is required, the creditor would be required to know whether the criteria regarding the property's sale prices and dates of acquisition are met. The Agencies believe it may be difficult in some cases for a creditor to know with absolute certainty whether the criteria in paragraphs (b)(3)(i)(A) and (b)(3)(i)(B) of proposed § 1026.XX are met. Similarly, a creditor may have difficulty knowing whether it had relied on the ''best information'' available in making such a determination, which could require that creditors perform an exhaustive review of every document that might contain information about a property's sales history and unduly limit the availability of credit to higher-risk mortgage consumers.

To meet the proposed reasonable diligence standard, the Agencies believe that creditors should be able to rely on written source documents that are generally available in the normal course of business. Accordingly, proposed comment XX(b)(3)(vi)(A)–1 clarifies that a creditor has acted with reasonable diligence to determine when the seller acquired the property and whether the price at which the seller acquired the property is lower than the price reflected in the consumer's acquisition agreement if, for example, the creditor bases its determination on information contained in written source documents, as discussed below.

The proposed comment provides a list of written source documents that the creditor could use to perform reasonable diligence as follows: a copy of the recorded deed from the seller; a copy of a property tax bill; a copy of any owner's title insurance policy obtained by the seller; a copy of the RESPA settlement statement from the seller's acquisition (*i.e.,* the HUD–1 or any successor form [54]); a property sales history report or title report from a third-party reporting service; sales price data recorded in multiple listing services; tax assessment records or transfer tax records obtained from local governments; a written appraisal, including a signed appraiser's certification stating that the appraisal was performed in conformity with USPAP, that shows any prior transactions for the subject property; a copy of a title commitment report; or a property abstract.

Question 34: The Agencies specifically invite comment on whether these or other source documents would provide reliable information about a property's sales history.[55] The Agencies also request comment on whether these or other source documents could be relied on in making the additional appraisal determination, provided they indicate the seller's acquisition date or the seller's acquisition price.

The proposed comment contains a footnote explaining that a ''title commitment report'' is a document from a title insurance company describing the property interest and status of its title, parties with interests in the title and the nature of their claims, issues with the

[54] As explained in a footnote in the proposed comment, the Bureau's 2012 TILA–RESPA Proposal contains a proposed successor form to the RESPA settlement statement. See § 1026.38 (Closing Disclosure Form) of the Bureau's 2012 TILA–RESPA Proposal, available at *http://www.consumerfinance.gov/regulations/.*

[55] *See also* HUD Mortgagee Letter 2003–07 (May 22, 2003) (providing examples of documents a creditor could use to comply with the time-period restrictions in the FHA Anti-Flipping Rule).

title that must be resolved prior to closing of the transaction between the parties to the transfer, amount and disposition of the premiums, and endorsements on the title policy. The footnote also explains that the document is issued by the title insurance company prior to the company's issuance of an actual title insurance policy to the property's transferee and/or creditor financing the transaction. In different jurisdictions, this instrument may be referred to by different terms, such as a title commitment, title binder, title opinion, or title report.

Regarding the list of source documents described above, the Agencies note that the first four listed items would be voluntarily provided directly or indirectly by the seller, rather than collected from publicly available sources. Permitting the use of these documents presents the risk that the creditor would be presented with altered copies. Balanced against this risk is the concern that no information sources are publicly available in non-disclosure jurisdictions and jurisdictions with significant lag times before public land records are updated to reflect new transactions.[56] The Agencies are concerned that, unless the creditor can rely on other sources, such as sources provided by the seller, the higher-risk mortgage transaction may not proceed at all, or could proceed only with an additional appraisal containing a limited form of the analysis that would be required by TILA section 129H(b)(2)(A). 15 U.S.C. 1639h(b)(2)(A). (For a discussion of how a higher-risk mortgage transaction could proceed with limited information about the seller's acquisition, see the section-by-section analysis of proposed § 1026.XX(b)(3)(vi)(B), below).

Question 35: The Agencies are particularly interested in whether a creditor should be permitted to rely on a signed USPAP-compliant written appraisal prepared for the higher-risk mortgage transaction to determine the seller's acquisition date and price.

The Agencies understand that USPAP Standards Rule 1–5 requires appraisers to ''analyze all sales of the subject property that occurred within the three (3) years prior to the effective date of the appraisal'' if that information is available to the appraiser ''in the normal course of business.'' [57] Thus, the Agencies expect that, in most cases, a creditor could rely on the first appraisal prepared for the higher-risk mortgage transaction to reveal information relevant to determining whether an additional appraisal would be required under § 1026.XX(b)(3)(i). However, the Agencies are concerned that a written appraisal may not be trustworthy if the appraiser were a party to a fraudulent flipping scheme.

Question 36: In light of the abuses sought to be prevented by the statute, the Agencies invite comment on whether allowing a creditor to rely on the appraisal for the requisite information is appropriate and whether a creditor could take any specific measures to ensure the appraiser is reporting prior sales accurately. The Agencies are particularly interested in receiving comment on whether, for creditors that are required to select an independent appraiser, such as creditors subject to the Federal banking agencies' FIRREA title XI rules, the creditor's selection of an independent appraiser is sufficient to address the concern that the appraiser may be colluding with a seller in perpetrating a fraudulent flipping scheme.

The Agencies also note that some of the listed documents may not necessarily be publicly available. Even in jurisdictions that, at the time of the particular loan application, make up-to-date sales information publicly available, the Agencies are reluctant to suggest that the creditor should have to look further than publicly available information that is commonly obtained as part of creditors' current loan underwriting processes.

Question 37: The Agencies question whether other information sources are likely to be more easily available or more accurate, and request commenters' views on this point.

Oral statements. Proposed comment XX(b)(3)(vi)(A)-2 explains that reliance on oral statements of interested parties, such as the consumer, seller, or mortgage broker does not constitute reasonable diligence for determining whether an additional appraisal is required under § 1026.XX(b)(3)(i). The Agencies do not believe that creditors should be permitted to rely on oral statements offered by parties to the transaction because they may be engaged in the type of fraud the statutory provision was designed to prevent.

Question 38: However, the Agencies request comment on whether circumstances exist in which oral statements offered by parties to the transaction could be considered reliable if documented appropriately, and how such statements should be documented to ensure greater reliability.

XX(b)(3)(vi)(B) Inability To Make the Determination Under Paragraphs (b)(3)(i)(A) and (b)(3)(i)(B) of this Section

In general, the Agencies believe that, based on recent data provided by FHFA, most property resales would not trigger the proposal's conditions requiring an additional appraisal.[58] However, the Agencies understand that, in some cases, a creditor performing typical underwriting and documentation procedures may be unable to ascertain through information derived from public records whether the conditions in the additional appraisal requirement have been triggered. For example, a creditor may be unable to determine information about the seller's acquisition because of lag times in recording public records. The Agencies also understand that some source documents often report only nominal amounts of consideration when describing the consideration paid by the current titleholder for the property. Moreover, as noted, several ''non-disclosure'' jurisdictions do not make the price at which a seller acquired a property publicly available. In addition, the creditor may obtain conflicting information from written source documents. In these cases, a creditor may be unable to determine, based on its reasonable diligence, whether the criteria in proposed paragraphs (b)(3)(i)(A) and (b)(3)(i)(B) have been met.

For the reasons discussed below, the Agencies believe that a higher-risk mortgage loan creditor should be required to obtain an additional appraisal if the creditor cannot determine the seller's acquisition price or date based on written source documents. Accordingly, proposed § 1026.XX(b)(3)(vi)(B) would require a higher-risk mortgage loan creditor that cannot determine the seller's acquisition date or price to obtain an additional appraisal.

Proposed comment XX(b)(3)(vi)(B)-1 provides two examples of how this rule would apply: one in which a creditor is

[56] During informal outreach conducted by the Agencies, representatives of large, small, and regional lenders expressed concern that in some cases, a creditor may be unable to determine the seller's date and price due to information gaps in the public record. The Agencies also understand that a creditor may not be able to determine prior transaction data because of delays in the recording of public records. The Agencies also understand that certain ''non-disclosure'' jurisdictions do not make the price at which a seller acquired a property available in the public records.

[57] Appraisal Standards Bd., Appraisal Fdn., Standards Rule 1–5, USPAP (2012–2013 ed.).

[58] Based on county recorder information from select counties licensed to FHFA by DataQuick Information Systems.

unable to obtain information on the seller's acquisition price or date and the other in which a creditor obtains conflicting information about the seller's acquisition price or date. In the first example, proposed comment XX(b)(3)(vi)(B)-1.i assumes that a creditor orders and reviews the results of a title search showing the seller's acquisition date is within the 180-day window, but the seller's acquisition price was not included. In this case, the creditor would not be able to determine whether the price paid by the seller to acquire the property was lower than the price the consumer is obligated to pay under the consumer's acquisition agreement, pursuant to § 1026.XX(b)(3)(i)(B). Before extending a higher-risk mortgage loan, the creditor must either: (1) perform additional diligence to obtain information showing the seller's acquisition price and determine whether two written appraisals in compliance with § 1026.XX(b)(3) would be required based on that information; or (2) obtain two written appraisals in compliance with § 1026.XX(b)(3). *See also* proposed comment XX(b)(3)(vi)(B)-2.

In the second example, proposed comment XX(b)(3)(vi)(B)-1.ii assumes that a creditor reviews the results of a title search indicating that the last recorded purchase was more than 180 days before the consumer's agreement to acquire the property. This proposed comment also assumes that the creditor subsequently receives a written appraisal indicating that the seller acquired the property less than 180 days before the consumer's agreement to acquire the property. In this case, the creditor would not be able to determine whether the seller acquired the property within 180 days of the date of the consumer's agreement to acquire the property from the seller, pursuant to § 1026.XX(b)(3)(i)(A). Before extending a higher-risk mortgage loan, the creditor must either: (1) perform additional diligence to obtain information confirming the seller's acquisition date (and price, if within 180 days) and determine whether two written appraisals in compliance with § 1026.XX(b)(3) would be required based on that information; or (2) obtain two written appraisals in compliance with § 1026.XX(b)(3). *See also* comment XX(b)(3)(vi)(B)-3.

Under this proposal, when information about a property is not available from written source documents, creditors extending higher-risk mortgage loans will routinely incur increased costs associated with obtaining the additional appraisal. One risk of the proposal is that, because TILA section 129H(b)(2)(B) prohibits creditors from charging their customers for the additional appraisal, 15 U.S.C. 1639h(b)(2)(B), creditors will simply refrain from engaging in any higher-risk mortgage loan transaction where sales history data cannot be obtained. *See also* proposed § 1026.XX(b)(3)(v). In ''non-disclosure'' jurisdictions, where property sales price information is routinely unavailable through public records, this requirement could limit the availability of higher-risk mortgage loans.

The Agencies believe, however, that requiring an additional appraisal where creditors are unable to obtain the seller's acquisition price and date is necessary to prevent circumvention of the statute. In particular, the Agencies are concerned that not requiring an additional appraisal in cases of limited information may encourage the concentration of fraudulent property flipping in ''non-disclosure'' jurisdictions. Similarly, the Agencies are concerned that sellers that acquire and sell properties within a short timeframe could take advantage of delays in the public recording of property sales to engage in fraudulent flipping transactions. The Agencies believe that, where the seller's acquisition date in particular is not in the public record due to recording delays, it is more reasonable to assume that the seller's transaction was sufficiently recent to be covered by the rule than not.

Question 39: The Agencies request comment on whether the enhanced protections for consumers afforded by requiring an additional appraisal whenever the seller's acquisition date or price cannot be determined merit the potential restraint on the availability of higher-risk mortgage loans. The Agencies also request comment on whether concerns about these potential restraints on credit availability make it particularly important to include the first four source documents listed in the proposed commentary, even though they would be seller-provided, and whether these concerns warrant further expanding the sources of information creditors may rely on to satisfy the reasonable diligence standard under the proposed rule.

Modified requirements for content of additional appraisal. As discussed above, proposed § 1026.XX(b)(3)(vi)(B) would require a higher-risk mortgage loan creditor that cannot determine the seller's acquisition date or price to obtain an additional appraisal. However, proposed § 1026.XX(b)(3)(vi)(B) also provides that the additional appraisal in this situation would not have to contain the full analysis required for additional appraisals of flipping transactions under proposed § 1026.XX(b)(3)(iv)(A)-(C). *See* TILA section 129H(b)(2)(A), 15 U.S.C. 1639h(b)(2)(A). Specifically, under proposed § 1026.XX(b)(vi)(B), the additional appraisal must include an analysis of the elements that would be required in proposed § 1026.XX(b)(3)(iv)(A)-(C) only to the extent that the creditor knows the seller's purchase price and acquisition date. As discussed in the section-by-section analysis of proposed § 1026.XX(b)(3)(ii), TILA section 129H(b)(2)(A) requires that the additional appraisal analyze changes in market conditions, improvements to the property, and the difference in sales prices. 15 U.S.C. 1639h(b)(2)(A). An appraiser could not perform this analysis if efforts to obtain the seller's acquisition date and price were not successful.

Proposed comment XX(b)(3)(vi)(B)–2 confirms that, in general, the additional appraisal required under § 1026.XX(b)(3)(i) should include an analysis of the factors listed in § 1026.XX(b)(3)(iv)(A)–(C). However, the proposed comment also confirms that if, following reasonable diligence, a creditor cannot determine whether the criteria in § 1026.XX(b)(3)(i)(A) and (B) are met due to a lack of information or conflicting information, the required additional appraisal must include the analyses required under § 1026.XX(b)(3)(iv)(A), (B), and (C) only to the extent that the information necessary to perform the analysis is known. *See* section-by-section analysis of paragraphs (b)(3)(i) and (b)(3)(iv) of proposed § 1026.XX. The proposed comment provides two examples. First, proposed comment XX(b)(3)(vi)(B)–2.i states that, if a creditor is unable, following reasonable diligence, to determine the price at which the seller acquired the property, the second written appraisal obtained by the creditor is not required to include the analysis under § 1026.XX(b)(3)(iv)(A) of the difference between the price at which the seller acquired the property and the price that the consumer is obligated to pay to acquire the property, as specified in the consumer's agreement to acquire the property from the seller. The proposed comment also explains that the second written appraisal would be required to include the analysis under paragraphs (b)(3)(iv)(B) and (b)(3)(iv)(C) of proposed § 1026.XX of the changes in market conditions and any improvements made to the property between the date the seller acquired the property and the date of the consumer's agreement to acquire the property.

In addition, the Agencies note that the proposed rule does not provide commentary explaining how the creditor would obtain an additional appraisal if the creditor is unable to determine the date the seller acquired the property but is able to determine the price at which the seller acquired the property. Proposed § 1026.XX(b)(3)(iv)(A) would require creditors to perform ''an analysis of the difference between the price at which the seller acquired the property and the price that the consumer is obligated to pay to acquire the property.''

Question 40: The Agencies request comment on whether an appraiser would be unable to analyze the difference in the price the consumer is obligated to pay to acquire the property and the price at which the seller acquired the property without knowing when the seller acquired the property. If such an analysis is not possible without information about when the seller acquired the property, the Agencies invite comment on whether the rule should assume the seller acquired the property 180 days prior to the date of the consumer's agreement to acquire the property.

The Agencies believe that allowing creditors to comply with a modified form of the full analysis where a creditor cannot determine information about a property based on its reasonable diligence is a reasonable interpretation of the statute. It would be impossible for a creditor to obtain an appraisal that complies with the full analysis requirement of TILA section 129H(b)(2)(A) concerning the change in price, market conditions, and improvements to the property if a creditor could not determine when or for how much the prior sale occurred.

In sum, the Agencies' proposed approach to situations in which the creditor cannot obtain the necessary information, either due to a lack of information or conflicting information, is to require an additional appraisal, but, to account for missing or conflicting information, require a modified version of the full additional analysis required under TILA section 129H(b)(2)(A) and proposed § 1026.XX(b)(3)(iv). 15 U.S.C. 1639h(b)(2)(A). Among alternative approaches not chosen by the Agencies is to prohibit creditors from extending the higher-risk mortgage loan altogether under these circumstances. The Agencies believe, however, that a flat prohibition would unduly limit the availability of higher-risk mortgage loans to consumers.

Question 41: The Agencies request comment on the proposed approach to situations in which the creditor cannot obtain the necessary information and whether the rule should address information gaps about the flipping transaction in other ways.

XX(c) Required Disclosure

XX(c)(1) In General

Title XIV of the Dodd-Frank Act added two new appraisal-related notification requirements for consumers. First, TILA section 129H(d) requires that, at the time of the initial mortgage application for a higher-risk mortgage loan, the applicant must be ''provided with a statement by the creditor that any appraisal prepared for the mortgage is for the sole use of the creditor, and that the applicant may choose to have a separate appraisal conducted at the expense of the applicant.'' 15 U.S.C. 1639h(d). Proposed § 1026.XX(c) implements the new disclosure requirement added by TILA section 129H(d).

In addition, new section 701(e)(5) of the Equal Credit Opportunity Act (ECOA) similarly requires a creditor to notify an applicant in writing, at the time of application, of the ''right to receive a copy of each written appraisal and valuation'' subject to ECOA section 701(e). 15 U.S.C. 1691(e)(5). Read together, the revisions to TILA and ECOA will require creditors to provide two appraisal disclosures to consumers applying for a higher-risk mortgage loan secured by a first lien on a consumer's principal dwelling. The Bureau intends to implement ECOA section 701(e) separately, using its authority to promulgate rules pursuant to section 703(a) of ECOA; however, in developing this proposal jointly with the Agencies, the Bureau has been cognizant of the need to promote consistency for consumers and reduce operational burden for creditors in implementing both the new TILA and ECOA appraisal-related disclosure requirements.

Consumer Testing. In developing this proposal to implement the disclosure requirements in TILA section 129H(d), the Agencies have relied on consumer testing conducted on behalf of the Bureau as part of its development of integrated disclosures under the Real Estate Settlement Procedures Act (RESPA) and TILA. While a short summary is included below, a more comprehensive discussion of the Bureau's consumer testing protocol and procedures has been published in the **Federal Register** as part of the Bureau's 2012 TILA–RESPA Proposal.

Testing the Appraisal Disclosures. As part of its broader testing of integrated mortgage disclosures, the Bureau tested versions of the new appraisal-related disclosures required by both TILA and ECOA. The Bureau believed that testing both appraisal-related disclosures together was important to determine how best to provide these two overlapping but separate disclosures in a manner that would minimize consumer confusion and improve consumer comprehension. Testing showed that consumers tended to find the two notifications confusing when they were given together using, in both cases, the language in the statute. Consumer comprehension of both appraisal-related disclosures significantly improved when a slightly longer plain language version of the notifications was provided. The Agencies believe that Congress intended the ECOA and TILA notices to work together to provide consumers a better understanding of collateral valuations used by the creditor in determining whether to extend secured credit to the consumer. Based on the results of the consumer testing performed by the Bureau, the Agencies are proposing to implement the appraisal disclosure required in TILA with a new § 1026.XX(c)(1) that would require the following disclosure: ''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.''

While the proposed disclosure is longer than the express statutory language provided in section 129H(d), the Agencies believe that the additional explanatory text is necessary to promote consumer comprehension and to reduce any confusion associated with the ECOA appraisal notification that will also have to be given to applicants for most higher-risk mortgage loans. The proposed notification is accurate because, like the ECOA section 701(e) appraisal requirement, TILA section 129H(c) also requires creditors to provide consumers with a copy of the appraisals at least three days prior to consummation.

The proposed disclosure does not include the express language in TILA section 129H(d) that ''the appraisal prepared for the mortgage is for the sole use of the creditor.'' 15 U.S.C. 1639h(d). The Agencies are proposing not to include this express language in the disclosure language because, in testing performed by the Bureau, it confused consumers. Requirements to disclose appraisal information to residential mortgage consumers, such as under TILA section 129H(c), are intended to help consumers understand the collateral valuation information on which creditors rely in reaching decisions on consumers' mortgage applications. 15 U.S.C. 1639h(c). TILA section 129H(d) seeks to convey that the valuation conclusions in the appraisal are prepared for the benefit of the creditor, not the consumer. 15 U.S.C. 1639h(d). The disclosure language proposed by the Agencies addresses this point by advising consumers they may obtain an additional appraisal at their own cost for their own use. In formulating this language without ''sole use'' terminology, the Agencies are not suggesting that TILA section 129H should be construed to confer upon consumers a status equivalent to an intended third-party beneficiary with respect to the valuation conclusion in written appraisals obtained by creditors. 15 U.S.C. 1639h.

Question 42: The Agencies request comment on the proposed language and whether additional changes should be made to the text of the notification to further enhance consumer comprehension.

Proposed comment XX(c)(1)–1 clarifies that when two or more consumers apply for a loan subject to this section, the creditor is required to give the disclosure to only one of the consumers. This interpretation is for consistency with comment 14(a)(2)(i)–1 in Regulation B, which interprets the requirement in § 1002.14(a)(2)(i) that creditors notify applicants of the right to receive copies of appraisals. 12 CFR 1002.14(a)(2) and comment 14(a)(2)(i)–1.

XX(c)(2) Timing of Disclosure

TILA section 129H(c) requires that the disclosure be provided at the time of the initial mortgage application. 15 U.S.C. 1639h(c). To be consistent with other similar TILA and RESPA notifications provided to consumers [59] and to allow creditors sufficient time to deliver written disclosures to applicants, when an application is submitted over the phone, by fax, or by mail, proposed § 1026.XX(c)(2) requires that the disclosure be delivered not later than the third business day after the creditor receives the consumer's application. In addition, providing the notification to consumers at the same time as other similar notifications allows consumers to read the notification in context with other important information that must be delivered not later than the third business day after the creditor receives the consumer's application. The Agencies believe this interpretation is consistent with the requirements of TILA section 129H(d). 15 U.S.C. 1639h(d).

Question 43: The Agencies request comment on whether providing the notification at some other time would be more beneficial to consumers, and how the notification should be provided when an application is submitted by telephone, facsimile or electronically. For example, the Agencies solicit comment on whether it would be appropriate to require that creditors provide the disclosure at the same time the application is received, or even as part of the application.

Question 44: The Agencies also solicit comment on whether creditors who have a reasonable belief that the transaction will not be a higher-risk mortgage loan at the time of application, but later determine that the applicant only qualifies for a higher-risk mortgage loan, should be allowed an opportunity to cure and give the required disclosure at some later time in the application process.

XX(d) Copy of Appraisals

XX(d)(1) In General

Consistent with TILA section 129H(c), proposed § 1026.XX(d) requires that a creditor must provide a copy of any written appraisal performed in connection with a higher-risk mortgage loan to the applicant. 15 U.S.C. 1639h(c).

Similar to proposed comment XX(c)(1)–1, proposed comment XX(d)(1)–1 clarifies that when two or more consumers apply for a loan subject to this section, the creditor is required to give the copy of required appraisals to only one of the consumers.

XX(d)(2) Timing

TILA section 129H(c) requires that the appraisal copy must be provided to the consumer at least three (3) days prior to the transaction closing date. 15 U.S.C. 1639h(c). Proposed § 1026.XX(d)(2) requires creditors to provide copies of written appraisals pursuant to § 1026.XX(d)(1) no later than ''three business days'' prior to consummation of the higher-risk mortgage loan. The Agencies believe that requiring that the appraisal be provided three (3) business days in advance of consummation is a reasonable interpretation of the statute and is consistent with the Agencies' interpretation of the statutory term ''days'' used in the Bureau's proposed rule amending 12 CFR 1002.14, which implements the appraisal requirements of new ECOA section 701(e)(1). *See* 15 U.S.C. 1691(e)(1); and the Bureau's 2012 ECOA Proposal.[60] In addition, the Agencies' interpretation of the term ''days'' to mean ''business days'' is consistent with other similar regulatory requirements being proposed under the TILA and RESPA. *See* Bureau's 2012 TILA–RESPA Proposal.

For consistency with the other provisions of Regulation Z, proposed § 1026.XX also uses the term ''consummation'' instead of the statutory term ''closing'' that is used in TILA section 129H(c). 15 U.S.C. 1639h(c). The term ''consummation'' is defined in § 1026.2(a)(13) as the time that a consumer becomes contractually obligated on a credit transaction. The Agencies have interpreted the two terms as having the same meaning for the purpose of implementing TILA section 129H. 15 U.S.C. 1639h.

XX(d)(3) Form of Copy

Section 1026.31(b) currently provides that the disclosures required under subpart E of Regulation Z may be provided to the consumer in electronic form, subject to compliance with the consumer-consent and other applicable provisions of the Electronic Signatures in Global and National Commerce Act (E-Sign Act) (15 U.S.C. 7001 et seq.). The Agencies believe that it is also appropriate to allow creditors to provide applicants with copies of written appraisals in electronic form if the applicant consents to receiving the copies in such form. Accordingly, proposed § 1026.XX(d)(3) provides that any copy of a written appraisal required by § 1026.XX(d)(1) may be provided to the applicant in electronic form, subject to compliance with the consumer consent and other applicable provisions of the E-Sign Act.

XX(d)(4) No Charge for Copy of Appraisal

TILA section 129H(c) provides that a creditor shall provide one (1) copy of each appraisal conducted in accordance with this section in connection with a higher-risk mortgage to the applicant without charge. 15 U.S.C. 1639h(c). The Agencies have interpreted this section to prohibit creditors from charging consumers for providing a copy of

[59] *See, e.g.,* 12 CFR 1026.19(a)(1)(i) (''In a mortgage transaction subject to the Real Estate Settlement Procedures Act (12 U.S.C. 2601 *et seq.*) that is secured by the consumer's dwelling * * * the creditor shall make good-faith estimates of the disclosures required by section 1026.18 and shall deliver or place them in the mail not later than the third business day after the creditor receives the consumer's written application.'').

[60] The Bureau's 2012 ECOA Proposal is available at *http://www.consumerfinance.gov/regulations/*.

written appraisals required for higher-risk mortgage loans. Accordingly, proposed § 1026.XX(d)(4) provides that a creditor must not charge the applicant for a copy of a written appraisal required to be provided to the consumer pursuant to § 1026.XX(d)(1).

Proposed comment XX(d)(4)–1 clarifies that the creditor is prohibited from charging the consumer for any copy of an appraisal required to be provided under § 1026.X(d)(1), including by imposing a fee specifically for a required copy of an appraisal or by marking up the interest rate or any other fees payable by the consumer in connection with the higher-risk mortgage loan.

XX(e) Relation to Other Rules

Proposed paragraph (e) would clarify that the proposed rules were developed jointly by the Agencies. The Board proposes to codify its higher-risk mortgage appraisal rules at 12 CFR 226.XX *et seq.;* the Bureau proposes to codify its higher-risk mortgage appraisal rules at 12 CFR 1026.XX *et seq.;* and the OCC proposes to codify its higher-risk mortgage appraisal rules at 12 CFR Part 34 and 12 CFR Part 164. There is, however, no substantive difference among the three sets of rules. The NCUA and FHFA propose to adopt the rules as published in the Bureau's Regulation Z at 12 CFR 1026.XX, by cross-referencing these rules in 12 CFR 722.3 and 12 CFR Part 1222, respectively. The FDIC proposes to not cross-reference the Bureau's Regulation Z at 12 CFR 1026.XX.

V. Section 1022(b)(2) of the Dodd-Frank Act

Overview

In developing the proposed rule, the Bureau has considered potential benefits, costs, and impacts to consumers and covered persons.[61] The Bureau is issuing this proposal jointly with the Federal banking agencies and FHFA, and has consulted with these agencies, the Department of Housing and Urban Development, and the Federal Trade Commission, including regarding consistency with any prudential, market, or systemic objectives administered by such agencies.

As discussed above, the proposed rule would implement section 1471 of the Dodd-Frank Act, which establishes appraisal requirements for higher-risk mortgage loans. Consistent with the statute, the proposal would allow a creditor to make a higher-risk mortgage loan only if the following conditions are met:

- The creditor obtains a written appraisal;
- The appraisal is performed by a certified or licensed appraiser;
- The appraiser conducts a physical property visit of the interior of the property;
- At application, the applicant is provided with a statement regarding the purpose of the appraisal, that the creditor will provide the applicant a copy of any written appraisal, and that the applicant may choose to have a separate appraisal conducted at the expense of the applicant; and
- The creditor provides the consumer with a free copy of any written appraisals obtained for the transaction at least three (3) business days before closing.

In addition, as required by the Act, the proposal would require a higher-risk mortgage loan creditor to obtain an additional written appraisal, at no cost to the borrower, under the following circumstances:

- The higher-risk mortgage loan will finance the acquisition of the consumer's principal dwelling;
- The seller selling what will become the consumer's principal dwelling acquired the home within 180 days prior to the consumer's purchase agreement (measured from the date of the consumer's purchase agreement); and
- The consumer is acquiring the home for a higher price than the seller paid, although comment is requested on whether a threshold price increase would be appropriate.

The additional written appraisal, from a different licensed or certified appraiser, generally must include the following information: an analysis of the difference in sale prices (*i.e.,* the sale price paid by the seller and the acquisition price of the property as set forth in the consumer's purchase agreement), changes in market conditions, and any improvements made to the property between the date of the previous sale and the current sale.

The proposal also includes a request for comments to address a proposed amendment to the method of calculation of the APR that is being proposed as part of another mortgage-related proposal issued for comment by the Bureau. In the Bureau's proposal to integrate mortgage disclosures (2012 TILA–RESPA Proposal), the Bureau is proposing to adopt a more simple and inclusive finance charge calculation for closed-end credit secured by real property or a dwelling.[62] As the finance charge is integral to the calculation of the APR, the Bureau believes it is possible that a more inclusive finance charge could increase the number of loans covered by this rule. The Bureau currently is seeking data to assist in assessing potential impacts of a more inclusive finance charge in connection with the 2012 TILA–RESPA and its proposal to implement Dodd-Frank Act provision related to ''high-cost'' loans (2012 HOEPA Proposal).[63]

In many respects, the proposed rule would codify mortgage lenders' current practices. In outreach calls to industry, all respondents reported requiring the use of full-interior appraisals in 95% or more of first-lien transactions[64] and providing copies of appraisals to borrowers as a matter of course if a loan is originated.[65] The convention of using full-interior appraisals on first-liens may have developed to improve underwriting quality, and the implementation of this proposed rule would assure that the practice would continue under different market conditions.

The Bureau notes that many of the proposed provisions implement self-effectuating amendments to TILA. The costs and benefits of these proposed provisions would arise largely or in some cases entirely from the statute and not from the proposed rule that implements them. Such proposed provisions would provide benefits compared to allowing these TILA amendments to take effect alone, however, by clarifying parts of the statute that are ambiguous. Greater clarity on these issues should reduce the compliance burdens on covered persons by reducing costs for attorneys and compliance officers as well as potential costs of over-compliance and unnecessary litigation. Moreover, the costs that these provisions would

[61] Specifically, Section 1022(b)(2)(A) calls for the Bureau to consider the potential benefits and costs of a regulation to consumers and covered persons, including the potential reduction of access by consumers to consumer financial products or services; the impact on depository institutions and credit unions with $10 billion or less in total assets as described in section 1026 of the Act; and the impact on consumers in rural areas.

[62] *See* 2012 TILA–RESPA Proposal, pp. 101–127, 725–28, 905–11 (published July 9, 2012), available at *http://files.consumerfinance.gov/f/201207_cfpb_proposed-rule_integrated-mortgage-disclosures.pdf.*

[63] *See* 2012 HOEPA Proposal, pp. 44, 149–211 (published July 9, 2012), available at *http://files.consumerfinance.gov/f/201207_cfpb_proposed-rule_high-cost-mortgage-protections.pdf.*

[64] Respondents include a large bank, a trade group of smaller depository institutions, a credit union, and an independent mortgage bank.

[65] Respondents include a large bank, a trade group of smaller depository institutions, and an independent mortgage bank.

impose beyond those imposed by the statute itself are likely to be minimal.

Section 1022 permits the Bureau to consider the benefits, costs and impacts of the proposed rule solely compared to the state of the world in which the statute takes effect without an implementing regulation. To provide the public better information about the benefits and costs of the statute, however, the Bureau has chosen to consider the benefits, costs, and impacts of these major provisions of the proposed rule against a pre-statutory baseline (*i.e.,* the benefits, costs, and impacts of the relevant provisions of the Dodd-Frank Act and the regulation combined).[66]

The Bureau has relied on a variety of data sources to analyze the potential benefits, costs, and impacts of the proposed rule. However, in some instances, the requisite data are not available or are quite limited. Data with which to quantify the benefits of the rule are particularly limited. As a result, portions of this analysis rely in part on general economic principles to provide a qualitative discussion of the benefits, costs, and impacts of the proposal.

The primary source of data used in this analysis is data collected under the Home Mortgage Disclosure Act (HMDA).[67] Because the latest wave of complete data available is for loans made in calendar year 2010, the empirical analysis generally uses the 2010 market as the baseline. Data from fourth quarter 2010 bank and thrift Call Reports,[68] fourth quarter 2010 credit union call reports from the National Credit Union Administration (NCUA), and de-identified data from the National Mortgage Licensing System (NMLS) Mortgage Call Reports (MCR) [69] for the first and second quarter of 2011were also used to identify financial institutions and their characteristics. Most of the analysis relies on a dataset that merges this depository institution financial data from Call Reports to the data from HMDA including higher-risk mortgage loan counts that are created from the loan-level HMDA dataset. The unit of observation in this analysis is the entity: If there are multiple subsidiaries of a parent company then their originations are summed and revenues are total revenues for all subsidiaries.

Other portions of the analysis rely on property-level data regarding parcels and their related financing from DataQuick; [70] data on the location of certified appraisers from the Appraisal Subcommittee Registry;[71] and, demographic data from the 2010 American Community Survey (ACS).[72] Tabulations of the DataQuick data are used for estimation of the frequency of properties being sold within 180 days of a previous sale. The Appraisal Subcommittee's Registry is used to describe the availability of appraisers and the ACS is used to characterize the frequency of first and subordinate liens in rural and urban areas. The Bureau seeks comment on the use of these data sources, the appropriateness to this purpose, and alternative or additional sources of information.

The Bureau requests comment and data on the potential benefits, costs, and impacts of this proposal.

Potential Benefits of the Proposed Rule for Covered Persons and Consumers

In a mortgage transaction, the primary beneficiary of an appraisal is the creditor, as the appraisal helps the creditor avoid lending based on an inflated valuation of the property. Consumers, however, can also benefit from an accurate appraisal. Assuming that full-interior appraisals conducted by a certified or licensed appraiser are more accurate than other valuation methods, the proposal would improve the quality of home price estimates for those transactions where such an appraisal would not be performed currently. The requirement that a second appraisal be conducted in certain circumstances would further reduce the likelihood of an inflated sales price for those transactions.

Benefits to covered persons. Transactions where the collateral is overvalued expose the creditor to higher default risk. Research has shown that lower appraisal quality, defined as the difference between price estimates derived via statistical models and the appraised value, is associated with higher default rates.[73] By tightening appraisal standards for a class of transactions, the proposed rule may reduce default risk for creditors. Furthermore, by requiring the use of full interior appraisals in transactions involving high-risk mortgage loans, the statute prevents creditors from using less costly and possibly less accurate valuation methods in underwriting in order to compete on price. Eliminating the ability to use lower cost valuation methods, and thereby eliminating price competition on this component of the transaction, may benefit firms that prefer to employ more thorough valuation methods.

Benefits to consumers. Individual consumers engage in real estate transactions infrequently, so developing the expertise to value real estate is costly and consumers often rely on experts, such as real estate agents, and list prices to make price determinations. These methods may not lead a consumer to an accurate valuation of a property. For example, there is evidence that real estate agents sell their own homes for significantly more than other houses, which suggests that sellers may not be able to accurately price the homes that they are selling.[74] Other

[66] The Bureau has discretion in any rulemaking to choose an appropriate scope of analysis with respect to potential benefits and costs and an appropriate baseline. The Bureau, as a matter of discretion, has chosen to describe a broader range of potential effects to more fully inform the rulemaking.

[67] The Home Mortgage Disclosure Act (HMDA), enacted by Congress in 1975, as implemented by the Bureau's Regulation C requires lending institutions annually to report public loan-level data regarding mortgage originations. For more information, see *http://www.ffiec.gov/hmda.* It should be noted that not all mortgage lenders report HMDA data. The HMDA data capture roughly 90–95 percent of lending by the Federal Housing Administration and 75–85 percent of other first-lien home loans. Depository institutions, including credit unions, with assets less than $39 million (in 2010), for example, and those with branches exclusively in non-metropolitan areas and those that make no purchase money mortgage loans are not required to report to HMDA. Reporting requirements for non-depository institutions depend on several factors, including whether the company made fewer than 100 purchase money or refinance loans, the dollar volume of mortgage lending as share of total lending, and whether the institution had at least five applications, originations, or purchased loans from metropolitan areas. Robert B. Avery, Neil Bhutta, Kenneth P. Brevoort & Glenn B. Canner, *The Mortgage Market in 2010: Highlights from the Data Reported under the Home Mortgage Disclosure Act,* 97 Fed. Res. Bull., December 2011, at 1, 1 n.2.

[68] Every national bank, State member bank, and insured nonmember bank is required by its primary Federal regulator to file consolidated Reports of Condition and Income, also known as Call Report data, for each quarter as of the close of business on the last day of each calendar quarter (the report date). The specific reporting requirements depend upon the size of the bank and whether it has any foreign offices. For more information, see *http://www2.fdic.gov/call_tfr_rpts/.*

[69] The Nationwide Mortgage Licensing System is a national registry of non-depository financial institutions including mortgage loan originators. Portions of the registration information are public. The Mortgage Call Report data are reported at the institution level and include information on the number and dollar amount of loans originated, the number and dollar amount of loans brokered.

[70] DataQuick is database of property characteristics on more than 120 million properties and 250 million property transactions.

[71] The National Registry is a database containing selected information about State certified and licensed real estate appraisers. Downloaded February 28, 2012.

[72] The American Community Survey is an ongoing survey conducted by the United States Census Bureau.

[73] *See* Michael Lacour-Little and Stephen Malpezzi, *Appraisal Quality and Residential Mortgage Default: Evidence from Alaska,* 27:2 Journal of Real Estate Finance Economics 211–33 (2003).

[74] Levitt, Steven and Chad Syverson. ''Market Distortions When Agents are Better Informed: The

research, this time in a laboratory setting, provides evidence that individuals are sensitive to anchor values when estimating home prices.[75] In such cases, an independent signal of the value of the home should benefit the consumer. Having a professional valuation as a point of reference may help consumers gain a more accurate understanding of the home's value and improve overall market efficiency, relative to the case where the knowledge of true valuations is more limited.[76]

If a borrower is prepared to pay an inflated price for a property then an appraisal that reflects its value more accurately may prevent the transaction from being completed at the inflated price. In addition to the direct costs of paying more than the true value for a property, buying an overvalue property is associated with higher risk of default. If a property that is sold shortly after its previous sale is more likely to have an inflated price, since it may have been purchased the first time with the intention to improve the property quickly and resell it for a profit, the additional appraisal requirement would help ensure an accurate estimate of the value of the property. This might be especially valuable to a consumer. In the case of subordinate-lien transactions, the full-interior appraisal requirement may prevent borrowers from extracting too much equity if their property is overvalued by other valuation methods.

Codifying appraisal standards across the industry would likely simplify the shopping process for consumers who receive HRM offers. First, it may improve their understanding of the determinants of the value of the property that they intend to purchase. In cases where a loan is denied due to an appraiser valuing the property at less than the contract price, the appraisal may provide an itemized explanation of why the property was overvalued, which may help the consumer in future negotiations or property searches. Second, codifying appraisal standards across the industry would simplify the shopping process for consumers by making the process of applying for HRM loans more consistent between lenders. Full-interior appraisals typically cost more than other valuation methods, and appraisal costs are often passed on to consumers. Consumers may not understand the differences between different appraisal methods or know that different creditors will use different methods, and therefore may benefit from the standardization the proposal, if adopted, would cause.

Potential Costs of the Proposed Rule for Covered Persons

The costs of the proposed rule, which are predominantly related to compliance, are more readily quantifiable than the benefits and can be calculated based on the mix of loans originated by an entity and the number of employees at that entity. These compliance costs may be considered as the discrete tasks that would be required by the proposed rule. These can be separated into costs that are associated with the origination of a single higher-risk mortgage loan and the costs of reviewing the regulation and training costs calculated per loan officer and per institution.

Costs per higher-risk mortgage loan. The costs of the proposal for covered persons that derive from additional appraisals depend on the number of appraisals that would be conducted, above and beyond current practice, and the degree to which those costs are passed to consumers. For HMDA reporters, counts of higher-risk mortgage loans that are purchase loans, first-lien refinance loans, or closed-end second loans are computed from the loan-level HMDA data. Accepted statistical methods are used to project loan counts for non-HMDA reporting depository institutions.[77] Estimates of loan officers can be calculated from similar projections of applications per institution.

The calculation of costs for independent mortgage banks (IMBs) uses a slightly different approach.[78] Consistent with the results from HMDA reporting IMBs, the Bureau estimates the costs to IMBs by multiplying a cost per loan by the total number of loans originated by IMBs.[79] To obtain a count of full-time equivalent employees, this number is imputed for HMDA reporting IMBs based on the number of applications (assuming 1.38 days per loan application).[80]

Based on these data sources, the Bureau estimates that there were approximately 280,000 HRMs in 2010. Of these, the Bureau estimates that 117,000 were purchase money mortgages, 136,000 were first-lien refinancings, and 27,000 were closed-end subordinate lien mortgages that were not part of a purchase transaction.[81] The Bureau estimates that the probability that full-interior appraisals are conducted as part of current practice is 95% for purchase-money transactions, 90% for refinance transactions, and 5% for second mortgages. The Bureau therefore estimates that the proposal would lead to 45,100 full-interior appraisals for originations that would not otherwise have a full-interior appraisal.[82]

There would also be additional appraisals from the proposed requirement that lenders obtain a second full-interior appraisal in situations where the home that would secure the higher-risk mortgage is being resold within 180 days at a higher price than the previous transaction involving the property. Based on estimates from DataQuick, the Bureau estimates that the proportion of sales that are resales within 180 days is 5%. For the purposes of this calculation the Bureau conservatively assumes that all of these

Value of Information In Real Estate Transactions.'' The Review of Economics and Statistics 90 no.4 (2008): 599–611.

[75] Scott, Peter and Colin Lizieri. ''Consumer House Price Judgments: New Evidence of Anchoring and Arbitrary Coherence.'' Journal of Property Research 29 no. 1 (2012): 49–68.

[76] For example, in Quan and Quigley's theoretical model where buyers and seller have incomplete information, trades are decentralized, and prices are the result of pairwise bargaining, ''[t]he role of the appraiser is to provide information so that the variance of the price distribution is reduced.'' Quan, Daniel and John Quigley. ''Price Formation and the Appraisal Function in Real Estate Markets.'' Journal of Real Estate Finance and Economics 4 (1991): 127–146.

[77] Poisson regressions are run, projecting loan volumes in these categories on the natural log of characteristics available in the Call reports (total 1–4 family residential loan volume outstanding, full-time equivalent employees, and assets), separately for each category of depository institutions.

[78] ''Independent Mortgage Bank'' refers to non-depository mortgage lenders.

[79] Loan counts and loan amounts were swapped for the one institution that reported originating 130,000 loans with total loan amounts of $8. Institutions with loan amounts above the maximum number of loans reported by an independent mortgage bank in HMDA (134,640) had their loan counts replaced by 134,640. This assumes that the largest independent mortgage bank in terms of loan counts would be a HMDA reporter, which is likely if the firm adheres to the originate-to-distribute model, which implies that most loans would be home purchase (either purchase or refinance) loans, it would originate more than 100 loans, and make at least 5 loans in an MSA or have an office in an MSA, which would require it to report to HMDA. Federal Financial Institutions Examination Council, *A Guide to HMDA Reporting: Getting it Right!* (June 2010), available at *http://www.ffiec.gov/hmda/pdf/2010guide.pdf.* (accessed June 11, 2012).

[80] Sumit Agarwal and Faye Wang, *Perverse Incentives at the Banks? Evidence from Loan Officers* (Federal Reserve Bank of Chicago Working Paper 2009–08).

[81] Purchase money mortgages includes second-lien higher-risk mortgage loans that were part of a purchase transaction. The Bureau assumes that these loans were part of a transaction where the first-lien mortgage was not a higher-risk mortgage loan; to the extent that any of these second-lien purchase money HRMs were part of a transaction where the first lien mortgage was a higher-risk mortgage loan the costs imposed by the proposal would be double-counted. First-lien refinancings includes loans classified as first-lien ''home improvement'' loans in HMDA.

[82] (5%*117,000) + (10%*136,000)+(95%*27,000) = 45,100

are at a price higher than the initial sale and therefore subject to the second appraisal requirement. The Bureau therefore estimates that this provision of the proposal would lead to 5,850 additional full-interior appraisals.[83]

The total effect of the proposal on the number of full-interior appraisals is therefore 50,950.[84]

The following discussion considers estimated compliance costs in the order in which they arise in the mortgage origination process. First, the proposed rule would require that the creditor furnish the applicant with the disclosure in proposed § 1026.xx(c)(1)(I).[85] The cost of this disclosure—at most, delivery of a single piece of paper with a standardized disclosure that could be delivered with other documents or disclosures—would be very low. In addition, the disclosure is included in the 2012 TILA–RESPA Loan Estimate integrated disclosure form proposal;[86] if that proposal were adopted, the cost of providing the disclosure would be part of the overall costs of implementing the integrated disclosure.

Second, the loan officer would be required to verify whether a loan is a higher-risk mortgage. However, this activity is assumed not to introduce any significant costs beyond the regular cost of business because creditors already must compare APRs to APOR for a variety of compliance purposes, such as determining whether a loan qualifies as a ''higher-priced mortgage loan'' for purposes of Regulation Z[87] or to determine if a loan is subject to the protections of the Home Ownership and Equity Protection Act of 1994 (HOEPA).[88]

The third step is that, in order to satisfy the proposed safe harbor provided for at § 1026.XX(b)(2), the creditor would likely order and review full-interior appraisals as prescribed by the proposed rule. The review process is described in the appendix N of the proposed rule, and is assumed to be performed by a loan officer and to take 15 minutes. Assuming an average total hourly labor cost of loan officers of $45.80, the cost of review per additional appraisal is $11.45.[89] With an estimated total number of additional appraisals conducted per year of 50,950, the total cost of reviewing those appraisals is $583,000 (rounded to the nearest thousand).[90]

Creditors would also need to determine whether a second appraisal would be required for the higher-risk mortgage loan based on prior sales involving the property that would secure the loan. This would require labor costs to determine, through reasonable diligence, whether a sale of the property has occurred in the past 180 days at a price lower than the current sale price. The proposal provides that reasonable diligence could be performed through reliance on sources such as property sales history reports, sales price data from Multiple Listing Services or other records, a signed appraisal report that includes prior transactions, title abstracts or reports, copies of the recorded deed from the seller, or other documentation such as a copy of the HUD–1, previous tax bills, or title commitments or binders demonstrating the seller's ownership of the property and the date it was acquired. Since many of these diligence activities are expected to already be carried out for other purposes during the process of closing the loan, and would often be curtailed if the loan is not related to a purchase, the Bureau estimates that reasonable diligence would take, on average, 15 minutes of staff time. The dollar cost per higher-risk mortgage loan is therefore $11.45.[91] With total annual higher-risk mortgage loans of 280,000, the total cost per year is estimated to be $3,205,000 (rounded to the nearest thousand).[92]

The Bureau assumes based on outreach that the direct costs of conducting appraisals would be passed through to consumers, except in the case of an additional appraisal that would be required by proposed § 1026.XX(b)(3) (requiring an additional appraisal for properties that are the subject of certain 180-day resales).[93]. The Bureau conservatively assumes that the cost of each full-interior appraisal is $600.[94] As noted above, the Bureau estimates that 5,850 second full-interior appraisals would be required each year under the proposal, for a total cost of $3,510,000.[95]

Finally, the proposed rule would also require that free copies of appraisals be distributed to borrowers three days before the loan is closed. Market participants, including a large bank, representatives from the Independent Community Bankers of America (ICBA), and a large independent mortgage bank[96] told the Bureau that, in cases where loans are closed, copies of the appraisal are sent out 100% of the time, so it is assumed that this imposes no incremental cost on creditors.

As noted above, the costs of many of the additional appraisals would be born by the consumers. This costs increase may lead to a reduction in the number of HRMs that are originated. The total losses to creditors of this reduction in HRM originations cannot exceed the costs of the appraisals, which are estimated below to be roughly $27,000,000 per year, as creditors could choose to pay for the appraisals, rather than forgo the transactions.

Costs per institution or loan officer. Aside from the per loan costs just described, the Bureau has estimated that each institution would incur the one-time cost of reviewing the regulation and one-time training costs for all loan officers to become familiar with the provisions of the rule.[97] Since the procedures that would be required by the proposed rule such as ordering appraisals and comparing an APR to APOR are already familiar to creditor employees, one-time training costs are assumed to be 30 minutes. The Bureau estimates that there are 83,000 loan officers in the United States, of which 62,000 are employed at depository institutions and 21,000 are employed at IMBs. Using an average hourly labor cost of $45.85, total one-time training costs are estimated to be $1,903,000 (rounded to the nearest thousand).[98]

It is assumed that the regulation is reviewed by lawyers and compliance officers. Each person reviewing the

[83] (117,000 * 5%) = 5,850

[84] (45,100) + (5,850) = 50,950

[85] Creditors must disclose the following statement, in writing, to a consumer who applies for a higher-risk mortgage loan: ''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 also pay for an additional appraisal for your own use at your own cost.''

[86] *See* 2012 TILA–RESPA Proposal, (published July 9, 2012), *available at http://files.consumerfinance.gov/f/201207_cfpb_proposed-rule_integrated-mortgage-disclosures.pdf.*

[87] 12 CFR 1026.35.

[88] 15 U.S.C. 1639.

[89] (.25 * $45.80) = $11.45 The hourly wage rate is based on a weighted average of loan officer wages at depository institutions of $30.66 and at non-depository institution of $31.81, weighted by the share of HRMs that the Bureau are originated by each type of creditor, and inflated to total labor costs. Wages comprised 67.5% of compensation for employees in credit intermediation and related fields in Q4 2010, according to the Bureau of Labor Statistics Series ID CMU2025220000000D,CMU2025220000000P. *http://www.bls.gov/ncs/ect/#tables.*

[90] ($11.45 * 50,950) = $583,000 (rounded to the nearest thousand).

[91] (.25 * $45.80) = $11.45.

[92] ($11.45 * 280,000) = $3,205,000 (rounded to the nearest thousand).

[93] Proposed § 1026.XX(b)(3)(v) would prohibit the creditor from charging the consumer the cost of the additional appraisal.

[94] Industry appraisal fee information shows median fees ranging from $300 to $600.

[95] (600 * 5,850) = $3,510,000.

[96] Interviews conducted on May 15, 2012 and May 24, 2012.

[98] (83,000 * $45.85 * .5) = $1,903,000 (rounded to the nearest thousand)The averages hourly labor cost here is calculated using employment share, rather than share of HRM originations.

regulation would need to review 18 pages of text. At three minutes per page, this is roughly one hour of review. At all firms, one lawyer is assumed to review the regulation. Compliance officer review is assumed to vary by size and type of the institutions, and it is assumed that in some cases there is no compliance officer review: one compliance officer at each independent mortgage bank, two compliance officers at each depository institution larger than $10 billion in assets; and half a compliance officer (on average) at each depository institution smaller than $10 billion in assets. Total hourly labor costs are estimated to be: $114.06 for attorneys at depository institutions, $43.67 for compliance officers at depository institutions, $113.47 for attorneys at IMBs, and $49.48 for compliance officers and IMBs. The Bureau estimates therefore that the review cost at depository institutions larger than $10 billion in assets is $201.41; at depository institutions smaller than $10 billion in assets the cost is $135.90; and at IMBs is $162.95.[99] The Bureau estimates that there were 128 depository institutions larger than $10 billion in assets that originated mortgages in 2010; 6,825 depository institutions smaller than $10 billion in assets, and 2,515 IMBs, so total one-time costs of review are $1,363,000 (rounded to the nearest thousand).[100]

Potential Costs of the Proposed Rule to Consumers

The direct pecuniary costs to consumers that would be imposed by the proposed rule can be calculated as the incremental cost of having a full interior appraisal instead of using another valuation method for those loans where the cost of the appraisal is not born by the creditor. As described above, the Bureau assumes that consumers would pay directly for all appraisals other than the additional appraisals that would be required because of a recent sale of the property, for a total of 45,100 additional appraisals per year. Assuming, conservatively, the consumer pays $600 for an appraisal that would not otherwise have been conducted, versus $5 for an alternative valuation, gives a total direct costs to consumers of [45,100 * ($600-$5)] = $26,835,000 (rounded to the nearest thousand).[101]

Potential Reduction in Access by Consumers to Consumer Financial Products or Services

Some of the costs that would be imposed by the proposed rule are likely to be passed on to consumers of HRMs, particularly those who would not otherwise have a full-interior appraisal or who would have an additional appraisal. This cost increase could be considered a reduction in consumers' access to mortgages. However, the impact on access to credit is probably negligible. Any costs that derive from the additional underwriting requirements incurred under the proposal are likely to be very small. More important, for both first and subordinate lien loans, are the incremental costs from the difference between the full-interior appraisal and alternative valuation method costs.

However, these are only incremental costs for the fraction of loans where this is not already accepted practice. For first liens, full interior inspections are common industry practice: passing the cost of appraisals on to consumers is current industry practice, and consumers appear to accept the appraisal fee so there is unlikely to be a significant adverse effect on consumers' access to credit. Furthermore, these costs may also be rolled into the loan, up to loan-to-value ratio limits, so buyers are unlikely to face short-term liquidity constraints that prevent purchasing the home. The impact of the proposed rule on higher-risk mortgage loan volumes may be greater for subordinate liens because this is where, in practice, the proposed rule would impose a change from the status quo, and also because the cost of a full interior appraisal is a larger proportion of the loan amount. However, changes in loan volume may be mitigated by consumers rolling the appraisal costs into the loan or the consumer and the creditor splitting the incremental cost of the full-interior appraisal if it is profitable for the creditor to do so.

Impact of the Proposed Rule on Depository Institutions and Credit Unions With $10 Billion or Less in Total Assets, As Described in Section 1026[102]

Depository institutions and credit unions with $10 billion or less in assets would experience the same types of impacts as those described above. The impact on individual institutions would depend on the mix of mortgages that these institutions originate, the number of loan officers that would need to be trained, and the cost of reviewing the regulation. The Bureau estimates that these institutions originated 160,000 higher-risk mortgage loans in 2010. Assuming the mix of purchase money, refinancings, and subordinate lien mortgages was the same at these institutions as for the industry as a whole, the Bureau estimates that the proposal would require these institutions to have 25,400 full interior appraisals conducted for transactions that would otherwise not have a full-interior appraisal, and 3,350 additional full-interior appraisal (as would be required by proposed § 1026.XX(b)(3)), for a total of 28,750 appraisals).

The Bureau estimates that the cost to depository institutions and credit unions with $10 billion or less in assets of reviewing the additional appraisals would be $326,000 (rounded to the nearest thousand). This would be $48 per institution per year.[103]

The Bureau estimates that the cost to depository institutions and credit unions with $10 Billion or less in assets of determining whether to order a second full-interior appraisal would also be $326,000 (rounded to the nearest thousand), or $48 per institution per year.[104]

The Bureau estimates that the cost to depository institutions and credit unions with $10 billion or less in assets of conducting second full interior appraisals for recent sold properties would be $2,010,000, or $295 per institution, per year.[105]

The Bureau estimates that the one-time training costs to depository institutions and credit unions with $10 billion or less would be $636,000, or $93 per institution.[106]

The Bureau estimates that the one-time costs of reviewing the regulation to depository institutions and credit unions with $10 billion or less are described above, and would be $135.90

[99] ($114.06) + (2 * 43.67) = $201.41; ($114.06) + (.5 * $43.67) = $135.90; ($113.47 + $49.48) = $162.95.

[100] (128 * $201.41) + (6,825 * $135.90) + (2,515 * 162.95) = $1,363,000 (rounded to the nearest thousand).

[101] [45,100 * ($600-$5)] = $26,835,000 (rounded to the nearest thousand). Industry appraisal fee information shows median fees ranging from $300 to $600.

[102] Approximately 50 banks with under $10 billion in assets are affiliates of large banks with over $10 billion in assets and subject to Bureau supervisory authority under Section 1025. However, these banks are included in this discussion for convenience.

[103] (28,750 * $45.42 * .25) = $326,000 (rounded to the nearest thousand). ($326,000/6,825) = $48.

[104] (28,750 * $45.42 * .25) = $326,000 (rounded to the nearest thousand).

[105] (3,350 * $600) = $2,010,000; ($2,010,000/6,825) = $ 295.

[106] (28,000 * $45.42 * .5) = $636,000.

per institution, or $927,000 (rounded to the nearest thousand) in total.[107]

Significant Alternatives Considered

In determining what level of review creditors should be required of full interior appraisals related to HRMs, two alternatives were considered. One alternative considered was to require a full technical review of the appraisal that would comply with USPAP3. Such a requirement, however, would add substantially to the cost of each appraisal, as a USPAP3 compliant review can costs nearly as much as a full interior appraisal. Another alternative was to require creditors to have USPAP3 compliant reviews conducts on a sample of the appraisals carried out on properties related to an HRM loan. Reviewing a sample of appraisals, however, would be most useful for creditors making a large number of HRMs and employing the same appraisers for a large number of those loans. Given the small number of HRMs made each year, the value of sampling appraisals for full USPAP3 review is likely to be small.

Impact of the Proposed Rule on Consumers in Rural Areas

The Bureau does not anticipate that the proposed rule would have a unique impact on consumers in rural areas. Table 1 presents some basic statistics on rural households' tenure and mortgage behavior from the 2010 American Community Survey. While the proportion of households that own their dwellings (the alternatives are renting or occupying without paying rent) differs between rural (29%) and non-rural households (43%), conditional on living in an owner occupied property, there is not a large difference in the proportion of households with first mortgages or contracts (70% in rural areas and 67% in non-rural areas) and subordinate liens (5% in rural areas and 4% in non-rural areas). Also, conditional on living in owner occupied property, the proportion of households that have moved in the past year and own their homes is 5% for both groups and the proportion of individuals who have moved into their own homes conditional on having a mortgage is 5% for both groups. This suggests that, conditional on owning a home, rural and non-rural households use first and subordinate liens and move at similar rates.

TABLE 1—OWNERSHIP AND MORTGAGE CHARACTERISTICS OF RURAL AND NON-RURAL HOUSEHOLDS, ACS 2010

	Rural [a]	Not rural [a]
Number of Households	19,052,528	103,502,244
Dwelling Owned or Being Bought	42.92%	64.51%
Has a First Mortgage or a Contract	29.92%	43.14%
Has a First Mortgage or a Contract, Conditional on Ownership	69.72%	66.87%
Has a Closed-End Second Mortgage or a Contract	1.99%	2.80%
Has a Closed-End Second Mortgage or a Contract, Conditional on Ownership	4.65%	4.35%
Moved in in the Past Year, Conditional on Ownership	5.17%	4.86%
Moved in in the Past Year, Conditional on Ownership and Having a First Mortgage or Contract	6.14%	5.71%

Source: American Community Survey, 2010.
Weighted using household weights (HHWT). Tabulations based on responses by person 1.
[a] Rural defined as households reported to not be in a metro area in the METRO variable. Households are considered not rural if they are coded: in a metro area, central city; in a metro area, outside central city; central city status unknown; not identifiable.

As mentioned earlier, many small and rural lenders are excluded from HMDA reporting. Because of this, the Bureau does not attempt to project the number of rural loans in a particular category, such as first-lien HRM, subordinate-lien HRM, etc. However, tabulations of rural loans [108] by HMDA reporters may be informative about patterns of rural HRM usage. As is shown in table 2, the proportion of both first lien purchase and first lien refinance loans are higher among loans secured by properties in rural counties than for properties that are not in rural counties—10% of rural first lien purchase loans are higher-risk mortgage loans while 3% of non-rural first-lien purchase loans are higher-risk mortgage loans. This suggests that rural borrowers may be more likely to incur the cost of the proposed rule than non-rural consumers. This assumes, however, that full-interior appraisal probabilities in the absence of the proposed rule are the same for rural and non-rural originations.

TABLE 2—PROPORTION OF HIGHER-RISK-MORTGAGE LOANS (HRMS) BY RURAL AND NON-RURAL STATUS, HMDA REPORTERS

	Rural		Non-Rural	
	% HRM	Total loans	% HRM	Total loans
First Lien Purchase Loans	9.88	285,762	3.19	2,224,001
First Lien Refinance Loans	5.09	563,210	1.67	4,321,446
Subordinate Liens	12.69	32,958	12.71	185,458
Total	7.17	941,590	2.57	6,934,172

Source: HMDA 2010.
Rural is defined as a loan made outside of a micropolitan or metropolitan statistical area.
HMDA reporters only.

One concern that has been raised is that rural creditors may face challenges in being able to hire appraisers for full interior appraisals, particularly when the second appraisal requirement applies. In order to investigate this

[107] ($114.06) + (.5 * $43.67) = $135.90; ($135.90 * 6,825) = $927,000.

[108] Rural is defined as a loan made outside of a micropolitan or metropolitan statistical area.

further, the current Appraisal Subcommittee Registry is used and the zip code provided by each registered appraiser is geocoded. These results are presented in table 3. Assuming that a county has access to an appraiser if he or she is registered in that or an adjacent county, then the median rural county has access to 107 appraisers. In order to obtain two independent appraisals a county must have access to at least two appraisers. Only 13 counties fail to meet this requirement; all of these counties are in Alaska. When attention is restricted to active appraisers, this number of counties increases to 22.

Although requiring the use of licensed and certified appraisers who adhere to the requisite standards may slow down the origination process, available data suggest the requirement is unlikely to result in widespread inability to originate loans.

TABLE 3—AVAILABILITY OF APPRAISERS BY URBAN/RURAL STATUS OF COUNTY

	Rural counties	Urban counties
Mean Number of Appraisers in County	11	155
Median Number of Appraisers in Own County	6	39
Mean Number of Appraisers in Own and Adjacent County	188	662
Median Number of Appraisers in Own and Adjacent County	107	959
Number with Less than 2 Appraisers in Own or Adjacent Counties	13 [a]	0
N	1355	1788

Source: Appraisal Subcommittee National Registry, downloaded Feb 23, 2012.
Appraisers include all appraisers registered in the National Registry.
Appraisers were assigned to counties based on the zip code provided to the National Registry.
[a] All counties that do not have 2 or more appraisers in the county or adjacent counties are in Alaska.

A number of industry representatives asserted that they believed that creditors making higher-risk mortgage loans in rural areas would find it particularly difficult to comply with the second appraisal requirements. The Agencies, in the section-by-section analysis under the heading ''Potential Exemptions from the Additional Appraisal Requirement,'' are requesting comment on whether the final rule, relying on the exemption authority provided in TILA section 129C(b)(4)(B), should provide an exemption from the second appraisal requirement for loans made in ''rural'' areas. In addition, the Agencies are requesting comment on whether the final rule should use the same definition of ''rural'' that is provided in the ability to repay and qualified mortgage rulemaking implementing new TILA section 129C. Accordingly, the Bureau requests that commenters provide data or other information to help demonstrate how such an exemption would serve the public interest and the promote safety and soundness of creditors.

Potential Use of Transaction Coverage Rate

As noted in the section-by-section analysis above, the Bureau is proposing in its 2012 TILA–RESPA Proposal a simpler, more inclusive definition of the finance charge. The broader definition of finance charge would likely increase the number of mortgage loans that meet the higher-risk mortgage loan trigger.

As discussed in the Bureau's 2012 TILA–RESPA Proposal, in the section-by-section analysis above, and below, the Bureau does not currently have sufficient data to model the impact of the more expansive definition of finance charge on other affected regulatory regimes or the impact of potential modifications to the triggers to more closely approximate existing coverage levels. The Bureau is working to obtain additional data prior to issuing a final rule and is seeking comment on plans for data analysis, and also seeks public comment and data submissions on these topics. The 2012 TILA–RESPA Proposal provides a qualitative assessment of the benefits and costs of expanding the finance charge definition, if the agencies made no modifications to the triggers for HRM or other regimes. In order to facilitate rule-by-rule consideration of potential modifications, this notice provides a qualitative assessment of the impact of potential changes to the APR for higher-risk mortgage loans.

The Bureau's separate proposal to expand the definition of finance charge would be expected to increase the number of loans classified as higher-risk mortgage loans, as discussed in the section-by-section analysis above and in the 2012 TILA–RESPA Proposal. The Agencies are seeking comment on whether to adopt a transaction coverage rate (TCR) to approximately offset this increase. Were the Agencies to adopt the proposed changes, the additional benefits and costs to consumers from further increasing the number of loans classified as higher-risk mortgage loans would not occur. The benefits and costs to consumers with such loans would be the inverse of those described above. In addition, because the TCR excludes fees to non-affiliated third-parties, the TCR might result in some loans not being classified as higher-risk mortgage loans that would qualify under an APR threshold using the current definition of finance charge.[109]

Using different metrics for purposes of disclosures and determining coverage of various regulatory regimes may also impose some ongoing complexity and compliance burden. The Bureau believes that any such effects with regard to transaction coverage rate would be mitigated by the fact that both TCR and APR would be easier to compute under the expanded definition of finance charge than the APR today using the current definition. If the Bureau adopts both the more inclusive finance charge and the TCR adjustment in a final rule pursuant to the 2012 HOEPA Proposal and escrow rule, adopting the TCR adjustment in the higher-risk mortgage rule could ensure consistency across rules. In addition, the Agencies are seeking comment on whether use of the TCR or other trigger modifications should be optional, so that creditors could use the broader definition of finance charge to calculate APR and points and fees triggers if they would prefer. The Bureau believes adoption of the proposed modifications would as a whole reduce the economic impacts on creditors of the more expansive definition of finance charge proposed in the 2012 TILA–RESPA Proposal.

[109] The Bureau believes that the margin of differences between the TCR and current APR is significantly smaller than the margin between the current APR and the APR calculated using the expanded finance charge definition because relatively few third-party fees would be excluded by the TCR that are not already excluded under current rules. The agencies are considering ways to supplement the data analysis described above to better assess this issue.

Additional Analysis Being Considered and Request for Information

The Bureau will further consider the benefits, costs and impacts of the proposed provisions and additional proposed modifications before finalizing the proposal. As noted above, there are a number of areas where additional information would allow the Bureau to better estimate the benefits, costs, and impacts of this proposal and more fully inform the rulemaking. The Bureau asks interested parties to provide comment or data on various aspects of the proposed rule, as detailed in the section-by-section analysis. The most significant of these include information or data addressing:

• Data on lending activity of creditors that are not required to report HMDA data, particularly small or rural institutions and non-reporting IMBs.

• Nationally representative data on the usage of different valuation methods or costs

• Measures to account for potential adoption of a broader definition of finance charge, as separately proposed in the Bureau's 2012 TILA–RESPA Proposal;

To supplement the information discussed in in this preamble and any information that the Bureau may receive from commenters, the Bureau is currently working to gather additional data that may be relevant to this and other mortgage related rulemakings. These data may include additional data from the NMLS and the NMLS MCR, loan file extracts from various lenders, and data from the pilot phases of the National Mortgage Database. The Bureau expects that each of these datasets will be confidential. This section now describes each dataset in turn.

First, as the sole system supporting licensure/registration of mortgage companies for 53 agencies for states and territories and mortgage loan originators under the SAFE Act, NMLS contains basic identifying information for non-depository mortgage loan origination companies. Firms that hold a State license or State registration through NMLS are required to complete either a standard or expanded Mortgage Call Report (MCR). The Standard MCR includes data on each firm's residential mortgage loan activity including applications, closed loans, individual mortgage loan originator activity, line of credit and other data repurchase information by state. It also includes financial information at the company level. The expanded report collects more detailed information in each of these areas for those firms that sell to Fannie Mae or Freddie Mac.[110] To date, the Bureau has received basic data on the firms in the NMLS and de-identified data and tabulations of data from the Mortgage Call Report. These data were used, along with data from HMDA, to help estimate the number and characteristics of IMBs active in various mortgage activities. In the near future, the Bureau may receive additional data on loan activity and financial information from the NMLS including loan activity and financial information for identified lenders. The Bureau anticipates that these data will provide additional information about the number, size, type, and level of activity for non-depository lenders engaging in various mortgage origination and servicing activities. As such, it supplements the Bureau's current data for IMBs reported in HMDA and the data already received from NMLS. For example, these new data will include information about the number and size of closed-end first and second loans originated, fees earned from origination activity, levels of servicing, revenue estimates for each firm and other information. The Bureau may compile some simple counts and tabulations and conduct some basic statistical modeling to better model the levels of various activities at various types of firms, such as the frequency of HRM loans.

Second, the Bureau is working to obtain a random selection of loan-level data from a handful of lenders. The Bureau intends to request loan file data from lenders of various sizes and geographic locations to construct a representative dataset. In particular, the Bureau will request a random sample of ''GFEs'' and ''HUD–1'' forms from loan files for closed-end mortgage loans. These forms include data on some or all loan characteristics including settlement charges, origination charges, appraisal fees, flood certifications, mortgage insurance premiums, homeowner's insurance, title charges, balloon payment, prepayment penalties, origination charges, and credit charges or points. Through conversations with industry, the Bureau believes that such loan files exist in standard electronic formats allowing for the creation of a representative sample for analysis. The Bureau may use these data to further measure the impacts of certain proposed changes. Calculations of various categories of settlement and origination charges may help the Bureau calculate the various impacts of proposed changes to the definitions of finance charges and other aspects of the proposal, including loans that would meet the high rate or high risk definitions mandating additional consumer protections.

Third, the Bureau may also use data from the pilot phases of the National Mortgage Database (NMDB) to refine its proposals and/or its assessments of the benefits costs and impacts of these proposals. The NMDB is a comprehensive database, currently under development, of loan-level information on first lien single-family mortgages. It is designed to be a nationally representative sample (1 percent) and contains data derived from credit reporting agency data and other administrative sources along with data from surveys of mortgage borrowers. The first two pilot phases, conducted over the past two years, vetted the data development process, successfully pretested the survey component and produced a prototype dataset. The initial pilot phases validated that credit repository data are both accurate and comprehensive and that the survey component yields a representative sample and a sufficient response rate. A third pilot is currently being conducted with the survey being mailed to holders of five thousand newly originated mortgages sampled from the prototype NMDB. Based on the 2011 pilot, a response rate of fifty percent or higher is expected. These survey data will be combined with the credit repository information of non-respondents, and then deidentified. Credit repository data will be used to minimize non-response bias, and attempts will be made to impute missing values. The data from the third pilot will not be made public. However, to the extent possible, the data may be analyzed to assist the CFPB in its regulatory activities and these analyses will be made publically available.

The survey data from the pilots may be used by the Bureau to analyze consumers' shopping behavior regarding mortgages. Questions may also assess borrowers' understanding of their loan terms and the various charges involved with origination. Tabulations of the survey data for various populations and simple regression techniques may be used to help the Bureau with its analysis.

In addition to the comment solicited elsewhere in this proposed rule, the Bureau requests commenters to submit data and to provide suggestions for additional data to assess the issues discussed above and other potential benefits, costs, and impacts of the proposed rule. The Bureau also requests comment on the use of the data

[110] More information about the Mortgage Call Report can be found at *http://mortgage.nationwidelicensingsystem.org/slr/common/mcr/Pages/default.aspx.*

described above. Further, the Bureau seeks information or data on the proposed rule's potential impact on consumers in rural areas as compared to consumers in urban areas. The Bureau also seeks information or data on the potential impact of the proposed rule on depository institutions and credit unions with total assets of $10 billion or less as described in Dodd-Frank Act section 1026 as compared to depository institutions and credit unions with assets that exceed this threshold and their affiliates.

VI. Regulatory Flexibility Act

Board

The Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*) requires an agency either to provide an initial regulatory flexibility analysis with a proposed rule or certify that the proposed rule will not have a significant economic impact on a substantial number of small entities. The proposed regulations cover certain banks, other depository institutions, and non-bank entities that extend higher-risk mortgage loans to consumers. The Small Business Administration (SBA) establishes size standards that define which entities are small businesses for purposes of the RFA.[111] The size standard to be considered a small business is: $175 million or less in assets for banks and other depository institutions; and $7 million or less in annual revenues for the majority of nonbank entities that are likely to be subject to the proposed regulations. Based on its analysis, and for the reasons stated below, the Board believes that the rule will not have a significant economic impact on a substantial number of small entities. Nevertheless, the Board is publishing an initial regulatory flexibility analysis. The Board will, if necessary, conduct a final regulatory flexibility analysis after consideration of comments received during the public comment period.

The Board requests public comment on all aspects of this analysis.

A. Reasons for the Proposed Rule

Section 1471 of the Dodd-Frank Act establishes a new TILA section 129H, which sets forth appraisal requirements applicable to higher-risk mortgages. The Act generally defines ''higher-risk mortgage'' as a closed-end consumer loan secured by a principal dwelling with an APR that exceeds the APOR by 1.5 percent for first-lien loans, 2.5 percent for first-lien jumbo loans, or 3.5 percent for subordinate-liens. The definition of higher-risk mortgage expressly excludes qualified mortgages, as defined in TILA section 129C, as well as reverse mortgage loans that are qualified mortgages as defined in TILA section 129C.

Specifically, new TILA section 129H does not permit a creditor to extend credit in the form of a higher-risk mortgage loan to any consumer without first:

- Obtaining a written appraisal performed by a certified or licensed appraiser who conducts a physical property visit of the interior of the property.
- Obtaining an additional appraisal from a different certified or licensed appraiser if the purpose of the higher-risk mortgage loan is to finance the purchase or acquisition of a mortgaged property from a seller within 180 days of the purchase or acquisition of the property by that seller at a price that was lower than the current sale price of the property. The additional appraisal must include an analysis of the difference in sale prices, changes in market conditions, and any improvements made to the property between the date of the previous sale and the current sale.
- Providing the applicant, at the time of the initial mortgage application, with a statement that any appraisal prepared for the mortgage is for the sole use of the creditor, and that the applicant may choose to have a separate appraisal conducted at the applicant's expense.
- Providing the applicant with one copy of each appraisal conducted in accordance with TILA section 129H without charge, at least three (3) days prior to the transaction closing date.

Section 1400 of the Dodd-Frank Act requires that final regulations to implement these provisions be issued by January 21, 2013.

B. Statement of Objectives and Legal Basis

The SUPPLEMENTARY INFORMATION above contains this information. As discussed above, the legal basis for the proposed regulations is new TILA sections 129H(b)(4). 15 U.S.C. 1639h(b)(4). New TILA section 129H was established by section 1471 of the Dodd-Frank Act.

C. Description of Small Entities to Which the Regulation Applies

The proposed regulations apply to creditors that make higher-risk mortgage loans, as defined above. To estimate the number of small entities that will be subject to the requirements of the proposed rule, the Board is relying primarily on data from Reports of Condition and Income (''Call Reports'') to identify asset size of depository institutions and certain subsidiaries of banks and bank companies, as well as home lending data reported by respondents subject to the reporting requirements of the Home Mortgage Disclosure Act (HMDA). The exact number of small entities likely to be affected by the proposal, however, is unknown because the Board lacks reliable sources for certain information. For example, reliable information is not available regarding the extent of mortgage loan origination activity by institutions not subject to the reporting requirements of HMDA; such institutions are predominantly those that have offices only in rural areas or that are very small entities (assets under $40 million as of the end of 2010). Moreover, for the majority of HMDA respondents that are not depository institutions, neither annual revenue information nor exact asset size information is available.

The Board can, however, provide an estimate of a portion of the number of small depository institutions that would be subject to the proposed rule. According to the 2011 HMDA data, there are approximately 1,569 commercial banks, 283 savings and loans, and 1,179 credit unions that could be considered small entities and that extend mortgages, and therefore are potentially subject to the proposed rule. HMDA data indicates that the majority of these institutions extended at least one higher-risk mortgage loan in 2011. As noted above, the available data are insufficient to estimate the number of non-bank entities that would be subject to the proposed rule and that are small as defined by the SBA. However, using the size standard set forth by the SBA for depository institutions ($175 million or less in assets), the Board can estimate based on 2011 HMDA data that about 250 small mortgage companies extended mortgages in 2011.

The number of these small entities that would make higher-risk mortgage loans in the future is unknown. The Board believes that of the small entities identified, however, the majority would make at least one higher-risk mortgage loan, and thus be subject to the proposed rule, because the majority have made such loans in the past.

The Board invites comment regarding the number and type of small entities that would be affected by the proposed rule.

[111] U.S. Small Business Administration, Table of Small Business Size Standards Matched to North American Industry Classification System Codes, available at *http://www.sba.gov/sites/default/files/files/Size_Standards_Table.pdf*.

D. Projected Reporting, Recordkeeping and Other Compliance Requirements

The compliance requirements of the proposed regulations are described in detail in the **SUPPLEMENTARY INFORMATION** above.

The proposed regulations generally apply to creditors that make higher-risk mortgage loans, which are generally mortgages with an annual percentage rate that exceeds the average prime offer rate by a specified percentage, subject to certain exceptions. The proposed rule would generally require creditors to obtain an appraisal or appraisals meeting certain specified standards, provide applicants with a notification regarding the use of the appraisals, and give applicants a copy of the written appraisals used.

A creditor would be required to determine if it extends higher-risk mortgage loans and, if so, would need to analyze the regulations. The creditor would need to establish procedures for identifying mortgages subject to the additional appraisal requirements. A creditor making a higher-risk mortgage loan would need to obtain a written appraisal performed by a certified or licensed appraiser who conducts a physical property visit of the interior of the property. Creditors seeking a safe harbor for compliance with this requirement would need to

- Order that the appraiser perform the written appraisal in conformity with the USPAP and title XI of the FIRREA, and any implementing regulations, in effect at the time the appraiser signs the appraiser's certification;
- Verify through the National Registry that the appraiser who signed the appraiser's certification was a certified or licensed appraiser in the State in which the appraised property is located as of the date the appraiser signed the appraiser's certification;
- Confirm that the elements set forth in appendix N to this part are addressed in the written appraisal; and
- Confirm that it has no actual knowledge to the contrary of facts or certifications contained in the written appraisal.

A creditor would also need to determine whether it is financing the purchase or acquisition of a mortgaged property from a seller within 180 days of the purchase or acquisition of the property by that seller, who purchased the property for less than the current sale price. If so, the creditor would need to obtain an additional appraisal of the property and confirm that the appraisal meets the requirements of the first appraisal. The creditor would also need to ensure that the additional appraisal included an analysis of the difference in sale prices, changes in market conditions, and any improvements made to the property between the date of the previous sale and the current sale.

Creditors extending higher-risk mortgages also would need to design, generate, and provide a new notice to applicants. Specifically, they would provide at the time of the initial application the statement that the appraisal is for the sole use of the creditor. In addition, higher-risk mortgage creditors would have to provide the applicant with a copy of each appraisal conducted at least three days prior to closing and develop systems for that purpose.

The Board believes that certain factors might mitigate the economic impact of the proposed rule. The Board believes only a small number of loans would be affected by the proposed rule. For example, according to HMDA data, less than four percent of first-lien mortgage loans in 2010 or 2011 would be classified as ''higher-risk'' and thus subject to any appraisal requirement. Moreover, information collected by the CFPB indicates that fewer than five percent of mortgage loans involve a property that was previously purchased within 180 days. Thus, significantly less than one percent of mortgage loans would be subject to the provisions requiring second appraisals.

In addition, based on outreach, the Board believes that many creditors are already obtaining written appraisals performed by certified or licensed appraisers who conduct a physical property visit of the interior of the property. Creditors may be obtaining such appraisals pursuant to other requirements, such as of FIRREA title XI or the FHA Anti-Flipping Rule, or they may be obtaining the appraisals voluntarily.

Because of the small number of transactions affected, the Board believes the proposed rule is unlikely to have a significant economic impact on a substantial number of small entities. The Board seeks information and comment on any costs, compliance requirements, or changes in operating procedures arising from the application of the proposed rule to small institutions.

E. Identification of Duplicative, Overlapping, or Conflicting Federal Regulations

The Board has not identified any Federal statutes or regulations that would duplicate, overlap, or conflict with the proposed regulations. The proposed rule will work in conjunction with the existing requirements of FIRREA title XI and its implementing regulations.

F. Discussion of Significant Alternatives

As noted in the **SUPPLEMENTARY INFORMATION**, the Board is proposing an alternative definition of ''higher-risk mortgage loan'' that would allow creditors to exclude some fees from the ''rate'' used to determine if a loan is a ''higher-risk mortgage loan.'' By excluding these fees, it is possible that fewer loans would be covered by the rule, and thus burden on creditors could be reduced. In addition, as described in the **SUPPLEMENTARY INFORMATION**, adopting the alternative definition could ensure uniformity and consistency across rules. The proposed rule also exempts reverse mortgages and loans secured only by a residential structure from the rule's coverage. In addition, the proposed rule seeks to establish a less burdensome means for creditors to determine that an appraiser has met certain requirements by providing creditors with a safe harbor. Lastly, the proposed rule seeks to reduce burden by allowing a creditor subject to the additional appraisal requirement under TILA section 129H(b)(2) to obtain an appraisal that contains the analysis required in TILA section 129H(b)(2)(A) only to the extent needed information is known. 15 U.S.C. 1639h(b)(2).

The Board welcomes comments on any other significant alternatives to the proposed rule that accomplish the objectives of section 1471 of the Dodd-Frank Act, which establishes new TILA section 129H, and that minimize any significant economic impact of the proposed rule on small entities.

Bureau

The Regulatory Flexibility Act (RFA) generally requires an agency to conduct an initial regulatory flexibility analysis (IRFA) and a final regulatory flexibility analysis (FRFA) of any rule subject to notice-and-comment rulemaking requirements, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities.[112] The Bureau

[112] For purposes of assessing the impacts of the proposed rule on small entities, ''small entities'' is defined in the RFA to include small businesses, small not-for-profit organizations, and small government jurisdictions. 5 U.S.C. 601(6). A ''small business'' is determined by application of Small Business Administration regulations and reference to the North American Industry Classification System (''NAICS'') classifications and size standards. 5 U.S.C. 601(3). A ''small organization'' is any ''not-for-profit enterprise which is independently owned and operated and is not dominant in its field.'' 5 U.S.C. 601(4). A ''small governmental jurisdiction'' is the government of a city, county, town, township, village, school

also is subject to certain additional procedures under the RFA involving the convening of a panel to consult with small business representatives prior to proposing a rule for which an IRFA is required.[113] An IRFA is not required for this proposal because the proposal, if adopted, would not have a significant economic impact on a substantial number of small entities.

A. Summary of Proposed Rule

The empirical approach to calculating the impact that the proposed regulation has on small entities subject to the proposed rule follows the methodology, and uses the same data, as the analysis conducted under Section 1022(a) of the Dodd-Frank Act. The impact analysis focuses on the economic impact of the proposed rule, relative to a pre-statute baseline, for small depository institutions (DIs) and non-depository independent mortgage banks (IMBs). The Small Business Administration classifies DIs (commercial banks, savings institutions, credit unions, and other depository institutions) as small if they have assets less than $175 million, and classifies other real estate credit firms as small if they have less than $7 million in annual revenues.[114]

The proposed rule would implement section 1471 of the Dodd-Frank Act, which establishes appraisal requirements for higher-risk mortgage loans.[115] Consistent with the statute, the proposal would allow a creditor to make a higher-risk mortgage loan only if the following conditions are met:

- The creditor obtains a written appraisal;
- The appraisal is performed by a certified or licensed appraiser;
- The appraiser conducts a physical property visit of the interior of the property;
- At application, the applicant is provided with a statement regarding the purpose of the appraisal, that the creditor will provide the applicant a copy of that any written appraisal, and that the applicant may choose to have a separate appraisal conducted at the expense of the applicant; and
- The creditor provides the consumer with a free copy of any written appraisals obtained for the transaction at least three (3) business days before closing.

In addition, as required by the Act, the proposal would require a higher-risk mortgage loan creditor to obtain an additional written appraisal, at no cost to the borrower, under the following circumstances:

- The higher-risk mortgage loan will finance the acquisition of the consumer's principal dwelling;
- The seller selling what will become the consumer's principal dwelling acquired the home within 180 days prior to the consumer's purchase agreement (measured from the date of the consumer's purchase agreement); and
- The consumer is acquiring the home for a higher price than the seller paid, although comment is requested on whether a threshold price increase would be appropriate.

The additional written appraisal, from a different licensed or certified appraiser, generally must include the following information: an analysis of the difference in sale prices (*i.e.,* the sale price paid by the seller and the acquisition price of the property as set forth in the consumer's purchase agreement), changes in market conditions, and any improvements made to the property between the date of the previous sale and the current sale.

The proposal also includes a request for comments to address a proposed amendment to the method of calculation of the APR that is being proposed as part of other mortgage-related proposals issued for comment by the Bureau. In the Bureau's proposal to integrate mortgage disclosures (2012 TILA–RESPA Proposal), the Bureau is proposing to adopt a more simple and inclusive finance charge calculation for closed-end credit secured by real property or a dwelling.[116] As the finance charge is integral to the calculation of the APR, the Agencies believe it is possible that a more inclusive finance charge could increase the number of loans covered by this rule. The Agencies note that the Bureau currently is seeking data to assist in assessing potential impacts of a more inclusive finance charge in connection with the 2012 TILA–RESPA and its proposal to implement Dodd-Frank Act provision related to ''high-cost'' loans (2012 HOEPA Proposal).[117]

B. Number and Classes of Affected Entities

Of the roughly 17,747 depository institutions (including credit unions) and IMBs, 13,106 are below the relevant small entity thresholds. Of the small institutions, 9,807 are estimated to have originated mortgage loans in 2010. While loan counts exist for credit unions and HMDA-reporting DIs and IMBs, they must be projected for non-HMDA reporters. For IMBs, data on revenues exists for 560 of 2,515 institutions. An accepted statistical method (''nearest neighbor matching'') is used to estimate the number of these institutions that have less than $7 million in revenues from the MCR.

TABLE 4—COUNTS AND ORIGINATIONS OF CREDITORS BY TYPE

Category	NAICS code	Total entities	Small entity threshold	Small entities	Entities that originate any mortgage loans [c]	Small entities that originate any mortgage loans [c]
Commercial Banking [a]	522110	6596	$175 million in assets	3764	6362	3597
Savings Institutions [a]	522120	1145	$175 million in assets	491	1138	487
Credit Unions [b]	522130	7491	$175 million in assets	6569	4359	3441

district, or special district with a population of less than 50,000. 5 U.S.C. 601(5).

[113] 5 U.S.C. 609.

[114] 13 CFR Ch. 1.

[115] The Bureau has proposed separately in the 2012 TILA–RESPA Proposal to expand the definition of the finance charge. If that change is adopted, it would be expected to increase the number of loans classified as higher-risk mortgage loans. The Bureau notes that it has accounted for the impacts of this potential change in the 2012 TILA–RESPA Proposal, including in that Proposal's Initial Regulatory Flexibility Analysis and Small Business Review Panel Process. In connection with the proposed definition change, the Agencies are seeking comment in this proposal on whether to modify the triggers, including by using the transaction coverage rate in place of the APR, to offset the impact of a broader definition of finance charge on higher-risk mortgage loan coverage levels. As discussed in the Dodd-Frank Act section 1022 analysis, adoption of those adjustments might impose some one-time implementation costs and compliance complexity, but the Bureau believes adoption of the proposed modifications would as a whole reduce the economic impacts on creditors of the more expansive definition of finance charge proposed in the 2012 TILA–RESPA Proposal.

[116] See 2012 TILA–RESPA Proposal, pp. 101–127, 725–28, 905–11 (published July 9, 2012), available at *http://files.consumerfinance.gov/f/201207_cfpb_proposed-rule_integrated-mortgage-disclosures.pdf.*

[117] See 2012 HOEPA Proposal, pp. 44, 149–211 (published July 9, 2012), available at *http://files.consumerfinance.gov/f/201207_cfpb_proposed-rule_high-cost-mortgage-protections.pdf.*

TABLE 4—COUNTS AND ORIGINATIONS OF CREDITORS BY TYPE—Continued

Category	NAICS code	Total entities	Small entity threshold	Small entities	Entities that originate any mortgage loans [c]	Small entities that originate any mortgage loans [c]
Real Estate Credit [d,e]	522292	2515	$7 million in revenues.	2282	2515	2282
Total	....	17,747	....	13106	14374	9807

[a] Asset size obtained from December 2010 Call Report Data downloaded from SNL. The institutions in the category savings institutions are all thrifts.
[b] Asset size obtained from December 2010 NCUA Call Reports.
[c] For HMDA reporters, loan counts from HMDA 2010. For institutions that do not report to HMDA, loan counts projected based on call report data fields and counts for HMDA reporters.
[d] NMLS Mortgage Call Report (MCR) for Q1 and Q2 of 2011. All MCR reporters who originate at least one loan or have positive loan amounts are considered to be engaged in real estate credit (instead of purely mortgage brokers).
[e] Revenues were not missing for 560 of the 2499 institutions. For institutions with missing revenue values revenues were imputed using nearest neighbor matching of the count of originations and the count of brokered loans.

C. Analysis

Although most depository institutions and IMBs are affected by the proposed rule, the proposed rule does not have a significant impact on a substantial number of small entities, as is demonstrated by the burden estimates for small institutions calculated below. For each institution the cost of compliance is calculated and then divided by a measure of revenue.[118] For depository institutions, revenue is obtained from the appropriate call report. For non-depository institutions, the frequency of HRM is not available in the MCR. However, data available in HMDA shows that the proportion of HRM in a non-DI's originations does not vary by origination volume. As such, HMDA data is used in lieu of the MCR data to calculate costs of compliance with the proposed rule.

For small depository institutions, Table 5 reports various statistics for the estimated cost of compliance with the proposed rule as a percentage of revenues using conservative assumptions. The assumptions underlying the Bureau's estimates are explained in the table and are generally discussed in more detail in the Section 1022(b)(2) section. The third column shows that for all small DIs and for each category of small DI, the median cost of compliance is between 0.0% and 0.8% of revenues, and for each category the mean cost of compliance is 0.10% or less of revenues. No small thrifts or small credit unions, and 0.1% of small banks have cost-to-revenue ratios that exceed 1% of revenues.

TABLE 5—COST OF COMPLIANCE FOR DEPOSITORY INSTITUTION AS A PERCENTAGE OF REVENUES, INSTITUTIONS LESS THAN $175 MILLION IN ASSETS

	N	Mean	Median	99th Percentile	Count >1%	Count >3%
All Institutions	7672	0.04%	0.02%	0.26%	9	7
Banks	3764	0.08%	0.06%	0.33%	9	7
Thrifts	491	0.10%	0.08%	0.45%	0	0
Credit Unions	3417	0.01%	0.00%	0.07%	0	0

Sources: HMDA 2010, bank and thrift Q4 2010 call report (obtained from SNL Financial) and credit union call report, and Bureau calculations. Originations drawn from HMDA 2010 for HMDA reporters and imputed for HMDA non-reporters using call report information.
Assumptions: The cost of providing the initial disclosure is $.10. Full-interior appraisals cost $600, alternative valuations cost $5. The probability of full-interior appraisals for a transaction is 95% for purchase-money transactions, 90% for refinance transactions, and 5% for second mortgages. The proportion of resales within 180 days is 5%. Costs of the first full interior appraisal are passed on completely to consumers. The review of the appraisal upon receipt takes 15 minutes of loan officer time. Loan officers are trained for 1 hour on the regulation beyond what considered customary training. Every 3 years the regulation is reviewed for 45 minutes by a lawyer and 0.5 compliance officers. Wages are $29.48 per hour for compliance officers, $30.66 for loan officers, and $76.99 for lawyers, and wages are assumed to be 67.5% of total compensation.[119]

The source of information on the number of HRMs is HMDA, but because HMDA does not provide revenue information it is not possible to determine which IMBs in HMDA have revenue less than $7 million. While most IMBs are small, in order to provide a very conservative estimate we evaluate the compliance costs of the smallest IMBs, as measured by originations. For IMBs that report HMDA data, Table 6 presents estimates of the cost of compliance.[120] Panel A presents estimates of the cost of compliance with the proposed rule for institutions in the first quartile (the smallest 25%) of IMBs by number of originations and Panel B presents estimates of the cost of compliance for all IMBs. As noted above, revenue information is not available for all IMBs so two proxies for revenue are employed: (1) 3% of origination dollar volume, and (2) the median revenue per origination for MCR reporters that report revenue.[121] Using either proxy, the mean cost of

[118] Revenue has been used in other analyses of economic impacts under the RFA. For purposes of this analysis, the Bureau uses revenue as a measure of economic impact. In the future, the Bureau will consider whether an alternative quantifiable or numerical measure may be available that would be more appropriate for financial firms.

[119] Wages comprised 67.5% of compensation for employees in credit intermediation and related fields in Q4 2010, according to the Bureau of Labor Statistics Series ID CMU2025220000000D,CMU2025220000000P. *http://www bls.gov/ncs/ect/#tables*.

[120] Since IMBs tend to originate-to-distribute regardless of size or urban/rural status, we believe that revenues per origination do not differ substantially between HMDA reporters and non-reporters. Thus, we believe it reasonable to extrapolate the results to HMDA non-reporters.

[121] Industry experts estimate that gross revenues per loan are approximately 3%.

compliance is less than 2 percent of total revenues for first quartile IMBs and median cost of compliance is below 0.3% of revenues. Using the 3% of origination dollar volume measure, 9.3% of institutions in the first quartile have compliance costs that exceed 1% of revenues and 4.4% have compliance costs that exceed 3% of revenues. Similarly, using the median revenue per loan measure, 11.0% have compliance costs that exceed 1% of revenues and 4.4% of have revenues that exceed 3% of revenues. Thus, the Bureau believes that, using the more conservative proxy, no more than approximately 11% of small IMBs would have compliance costs that exceed 1% of revenues, and no more than approximately 4.4% would have costs that exceed 3% of revenues.

TABLE 6—COST OF COMPLIANCE FOR IMB, HMDA REPORTERS ONLY

	N[a]	Mean	Median	99th Percentile	Count >1%	Count >3%
Panel A: 1st Quartile of HMDA Reporting IMBs						
Cost Per Origination	181	$53.28	$9.50	$695.96		
Cost Per Application	211	$7.97	$5.10	$91.89		
Total Cost/(3% of Origination Volume)[b]	181	1.17%	0.21%	13.98%	17	8
(Cost Per Origination)/(Median Revenues Per Loan)[c]	181	1.60%	0.29%	20.91%	20	8
Panel B: All IMBs						
Cost Per Origination	819	$17.82	$6.23	$91.89		
Cost Per Application	849	$5.30	$4.30	$21.60		
Total Cost/(3% of Origination Volume)	819	0.38%	0.11%	3.97%	26	11
(Cost Per Origination)/(Median Revenues Per Loan)	819	0.54%	0.19%	2.76%	32	8

Source: HMDA 2010.

Number of employees at IMBs imputed by application count divided by 1.38 loan-officer days per application for full time loan officers who work 2080 hours per year.

Assumptions: Full-interior appraisal costs $600, alternative valuations cost $5. The probability of full-interior appraisals for a transaction are 95% is purchase-money transactions, 90% for refinance transactions, and 5% for second mortgages. The proportion of resales within 180 days is 5%. Costs of the first full interior appraisal are passed on completely to consumers. The review of the appraisal upon receipt takes 15 minutes of loan officer time. Loan officers are trained for 1 hour on the regulation beyond what is considered customary training. Every 3 years the regulation is reviewed for 45 minutes by a lawyer and a compliance officer. Wages are $33.40 per hour for compliance officers, $31.81 for loan officers, and $76.59 for lawyers, and wages are assumed to be 67.5% of total compensation.

[a] Cost per origination restricted to institutions with positive origination values, cost per application restricted to institutions with positive application values, total cost divided by 3% of origination volume restricted to institutions with positive origination volume.

[b] Industry experts estimate that gross revenues per loan are approximately 3% of origination amount. The MBA's Mortgage Bankers Performance Report reports that in the 4th quarter of 2010 IMBs and subsidiaries reported that total production operating expenses were $4930 per loan, average profits were $1082 per loan, and average loan balance was $208,319.

[c] Median revenue per origination ($3328) calculated using NMLS MCR data from Q1 and Q2 of 2011.

Because many of the costs imposed by the proposed rule are likely to be passed on to consumers, this may result in a decrease in demand for mortgage loans. However, any possible decrease in loan amounts is likely to be negligible. For both first and subordinate lien loans, the incremental costs to consumers are the difference in costs between the full-interior appraisal and alternative valuation method costs and perhaps some additional underwriting charges to reflect additional labor costs. These charges are unlikely to exceed $600. For first liens, full interior inspections are common industry practice so for the typical transaction additional costs passed on to consumers would be small. Furthermore, these costs may also be rolled into the loan, up to loan-to-value ratio limits, so short-term liquidity constraints for buyers are unlikely to bind. Passing the cost of appraisals on to consumers is current industry practice, and consumers appear to accept the appraisal fee, so there is unlikely to be an adverse effect on demand.

A more likely impact would be on the volume of higher-risk mortgage subordinate liens because this is where, in practice, the proposed rule would impose a change from the status quo, and also because the cost of a full interior appraisal is a larger proportion of the loan amount. However, changes in loan volume may be mitigated by consumers rolling the appraisal costs into the loan or the consumer and the creditor splitting the incremental cost of the full-interior appraisal if it is profitable for the creditor to do so. Similarly, the costs imposed on creditors are sufficiently small that they are unlikely to result in a decrease in the supply of credit.

D. Certification

Accordingly, the Director of the Consumer Financial Protection Bureau certifies that this proposal, if adopted, would not have a significant economic impact on a substantial number of small entities. The Bureau requests comment on the analysis above and requests any relevant data.

FDIC

The RFA generally requires that, in connection with a notice of proposed rulemaking, an agency prepare and make available for public comment an initial regulatory flexibility analysis that describes the impact of a proposed rule on small entities.[122] A regulatory flexibility analysis is not required, however, if the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities (defined in regulations promulgated by the Small Business Administration to include banking organizations with total assets of less than or equal to $175 million) and publishes its certification and a short, explanatory statement in the **Federal Register** together with the rule.

[122] *See* 5 U.S.C. 601 *et seq.*

As of March 31, 2012, there were approximately 2,571 small FDIC-supervised banks, which include 2,410 state nonmember banks and 161 state-chartered savings banks. The FDIC analyzed the 2010 Home Mortgage Disclosure Act [123] (HMDA) dataset to determine how many loans by FDIC-supervised banks might qualify as HRMs under section 129H of the TILA as added by section 1471 of the Dodd-Frank Act. This analysis reflects that only 70 FDIC-supervised banks originated at least 100 HRMs, with only four banks originating more than 500 HRMs. Further, the FDIC-supervised banks that met the definition of a small entity originated on average less than 8 HRM loans each in 2010.

The proposed rule could impact small FDIC-supervised institutions by:

1. Requiring an appraisal on real estate financial transactions that previously did not require an appraisal,
2. Mandating that the appraiser conduct a physical visit to the interior of the property, and
3. Requiring a second appraisal at the lender's expense in certain situations.

As for the first potential impact, the FDIC noted that Part 323 of the FDIC Rules and Regulations [124] (Part 323) requires financial institutions to obtain an appraisal for federally related transactions unless an exemption applies. Part 323 grants an exemption to the appraisal requirement for real estate-related financial transactions of $250,000 or less. However, Part 323 requires financial institutions to obtain an appropriate evaluation that is consistent with safe and sound banking practices for such transactions. The proposed NPR will supersede this exemption, resulting in creditors having to obtain an appraisal for a HRM transaction regardless of the transaction amount. The requirement to obtain an appraisal rather than an evaluation does not pose a new burden to financial institutions, as they are required by Part 323 to obtain some type of valuation of the mortgaged property. The proposed NPR merely limits the type of permissible valuation to an appraisal for HRMs.

As for the second potential impact, the proposed NPR's requirement affects a lender to the extent that a lender must instruct the appraiser to conduct a physical visit of the interior of the mortgaged property. The USPAP and title XI of FIRREA and the regulations prescribed thereunder do not require appraisers to perform on-site visits. Instead, USPAP requires appraisers to include a certification which clearly states whether the appraiser has or has not personally inspected the subject property. During informal outreach conducted by the Agencies, outreach participants indicated that many creditors require appraisers to perform a physical inspection of the mortgaged property. This requirement is documented in the *Uniform Residential Appraisal Report* form used as a matter of practice in the industry, which includes a certification that the appraiser performed a complete visual inspection of the interior and exterior areas of the subject property. Outreach participants indicated that requiring a physical visit of the interior of the mortgaged property added on average an additional cost of about $50 to the appraisal fee, which is paid by the applicant.

As for the third potential impact, the proposed NPR's requirement to conduct a second appraisal for certain transactions should not affect many FDIC-supervised banks. As previously indicated, FDIC-supervised banks that met the definition of a small entity originated an average of less than 8 HRM loans each in 2010. According to estimates provided by FHFA, about five (5) percent of single-family property sales in 2010 reflected situations in which the same property had been sold within a 180-day period. This information reflects that most small FDIC-supervised banks will have to obtain a second appraisal for a nominal amount of transactions at the banks' expense. The estimated cost of a second appraisal is between $350 to $600.

It is the opinion of the FDIC that the proposed rule will not have a significant economic impact on a substantial number of small entities that it regulates in light of the fact that: (1) Part 323 already requires FDIC-supervised depository institutions to obtain some type of valuation for real estate-related financial transactions; (2) the requirement of conducting a physical visit of the interior of the mortgaged property creates a potential burden for an appraiser, rather than the lender, with the cost being born by the applicant; and (3) the second appraisal requirement should affect a nominal amount of transactions. Accordingly, a regulatory flexibility analysis is not required.

The FDIC seeks comment on whether the proposed rule, if adopted in final form, would impose undue burdens, or have unintended consequences for, small FDIC-supervised institutions and whether there are ways such potential burdens or consequences could be minimized in a manner consistent with section 129H of TILA.

FHFA

The proposed rule applies only to institutions in the primary mortgage market that originate mortgage loans. FHFA's regulated entities—Fannie Mae, Freddie Mac, and the Federal Home Loan Banks—operate in the secondary mortgage markets. In addition, these entities do not come within the meaning of small entities as defined in the Regulatory Flexibility Act (See 5 U.S.C. 601(6)).

NCUA

The RFA generally requires that, in connection with a notice of proposed rulemaking, an agency prepare and make available for public comment an initial regulatory flexibility analysis that describes the impact of a proposed rule on small entities.[125] A regulatory flexibility analysis is not required, however, if the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities and publishes its certification and a short, explanatory statement in the **Federal Register** together with the rule. NCUA defines small entities as small credit unions having less than ten million dollars in assets [126] in contrast to the definition of small entities in the rules issued by the Small Business Administration (SBA), which include banking organizations with total assets of less than or equal to $175 million.

NCUA staff analyzed the 2010 Home Mortgage Disclosure Act (HMDA) dataset to determine how many loans by federally insured credit unions (FICUs) might qualify as HRMs under section 129H of the TILA.[127] As of March 31, 2012, there were 2,475 FICUs that met NCUA's small entity definition but none of these institutions reported data to HMDA in 2010. For purposes of this rulemaking and for consistency with the Agencies, NCUA reviewed the dataset for FICUs that met the small entity standard for banking organizations

[123] The FDIC based its analysis on the HMDA data, as it provided a proxy for the characteristics of HRMs. While the FDIC recognizes that fewer higher-price loans were generated in 2010, a more historical review is not possible because the average offer price (a key data element for this review) was not added until the fourth quarter of 2009. The FDIC also recognizes that the HMDA data provides information relative to mortgage lending in metropolitan statistical areas, but not in rural areas.

[124] 12 CFR part 323.

[125] *See* 5 U.S.C. 601 *et seq.*

[126] 68 FR 31949 (May 29, 2003).

[127] NCUA based its analysis on the HMDA data, as it provided a proxy for the characteristics of HRMs. The analysis is restricted to 2010 HMDA data because the average offer price (a key data element for this review) was not added in the HMDA data until the fourth quarter of 2009.

under the SBA's regulations. As of March 31, 2012, there were approximately 6,060, FICUs with total assets of $175 million or less. Of the FICUs which reported 2010 HMDA data, 452 reported at least one HRM. The data reflects that only three FICUs originated at least 100 HRMs, with no FICUs originating more than 500 HRMs, and eighty-eight percent of reporting FICUs originating 10 HRMs or less. Further, FICUs that met the SBA's definition of a small entity originated an average 4 HRM loans each in 2010.[128] For the reasons provided below, NCUA certifies that the proposed rule, if adopted in final form, would not have a significant economic impact on a substantial number of small entities. Accordingly, a regulatory flexibility analysis is not required.

As previously discussed, section 1471 of the Dodd-Frank Act[129] generally requires the Agencies to jointly prescribe regulations that require a creditor to:

(i) Obtain a written appraisal for a higher-risk mortgage that is prepared by a state licensed or certified appraiser who:

a. Conducted a physical visit of the interior of the property to be mortgage, and

b. Performed the appraisal in compliance with USPAP and title XI of FIRREA, and the regulations prescribed under such title;

(ii) Obtain, at not cost to the applicant, a second appraisal that includes certain analyses from a different certified or licensed appraiser if the purpose of a higher-risk mortgage is to finance the acquisition of the mortgaged property from a seller within 180 days of the seller's acquisition and at a price lower than the current sale price of the property;

(iii) Provide, at the time of the initial mortgage application, the applicant a statement that any appraisal prepared for the mortgage is for the sole use of the creditor, and that the applicant may choose to have a separate appraisal conducted by an appraiser of the applicant's choosing at the applicant's expense; and

(iv) Provide the applicant with one (1) copy of each appraisal without charge and at least three (3) business days prior to the transaction closing date.

The proposed rule implements the appraisal requirements of section 1471 of the Dodd-Frank Act. Part 722 of NCUA's Rules and Regulations[130] requires FICUs to obtain an appraisal for federally related transactions unless an exemption applies. Part 722 grants an exemption to the appraisal requirement for real estate-related financial transactions of $250,000 or less. However, part 722 requires FICUs to obtain an appropriate evaluation that is consistent with safe and sound banking practices for such transactions.

The proposed NPR will supersede this exemption, resulting in FICUs having to obtain an appraisal for a HRM transaction regardless of the transaction amount. The requirement to obtain an appraisal rather than an evaluation does not pose a new burden to financial institutions, as they are required by part 722 to obtain some type of valuation of the mortgaged property. The proposed NPR merely limits the type of permissible valuation to an appraisal for HRMs.

The proposed NPR's requirement to conduct a physical visit of the interior of the mortgaged property potentially adds an additional burden to the appraiser. The USPAP and title XI of FIRREA and the regulations prescribed thereunder do not require appraisers to perform on-site visits. Instead, USPAP requires appraisers to include a certification which clearly states whether the appraiser has or has not personally inspected the subject property. During informal outreach conducted by the Agencies, outreach participants indicated that many creditors require appraisers to perform a physical inspection of the mortgaged property. This requirement is documented in the *Uniform Residential Appraisal Report* form used as a matter of practice in the industry, which includes a certification that the appraiser performed a complete visual inspection of the interior and exterior areas of the subject property. Outreach participants indicated that requiring a physical visit of the interior of the mortgaged property added on average an additional cost of about $50 to the appraisal fee, which is paid by the applicant.

In light of the fact that few loans made by FICUs would qualify as HRMs, the fact that many creditors already require that an appraiser conduct an interior inspection of mortgage collateral property in connection with an appraisal; and the fact that requiring an interior inspection would add a relatively small amount to the cost of an appraisal, the proposed rule will not have a significant economic impact on a substantial number of small FICUs, and therefore, no regulatory flexibility analysis is required.

OCC

Pursuant to section 605(b) of the Regulatory Flexibility Act, 5 U.S.C. 605(b) (RFA), the regulatory flexibility analysis otherwise required under section 603 of the RFA is not required if the agency certifies that the proposed rule will not, if promulgated, have a significant economic impact on a substantial number of small entities (defined for purposes of the RFA to include commercial banks, savings institutions and other depository credit intermediation with assets less than or equal to $175 million[131] and trust companies with total assets of $7 million or less) and publishes its certification and a short, explanatory statement in the **Federal Register** along with its proposed rule.

Section 1471 of the Dodd-Frank Act establishes a new TILA section 129H, which sets forth appraisal requirements applicable to higher-risk mortgage loans. A ''higher-risk mortgage'' generally is a closed-end consumer loan secured by a principal dwelling with an APR that exceeds the APOR by 1.5 percent for first-lien loans with a principal amount below the conforming loan limit, 2.5 percent for first-lien jumbo loans, or 3.5 percent for subordinate-liens. The definition of higher-risk mortgage loan expressly excludes qualified mortgages, as defined in TILA section 129C, as well as reverse mortgage loans that are qualified mortgages as defined in TILA section 129C.

Specifically, new TILA section 129H does not permit a creditor to extend credit in the form of a higher-risk mortgage loan to any consumer without first:

- Obtaining a written appraisal performed by a certified or licensed appraiser who conducts a physical property visit of the interior of the property.
- Obtaining an additional written appraisal from a different certified or licensed appraiser if the purpose of the higher-risk mortgage loan is to finance the purchase or acquisition of a mortgaged property from a seller within 180 days of the purchase or acquisition of the property by that seller at a price

[128] With only a fraction of small FICUs reporting data to HMDA, NCUA also analyzed FICUs not observed in the HMDA data. Using the total number of real estate loans originated by FICUs with less than $175M in total assets, NCUA estimated the average number of HRMs per real estate loan originated. Using this ratio to interpolate the likely number of HRM originations, the analysis suggests that small FICUs originate on average less than 2 HRM loans each year.

[129] *Codified at* section 129H of the Truth-in-Lending Act, 15 U.S.C. 1631 *et seq.*

[130] 12 CFR part 722.

[131] ''A financial institution's assets are determined by averaging the assets reported on its four quarterly financial statements for the preceding year.'' See footnote 8 of the U.S. Small Business Administration's Table of Size Standards.

that was lower than the current sale price of the property. The additional written appraisal must include an analysis of the difference in sale prices, changes in market conditions, and any improvements made to the property between the date of the previous sale and the current sale.

• Providing the applicant, at the time of the initial mortgage application, with a statement that any written appraisal prepared for the mortgage is for the sole use of the creditor, and that the applicant may choose to have a separate appraisal conducted at the applicant's expense.

• Providing the applicant with one copy of each appraisal conducted in accordance with TILA section 129H without charge, at least three (3) days prior to the transaction closing date.

The OCC currently supervises 1,970 banks (1,281 commercial banks, 66 trust companies, 576 Federal savings associations and 47 branches or agencies of foreign banks). We estimate that less than 1,400 of the banks supervised by the OCC are currently originating one- to four-family residential mortgage loans. Approximately 772 OCC supervised banks are small entities based on the SBA's definition of small entities for RFA purposes. Of these, the OCC estimates that 465 originate mortgages and therefore maybe impacted by the proposed rule.

The OCC classifies the economic impact of total costs on a bank as significant if the total costs in a single year are greater than 5 percent of total salaries and benefits, or greater than 2.5 percent of total non-interest expense. The OCC estimates that the average cost per small bank will range from a lower bound of approximately $10 thousand to an upper bound of approximately $18 thousand. Using the upper bound cost estimate, we believe the proposed rule will have a significant economic impact on three small banks, which is not a substantial number.

Therefore, we believe the proposed rule will not have a significant economic impact on a substantial number of small entities. The OCC certifies that the Proposed Rule would not, if promulgated, have a significant economic impact on a substantial number of small entities.

VII. Paperwork Reduction Act

Certain provisions of this proposed rule contain ''collection of information'' requirements within the meaning of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) (Paperwork Reduction Act or PRA). Under the PRA, the Agencies may not conduct or sponsor, and a person is not required to respond to, an information collection unless the information collection displays a valid Office of Management and Budget (OMB) control number. The information collection requirements contained in this joint notice of proposed rulemaking have been submitted to OMB for review and approval by the Bureau, FDIC, NCUA, and OCC under section 3506 of the PRA and section 1320.11 of the OMB's implementing regulations (5 CFR part 1320). The Board reviewed the proposed rule under the authority delegated to the Board by OMB.

Title of Information Collection: Higher-Risk Mortgage Appraisals.

Frequency of Response: Event generated.

Affected Public: Businesses or other for-profit and not-for-profit organizations.[132]

Bureau: Insured depository institutions with more than $10 billion in assets, their depository institution affiliates, and certain non-depository mortgage institutions.[133]

FDIC: Insured state non-member banks, insured state branches of foreign banks, and certain subsidiaries of these entities.

OCC: National banks, Federal savings associations, Federal branches or agencies of foreign banks, or any operating subsidiary thereof.

Board: State member banks, uninsured state branches and agencies of foreign banks.

NCUA: Federally insured credit unions.

Abstract: The collection of information requirements in this proposed rule are found in proposed paragraphs (b)(1), (b)(2), (b)(3), (c), and (d) of 12 CFR 1026.XX. This information is required to protect consumers and promotes the safety and soundness of creditors making higher-risk mortgage loans. This information will be used by creditors to evaluate real estate collateral in higher-risk mortgage loan transactions and by consumers entering these transactions. The collections of information are mandatory for creditors making higher-risk mortgage loans.

The proposed rule would require that, within three days of application, a creditor provide a disclosure that informs consumers regarding the purpose of the appraisal, that the creditor will provide the consumer a copy of any appraisal, and that the consumer may choose to have a separate appraisal conducted at the expense of the consumer (Initial Appraisal Disclosure). *See* proposed 12 CFR 1026.XX(c). If a loan meets the definition of a higher-risk mortgage loan, then the creditor would be required to obtain a written appraisal prepared by a certified or licensed appraiser who conducts a physical visit of the interior of the property that will secure the transaction, and send a copy of the written appraisal to the consumer (Written Appraisal). *See* proposed 12 CFR 1026.XX(b)(1) and (d). To qualify for the safe harbor provided under the proposed rule, a creditor would be required to review the written appraisal as specified in the text of the rule and appendix N. *See* proposed 12 CFR 1026.XX(b)(2). If a loan is classified as a higher-risk mortgage loan that will finance the acquisition of the property to be mortgaged, and the property was acquired within the previous 180 days by the seller at a price that was lower than the current sale price, then the creditor would be required to obtain an additional appraisal that meets the requirements described above (Additional Written Appraisal). *See* proposed 12 CFR 1026.XX(b)(3). The Additional Written Appraisal must also analyze: (1) the difference between the price at which the seller acquired the property and the price the consumer agreed to pay, (2) changes in market conditions between the date the seller acquired the property and the date the consumer agreed to acquire the property, and (3) any improvements made to the property between the date the seller acquired the property and the consumer agreed to acquire the property. *See* proposed 12 CFR 1026.XX(b)(3)(iv). A creditor would also be required to send a copy of the additional written appraisal to the consumer. 12 CFR 1026.XX(d).

Calculation of Estimated Burden

Under the proposed Initial Appraisal Disclosure, the creditor would be required to provide a short, written disclosure within three days of application. Because the disclosure may be classified as a warning label supplied by the Federal government, the Agencies are assigning it no burden for purposes of this PRA analysis.[134] In

[132] The burdens on the affected public generally are divided in accordance with the Agencies' respective administrative enforcement authority under TILA section 108, 15 U.S.C. 1607.

[133] The Bureau and the Federal Trade Commission (FTC) generally both have enforcement authority over non-depository institutions for Regulation Z. Accordingly, for purposes of this PRA analysis, the Bureau has allocated to itself half of the Bureau's estimated burden to non-depository mortgage institutions. The FTC is responsible for estimating and reporting to OMB its share of burden under this proposal.

[134] ''The public disclosure of information originally supplied by the Federal government to the recipient for the purpose of disclosure to the

addition, the Agencies contemplate that once the TILA–RESPA integrated disclosure forms are finalized, the appraisal-related disclosure will be given as part of those forms. As such, this disclosure should not impose additional costs on creditors.

The estimated burden for the proposed Written Appraisal requirements includes the burden the creditor bears to review for completeness the written appraisal in order to satisfy the safe harbor criteria set forth in the proposed rule and to send a copy of the written appraisal to the consumer.

Under the Additional Written Appraisal requirement, if a loan is classified as a higher-risk mortgage loan that will finance the acquisition of the property to be mortgaged, and that property was acquired within the previous 180 days by the seller at a price that was lower than the current sale price, then the creditor would be required to obtain an additional written appraisal containing additional analyses. The additional written appraisal would have to be prepared by a certified or licensed appraiser different from the appraiser performing the other written appraisal for the higher-risk mortgage loan, and a copy of the additional appraisal must be sent to the consumer. The additional appraisal would be required to meet the standards of the other written appraisal for the higher-risk mortgage loan. Thus, in order to qualify for the safe harbor provided in the proposed rule, the written appraisal would also have to be reviewed for completeness.

The agencies estimate that respondents would take, on average, 15 minutes per appraisal to comply with the proposed disclosure requirements under the Written Appraisal requirement. The agencies estimate further that respondents would take, on average, 15 minutes per HRM to investigate and verify the need for a second appraisal; and then an additional 15 minutes to comply, where necessary, with the proposed disclosure requirements of the Second Written Appraisal. For the small fraction of loans requiring a second appraisal, the burden is similar to the prior information collection. The following table summarizes these burdens.

Estimated Paperwork Burden

TABLE 7—SUMMARY OF BURDEN HOURS FOR INFORMATION COLLECTIONS IN PROPOSED RULE

	Estimated number of respondents [a]	Estimated number of appraisals per respondent [b]	Estimated burden hours per appraisal [c]	Estimated total annual burden hours [d] = (a*b*c)
Review and Provide a Copy of a Full Interior Appraisal				
Bureau:[135]				
Depository Inst. > $10 B in total assets + Depository Inst. Affiliates	128	472	0.25	15,104
Non-Depository Inst.	2,515	24	0.25	15,090
FDIC	2,571	8	0.25	5,142
Board[136]	418	24	0.25	2,508
OCC	1,399	69	0.25	24,133
NCUA	2,437	6	0.25	3,656
Total	9,468			65,632
Investigate and Verify Requirement for Second Appraisal				
Bureau:				
Depository Inst. > $10 B in total assets + Depository Inst. Affiliates	128	472	0.25	15,104
Non-Depository Inst.	2,515	24	0.25	15,090
FDIC	2,571	15	0.25	9,641
Board	418	24	0.25	2,508
OCC	1,399	69	0.25	24,133
NCUA	2,437	6	0.25	3,656
Total	9,468			70,132
Conduct and Provide Second Appraisal				
Bureau:				
Depository Inst. > $10 B in total assets + Depository Inst. Affiliates	128	24	0.25	768
Non-Depository Inst.	2,515	1	0.25	629
FDIC	2,571	1	0.25	643
Board	418	1	0.25	105
OCC	1,399	3	0.25	1,049
NCUA	2,437	0.3	0.25	183
Total	9,468			3,376

Notes: (1) Respondents include all institutions estimated to originate HRMs.

(2) There may be an additional ongoing burden of roughly 75 hours for privately insured credit unions estimated to originate HRMs. The Bureau will assume half of the burden for non-depository institutions and the privately insured credit unions.

public is not included within'' the definition of ''collection of information.'' 5 CFR 1320.3(c)(2).

Respondents will also have to review the instructions and legal guidance associated with the proposed rule and train loan officers regarding the proposed rule. The Agencies estimate that these one-time costs are as follows: Bureau 32,754 hours; FDIC: 10,284 hours; Board 3,344 hours; OCC: 19,586 hours; NCUA: 7,311 hours.[137]

Request for Comments on Proposed Information Collection

Comments are specifically requested concerning: (i) Whether the proposed collections of information are necessary for the proper performance of the functions of the Agencies, including whether the information will have practical utility; (ii) the accuracy of the estimated burden associated with the proposed collections of information; (iii) how to enhance the quality, utility, and clarity of the information to be collected; and (iv) how to minimize the burden of complying with the proposed collections of information, including the application of automated collection techniques or other forms of information technology. All comments will become a matter of public record. Comments on the collection of information requirements should be sent to the OMB desk officers for the agencies (*i.e.* ''Desk Officer for the Bureau of Consumer Financial Protection''): by mail to U.S. Office of Management and Budget, Office of Information and Regulatory Affairs, Washington, DC 20503, or by the internet to *http://oira_submission@omb.eop.gov,* with copies to the Agencies at the addresses listed in the **ADDRESSES** section of this **SUPPLEMENTARY INFORMATION.**

FHFA

The proposed rule does not contain any collections of information requiring review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501, *et seq.*). Therefore, FHFA has not submitted any materials to OMB for review.

List of Subjects

12 CFR Part 34

Appraisal, Appraiser, Banks, Banking, Consumer protection, Credit, Mortgages, National banks, Reporting and recordkeeping requirements, Savings associations, Truth in Lending.

12 CFR Part 164

Appraisals, Mortgages, Reporting and recordkeeping requirements, Savings associations, Truth in Lending.

12 CFR Part 226

Advertising, Appraisal, Appraiser, Consumer protection, Credit, Federal Reserve System, Mortgages, Reporting and recordkeeping requirements, Truth in lending.

12 CFR Part 722

Appraisal, Credit, Credit unions, Mortgages, Reporting and recordkeeping requirements.

12 CFR Part 1026

Advertising, Appraisal, Appraiser, Banking, Banks, Consumer protection, Credit, Credit unions, Mortgages, National banks, Reporting and recordkeeping requirements, Savings associations, Truth in lending.

12 CFR Part 1222

Government sponsored enterprises, Mortgages, Appraisals.

Text of Proposed Revisions

Department of the Treasury

Office of the Comptroller of the Currency

Authority and Issuance

For the reasons set forth in the preamble, the OCC proposes to amend 12 CFR parts 34 and 164, as follows:

PART 34—REAL ESTATE LENDING AND APPRAISALS

1. The authority citation for part 34 is revised to read as follows:

Authority: 12 U.S.C. 1 *et seq.,* 25b, 29, 93a, 371, 1463, 1464, 1465, 1701j-3, 1828(o), 3331 *et seq.,* 5101 *et seq.,* 5412(b)(2)(B) and 15 U.S.C. 1639h.

2. Subpart G to part 34 is added to read as follows:

Subpart G—Appraisals for Higher Risk Mortgage Loans

Subpart G—Appraisals for Higher Risk Mortgage Loans

§ 34.201 Authority, purpose and scope.

(a) *Authority.* This subpart is issued by the Office of the Comptroller of the Currency under 12 U.S.C. 93a, 12 U.S.C. 1463, 1464 and 15 U.S.C. 1639h.

(b) *Purpose.* The OCC adopts this subpart pursuant to the requirements of section 129H of the Truth in Lending Act (15 U.S.C. 1639h) which provides that a creditor, including a national bank or operating subsidiary, a Federal branch or agency or a Federal savings association or operating subsidiary, may not extend credit in the form of a higher risk mortgage loan without complying with the requirements of section 129H of the Truth in Lending Act (15 U.S.C. 1639h) and this subpart G.

(c) *Scope.* This subpart applies to higher risk mortgage loan transactions entered into by national banks and their operating subsidiaries, Federal branches and agencies and Federal savings associations and operating subsidiaries of savings associations.

§ 34.202 Definitions applicable to higher risk mortgage loans.

For purposes of this subpart:

(a) Annual percentage rate has the same meaning as determined under 12 CFR 1026.22.

(b) Average prime offer rate has the same meaning as in 12 CFR 1026.35(a)(2)(ii).

(c) Creditor has the same meaning as in 12 CFR 1026.2(17).

(d) Reverse mortgage has the same meaning as in 12 CFR 1026.33(a).

(e) Qualified mortgage has the same meaning as in 12 CFR 1026.43(e).

(f) Transaction coverage rate has the same meaning as in 12 CFR 1026.35(a)(2)(i).

§ 34.203 Appraisals for higher risk mortgage loans.

(a) *Definitions.* For purposes of this subpart:

(1) *Certified or licensed appraiser* means a person who is certified or licensed by the State agency in the State in which the property that secures the transaction is located, and who performs the appraisal in conformity with the Uniform Standards of Professional Appraisal Practice and the requirements applicable to appraisers in title XI of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, as amended (12 U.S.C. 3331 *et seq.*), and any implementing regulations

[135] The information collection requirements (ICs) in this proposed rule will be incorporated with the Bureau's existing collection associated with Truth in Lending Act (Regulation Z) 12 CFR 1026 (OMB No. 3170–0015).

[136] The ICs in this rule will be incorporated with the Board's Reporting, Recordkeeping, and Disclosure Requirements associated with Regulation Z (Truth in Lending), 12 CFR part 226, and Regulation AA (Unfair or Deceptive Acts or Practices), 12 CFR part 227 (OMB No. 7100–0199). The burden estimates provided in this rule pertain only to the ICs associated with this proposed rulemaking.

[137] Estimated one-time burden is calculated assuming a fixed burden per institution to review the regulations and fixed burden per estimated loan officer in training costs. As a result of the different size and mortgage activities across institutions, the average per-institution one-time burdens vary across the Agencies.

in effect at the time the appraiser signs the appraiser's certification.

(2) Except as provided in paragraph (a)(2)(ii) of this section, *higher-risk mortgage loan* means:

Alternative 1: Annual Percentage Rate—Paragraph (a)(2)(i)

(i) A closed-end consumer credit transaction secured by the consumer's principal dwelling with an annual percentage rate, as determined under 12 CFR 1026.22, that exceeds the average prime offer rate, as defined in 12 CFR 1026.35(a)(2)(ii), for a comparable transaction as of the date the interest rate is set:

(A) By 1.5 or more percentage points, for a loan secured by a first lien with a principal obligation at consummation that does not exceed the limit in effect as of the date the transaction's interest rate is set for the maximum principal obligation eligible for purchase by Freddie Mac;

(B) By 2.5 or more percentage points, for a loan secured by a first lien with a principal obligation at consummation that exceeds the limit in effect as of the date the transaction's interest rate is set for the maximum principal obligation eligible for purchase by Freddie Mac; and

(C) By 3.5 or more percentage points, for a loan secured by a subordinate lien.

Alternative 2: Transaction Coverage Rate—Paragraph (a)(2)(i)

(i) A closed-end consumer credit transaction secured by the consumer's principal dwelling with a transaction coverage rate, as defined in 12 CFR 1026.35(a)(2)(i), that exceeds the average prime offer rate, as defined in 12 CFR 1026.35(a)(2)(ii), for a comparable transaction as of the date the interest rate is set:

(A) By 1.5 or more percentage points, for a loan secured by a first lien with a principal obligation at consummation that does not exceed the limit in effect as of the date the transaction's interest rate is set for the principal obligation eligible for purchase by Freddie Mac;

(B) By 2.5 or more percentage points, for a loan secured by a first lien with a principal obligation at consummation that exceeds the limit in effect as of the date the transaction's interest rate is set for the maximum principal obligation eligible for purchase by Freddie Mac; and

(C) By 3.5 or more percentage points, for a loan secured by a subordinate lien.

(ii) Notwithstanding paragraph (a)(2)(i) of this section, a *higher-risk mortgage loan* does not include:

(A) A qualified mortgage.

(B) A reverse-mortgage transaction.

(C) A loan secured solely by a residential structure.

(3) *National Registry* means the database of information about State certified and licensed appraisers maintained by the Appraisal Subcommittee of the Federal Financial Institutions Examination Council.

(4) *State agency* means a ''State appraiser certifying and licensing agency'' recognized in accordance with section 1118(b) of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (12 U.S.C. 3347(b)) and any implementing regulations.

(b) *Appraisals required for higher-risk mortgage loans.* (1) *In general.* A creditor shall not extend a higher-risk mortgage loan to a consumer without obtaining, prior to consummation, a written appraisal of the property to be mortgaged. The appraisal must be performed by a certified or licensed appraiser who conducts a physical visit of the interior of the property that will secure the transaction.

(2) *Safe harbor.* A creditor is deemed to have obtained a written appraisal that meets the requirements of paragraph (b)(1) of this section if the creditor:

(i) Orders that the appraiser perform the appraisal in conformity with the Uniform Standards of Professional Appraisal Practice and title XI of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, as amended (12 U.S.C. 3331 *et seq.*), and any implementing regulations, in effect at the time the appraiser signs the appraiser's certification;

(ii) Verifies through the National Registry that the appraiser who signed the appraiser's certification was a certified or licensed appraiser in the State in which the appraised property is located as of the date the appraiser signed the appraiser's certification;

(iii) Confirms that the elements set forth in Appendix A to this subpart are addressed in the written appraisal; and

(iv) Has no actual knowledge to the contrary of facts or certifications contained in the written appraisal.

(3) *Additional appraisal for certain higher-risk mortgage loans.* (i) *In general.* A creditor shall not extend a higher-risk mortgage loan to a consumer to finance the acquisition of the consumer's principal dwelling without obtaining, prior to consummation, two written appraisals, if:

(A) The seller acquired the property 180 or fewer days prior to the date of the consumer's agreement to acquire the property from the seller; and

(B) The price at which the seller acquired the property was lower than the price that the consumer is obligated to pay to acquire the property, as specified in the consumer's agreement to acquire the property from the seller, by an amount equal to or greater than *XX.*

(ii) *Different appraisers.* The two appraisals required under paragraph (b)(3)(i) of this section may not be performed by the same certified or licensed appraiser.

(iii) *Relationship to paragraph (b)(1) of this section.* If two appraisals must be obtained under paragraph (b)(3)(i) of this section, each appraisal shall meet the requirements of paragraph (b)(1) of this section.

(iv) *Requirements for the additional appraisal.* In addition to meeting the requirements for an appraisal under paragraph (b)(1) of this section, the additional appraisal must include an analysis of:

(A) The difference between the price at which the seller acquired the property and the price that the consumer is obligated to pay to acquire the property, as specified in the consumer's agreement to acquire the property from the seller;

(B) Changes in market conditions between the date the seller acquired the property and the date of the consumer's agreement to acquire the property; and

(C) Any improvements made to the property between the date the seller acquired the property and the date of the consumer's agreement to acquire the property.

(v) *No charge for the additional appraisal.* If the creditor must obtain two appraisals under paragraph (b)(3)(i) of this section, the creditor may charge the consumer for only one of the appraisals.

(vi) *Creditor's determination under paragraphs (b)(3)(i)(A) and (b)(3)(i)(B) of this section.*

(A) *Reasonable diligence.* A creditor shall exercise reasonable diligence to determine whether the criteria in paragraphs (b)(3)(i)(A) and (b)(3)(i)(B) of this section are met.

(B) *Inability to make the determination under paragraphs (b)(3)(i)(A) and (b)(3)(i)(B) of this section.* If, after exercising reasonable diligence, a creditor cannot determine whether the criteria in paragraphs (b)(3)(i)(A) and (b)(3)(i)(B) of this section are met, the creditor shall not extend a higher-risk mortgage loan without obtaining, prior to consummation, two written appraisals in accordance with paragraphs (b)(3)(ii) through (v) of this section. However, the additional appraisal shall include an analysis of the factors in paragraph (b)(3)(iv) of this section only to the extent that the information necessary for the appraiser to perform the analysis can be determined.

(c) *Required disclosure.* (1) *In general.* A creditor shall disclose the following statement, in writing, to a consumer who applies for a higher-risk mortgage loan: ''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.''

(2) *Timing of disclosure.* The disclosure required by paragraph (c)(1) of this section shall be mailed or delivered not later than the third business day after the creditor receives the consumer's application. If the disclosure is not provided to the consumer in person, the consumer is presumed to have received the disclosures three business days after they are mailed or delivered.

(d) *Copy of appraisals.* (1) *In general.* A creditor shall provide to the consumer a copy of any written appraisal performed in connection with a higher-risk mortgage loan pursuant to the requirements of paragraph (b) of this section.

(2) *Timing.* A creditor shall provide a copy of each written appraisal pursuant to paragraph (d)(1) of this section no later than three business days prior to consummation of the higher-risk mortgage loan.

(3) *Form of copy.* Any copy of a written appraisal required by paragraph (d)(1) of this section may be provided to the applicant in electronic form, subject to compliance with the consumer consent and other applicable provisions of the Electronic Signatures in Global and National Commerce Act (E-Sign Act) (15 U.S.C. 7001 *et seq.*).

(4) *No charge for copy of appraisal.* A creditor shall not charge the applicant for a copy of a written appraisal required to be provided to the consumer pursuant to paragraph (d)(1) of this section.

(e) *Relation to other rules.* These rules were developed jointly by the Federal Reserve Board (Board), the OCC, the Federal Deposit Insurance Corporation, the National Credit Union Administration, the Federal Housing Finance Agency, and the Consumer Financial Protection Bureau (Bureau). These rules are substantively identical to the Board's and the Bureau's higher-risk mortgage appraisal rules published separately in 12 CFR 226.43 and 12 CFR 1026.XX.

Appendix A to Subpart G—Appraisal Safe Harbor Review

To qualify for the safe harbor provided in § 34.203(b)(2) a creditor must check the appraisal report to confirm that the written appraisal:

1. Identifies the creditor who ordered the appraisal and the property and the interest being appraised.
2. Indicates whether the contract price was analyzed.
3. Addresses conditions in the property's neighborhood.
4. Addresses the condition of the property and any improvements to the property.
5. Indicates which valuation approaches were used, and includes a reconciliation if more than one valuation approach was used.
6. Provides an opinion of the property's market value and an effective date for the opinion.
7. Indicates that a physical property visit of the interior of the property was performed.
8. Includes a certification signed by the appraiser that the appraisal was prepared in accordance with the requirements of the Uniform Standards of Professional Appraisal Practice.
9. Includes a certification signed by the appraiser that the appraisal was prepared in accordance with the requirements of title XI of the Financial Institutions Reform, Recovery and Enforcement Act of 1989, as amended (12 U.S.C. 3331 *et seq.*), and any implementing regulations.

Appendix B to Subpart G—OCC Interpretations

Commentary to § 34.203—Appraisals for Higher-Risk Mortgage Loans

34.203(a) Definitions.

34.203(a)(1) Certified or licensed appraiser.

1. *USPAP.* The Uniform Standards of Professional Appraisal Practice (USPAP) are established by the Appraisal Standards Board of the Appraisal Foundation (as defined in 12 U.S.C. 3350(9)). Under § 34.203(a)(1), the relevant USPAP standards are those found in the edition of USPAP in effect at the time the appraiser signs the appraiser's certification.

2. *Appraiser's certification.* The appraiser's certification refers to the certification that must be signed by the appraiser for each appraisal assignment. This requirement is specified in USPAP Standards Rule 2–3.

3. *FIRREA title XI and implementing regulations.* The relevant regulations are those prescribed under section 1110 of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), as amended (12 U.S.C. 3339), that relate to an appraiser's development and reporting of the appraisal in effect at the time the appraiser signs the appraiser's certification. Paragraph (3) of FIRREA section 1110 (12 U.S.C. 3339(3)), which relates to the review of appraisals, is not relevant for determining whether an appraiser is a certified or licensed appraiser under § 34.203(a)(1).

34.203(a)(2) Higher-risk mortgage loan.

Paragraph 34.203(a)(2)(i).

1. *Principal dwelling.* The term ''principal dwelling'' has the same meaning under § 34.203(a)(2) as under 12 CFR 1026.2(a)(24). *See* the Official Staff Interpretations to the Bureau's Regulation Z (Supplement I to Part 1026), comment 2(a)(24)-3.

2. *Average prime offer rate.* For guidance on average prime offer rates, *see* the Official Staff Interpretations to the Bureau's Regulation Z, comment 35(a)(2)-1.

3. *Comparable transaction.* For guidance on determining the average prime offer rate for comparable transactions, *see* the Official Staff Interpretations to the Bureau's Regulation Z, comments 35(a)(2)-2 and -4.

4. *Rate set.* For guidance on the date the annual percentage rate is set, *see* the Official Staff Interpretations to the Bureau's Regulation Z, comment 35(a)(2)-3.

Paragraph 34.203(a)(2)(ii)(C).

1. *Secured solely by a residential structure.* Loans secured solely by a residential structure cannot be ''higher-risk mortgage loans.'' Thus, for example, a loan secured by a manufactured home and the land on which it is sited could be a ''higher-risk mortgage loan.'' By contrast, a loan secured solely by a manufactured home cannot be a ''higher-risk mortgage loan.''

34.203(b) Appraisals required for higher-risk mortgage loans.

34.302(b)(1) In general.

1. *Written appraisal—electronic transmission.* To satisfy the requirement that the appraisal be ''written,'' a creditor may obtain the appraisal in paper form or via electronic transmission.

34.203(b)(2) Safe harbor.

1. *Safe harbor.* A creditor that satisfies the conditions in § 34.203(b)(2)(i) through (iv) will be deemed to have complied with the appraisal requirements of § 34.203(b)(1). A creditor that does not satisfy the conditions in § 34.203(b)(2)(i) through (iv) does not necessarily violate the appraisal requirements of § 34.203(b)(1).

Paragraph 34.203(b)(2)(iii).

1. *Confirming elements in the appraisal.* To confirm that the elements in Appendix A to this subpart are included in the written appraisal, a creditor need not look beyond the face of the written appraisal and the appraiser's certification.

34.203(b)(3) Additional appraisal for certain higher-risk mortgage loans.

1. *Acquisition.* For purposes of § 34.203(b)(3), the terms ''acquisition'' and ''acquire'' refer to the acquisition of legal title to the property pursuant to applicable State law, including by purchase.

34.203(b)(3)(i) In general.

1. *Two appraisals.* An appraisal that was previously obtained in connection with the seller's acquisition or the financing of the seller's acquisition of the property does not satisfy the requirements of § 34.203 (b)(3).

Paragraph 34.203(b)(3)(i)(A).

1. *180-day calculation.* The time period described in § 34.203(b)(3)(i)(A) is calculated by counting the day after the date on which the seller acquired the property, up to and including the date of the consumer's agreement to acquire the property that secures the transaction. *See also* comments 34.203(b)(3)(i)(A)-2 and -3 in this Appendix B. For example, assume that the creditor determines that date of the consumer's acquisition agreement is October 15, 2012, and that the seller acquired the property on April 17, 2012. The first day to be counted

in the 180-day calculation would be April 18, 2012, and the last day would be October 15, 2012. In this case, the number of days would be 181, so an additional appraisal is not required.

2. *Date of the consumer's agreement to acquire the property.* For the date of the consumer's agreement to acquire the property under § 34.203(b)(3)(i)(A), the creditor should use the date on which the consumer and the seller signed the agreement provided to the creditor by the consumer. The date on which the consumer and the seller signed the agreement might not be the date on which the consumer became contractually obligated under State law to acquire the property. For purposes of § 34.203(b)(3)(i)(A), a creditor is not obligated to determine whether and to what extent the agreement is legally binding on both parties. If the dates on which the consumer and the seller signed the agreement differ, the creditor should use the later of the two dates.

3. *Date seller acquired the property.* For purposes of § 34.203(b)(3)(i)(A), the date on which the seller acquired the property is the date on which the seller became the legal owner of the property pursuant to applicable State law. *See also* comments 34.203(b)(3)(vi)(A)-1 and -2 and comment (b)(3)(vi)(B)-1 in this Appendix B.

Paragraph 34.203(b)(3)(i)(B).

1. *Price at which the seller acquired the property.* The price at which the seller acquired the property refers to the amount paid by the seller to acquire the property. The price at which the seller acquired the property does not include the cost of financing the property. *See also* comments 34.203(b)(3)(vi)(A)-1 and (b)(3)(vi)(B)-1 in this Appendix B.

2. *Price the consumer is obligated to pay to acquire the property.* The price the consumer is obligated to pay to acquire the property is the price indicated on the consumer's agreement with the seller to acquire the property. *See* comment 34.203(b)(3)(i)(A)-2 in this Appendix B. The price the consumer is obligated to pay to acquire the property from the seller does not include the cost of financing the property. For purposes of § 34.203(b)(3)(i)(B), a creditor is not obligated to determine whether and to what extent the agreement is legally binding on both parties.

34.203(b)(3)(iv) Requirements for the additional appraisal.

1. *Determining acquisition dates and prices used in the analysis of the additional appraisal.* For guidance on identifying the date the seller acquired the property, see comment 34.203(b)(3)(i)(A)-3 in this Appendix B. For guidance on identifying the date of the consumer's agreement to acquire the property, *see* comment 34.203(b)(3)(i)(A)-2 in this Appendix B. For guidance on identifying the price at which the seller acquired the property, *see* comment 34.203(b)(3)(i)(B)-1 in this Appendix B. For guidance on identifying the price the consumer is obligated to pay to acquire the property, *see* comment 34.203(b)(3)(i)(B)-2 in this Appendix B.

34.203(b)(3)(v) No charge for additional appraisal.

1. *Fees and mark-ups.* The creditor is prohibited from charging the consumer for the performance of one of the two appraisals required under § 34.203(b)(3)(i), including by imposing a fee specifically for that appraisal or by marking up the interest rate or any other fees payable by the consumer in connection with the higher-risk mortgage loan.

Paragraph 34.203(b)(3)(vi) Creditor's determination under paragraphs (b)(3)(i)(A) and (b)(3)(i)(B) of this section.

34.203(b)(3)(vi)(A) In general.

1. *Reasonable diligence—documentation required.* A creditor acts with reasonable diligence to determine when the seller acquired the property and whether the price at which the seller acquired the property is lower than the price reflected in the consumer's agreement to acquire the property if, for example, the creditor bases its determination on information contained in written source documents, such as:

i. A copy of the recorded deed from the seller.

ii. A copy of a property tax bill.

iii. A copy of any owner's title insurance policy obtained by the seller.

iv. A copy of the RESPA settlement statement from the seller's acquisition (*i.e.,* the HUD–1 or any successor form [138]).

v. A property sales history report or title report from a third-party reporting service.

vi. Sales price data recorded in multiple listing services.

vii. Tax assessment records or transfer tax records obtained from local governments.

viii. An appraisal report signed by an appraiser who certifies that the appraisal was performed in conformity with USPAP that shows any prior transactions for the subject property.

ix. A copy of a title commitment report [139] detailing the seller's ownership of the property, the date it was acquired, or the price at which the seller acquired the property.

x. A property abstract.

2. *Reasonable diligence—oral statements insufficient.* Reliance on oral statements of interested parties, such as the consumer, seller, or mortgage broker, does not constitute reasonable diligence under § 34.203(b)(3)(vi)(A).

34.203(b)(3)(vi)(B) Inability to make the determination under paragraphs (b)(3)(i)(A) and (b)(3)(i)(B) of this subpart.

1. *Lack of information and conflicting information—two appraisals required.* Unless a creditor can demonstrate that the requirement to obtain two appraisals under § 34.203(b)(3)(i) does not apply, the creditor must obtain two written appraisals in compliance with § 34.203(b)(3)(vi)(B). *See also* comment 34.203(b)(3)(vi)(B)–2. For example:

i. Assume a creditor orders and reviews the results of a title search and the seller's acquisition price was not included. In this case, the creditor would not be able to determine whether the price at which the seller acquired the property was lower than the price the consumer is obligated to pay under the consumer's acquisition agreement, pursuant to § 34.203(b)(3)(i)(B). Before extending a higher-risk mortgage loan, the creditor must either: perform additional diligence to obtain information showing the seller's acquisition price and determine whether two written appraisals would be required based on that information; or obtain two written appraisals in compliance with § 34.203(b)(3)(vi)(B). *See also* comment 34.203(b)(3)(vi)(B)–2 in this Appendix B.

ii. Assume a creditor reviews the results of a title search indicating that the last recorded purchase was more than 180 days before the consumer's agreement to acquire the property. Assume also that the creditor subsequently receives an appraisal report indicating that the seller acquired the property fewer than 180 days before the consumer's agreement to acquire the property. In this case, the creditor would not be able to determine whether the seller acquired the property within 180 days of the date of the consumer's agreement to acquire the property from the seller, pursuant to § 34.203(b)(3)(i)(A). Before extending a higher-risk mortgage loan, the creditor must either: perform additional diligence to obtain information confirming the seller's acquisition date and determine whether two written appraisals would be required based on that information; or obtain two written appraisals in compliance with § 34.203(b)(3)(vi)(B). *See also* comment 34.203(b)(3)(vi)(B)–2 in this Appendix B.

2. *Lack of information and conflicting information—requirements for the additional appraisal.* In general, the additional appraisal required under § 34.203(b)(3)(i) should include an analysis of the factors listed in § 34.203(b)(3)(iv)(A)–(C). However, if, following reasonable diligence, a creditor cannot determine whether the criteria in paragraphs (b)(3)(i)(A) and (b)(3)(i)(B) of § 34.203 are met due to a lack of information or conflicting information, the required additional appraisal must include the analyses required under § 34.203(b)(3)(iv)(A) through (C) only to the extent that the information necessary to perform the analysis is known. For example:

i. Assume that a creditor is able, following reasonable diligence, to determine that the date on which the seller acquired the property occurred 180 or fewer days prior to the date of the consumer's agreement to acquire the property. However, the creditor is unable, following reasonable diligence, to determine the price at which the seller acquired the property. In this case, the creditor is required to obtain an additional written appraisal that includes an analysis

[138] The Bureau has developed a successor form to the RESPA settlement statement as explained in the Bureau's proposal for an integrated TILA–RESPA disclosure form. See the Bureau's 2012 TILA–RESPA Proposal.

[139] The ''title commitment report'' is a document from a title insurance company describing the property interest and status of its title, parties with interests in the title and the nature of their claims, issues with the title that must be resolved prior to closing of the transaction between the parties to the transfer, amount and disposition of the premiums, and endorsements on the title policy. This document is issued by the title insurance company prior to the company's issuance of an actual title insurance policy to the property's transferee and/or creditor financing the transaction. In different jurisdictions, this instrument may be referred to by different terms, such as a title commitment, title binder, title opinion, or title report.

under paragraphs (b)(3)(iv)(B) and (b)(3)(iv)(C) of § 34.203 of the changes in market conditions and any improvements made to the property between the date the seller acquired the property and the date of the consumer's agreement to acquire the property. However, the creditor is not required to obtain an additional written appraisal that includes analysis under § 34.203(b)(3)(iv)(A) of the difference between the price at which the seller acquired the property and the price that the consumer is obligated to pay to acquire the property.

34.203(c) Required disclosure.

34.203(c)(1) In general.

1. *Multiple applicants.* When two or more consumers apply for a loan subject to this section, the creditor is required to give the disclosure to only one of the consumers.

34.203(d) Copy of appraisals.

34.203(d)(1) In general.

1. *Multiple applicants.* When two or more consumers apply for a loan subject to this subpart, the creditor is required to give the copy of each required appraisal to only one of the consumers.

34.203(d)(4) No charge for copy of appraisal.

1. *Fees and mark-ups.* The creditor is prohibited from charging the consumer for any copy of an appraisal required to be provided under § 34.203(d)(1), including by imposing a fee specifically for a required copy of an appraisal or by marking up the interest rate or any other fees payable by the consumer in connection with the higher-risk mortgage loan.

PART 164—APPRAISALS

3. The authority citation for Part 164 is revised to read as follows:

Authority: 12 U.S.C. 1462, 1462a, 1463, 1464, 1828(m), 3331 *et seq.,* 5412(b)(2)(B), 15 U.S.C. 1639h.

§§ 164.1–164.8 [Designated as Subpart A]

4. Sections 164.1 through 164.8 are designated as Subpart A.

Subpart A—Appraisals

4a. The heading of subpart A is added to read as set forth above.

5. Subpart B is added to read as follows:

Subpart B—Appraisals for Higher Risk Mortgage Loans

Sec.
164.20 Authority, purpose and scope.
164.21 Application of requirements for higher risk mortgage loans.

164.20 Authority, purpose and scope.

(a) *Authority.* This subpart is issued under 12 U.S.C. 1463, 1464 and 15 U.S.C. 1639h.

(b) *Purpose.* This subpart implements section 129H of the Truth in Lending Act (15 U.S.C. 1639h), which provides that a creditor, including a Federal savings association or its operating subsidiary, may not extend credit in the form of a higher risk mortgage loan without complying with the requirements of section 129H of the Truth in Lending Act (15 U.S.C. 1639h) and the implementing regulations.

(c) *Scope.* This subpart applies to higher risk mortgage loan transactions entered into by Federal savings associations and operating subsidiaries of savings associations.

§ 164.21 Application of requirements for higher risk mortgage loans.

Federal savings associations and their operating subsidiaries may not extend credit in the form of a higher risk mortgage loan without complying with the requirements of Section 129H of the Truth in Lending Act (15 U.S.C. 1639h) and the implementing regulations adopted by the OCC at 12 CFR Part 34, Subpart G.

Board of Governors of the Federal Reserve System

Authority and Issuance

For the reasons stated above, the Board of Governors of the Federal Reserve System proposes to amend Regulation Z, 12 CFR part 226, as follows:

PART 226—TRUTH IN LENDING ACT (REGULATION Z)

6. The authority citation for part 226 is revised to read as follows:

Authority: 12 U.S.C. 3806; 15 U.S.C. 1604, 1637(c)(5), 1639(l), and 1639h; Pub. L. 111–24 section 2, 123 Stat. 1734; Pub. L. 111–203, 124 Stat. 1376.

7. New § 226.43 is added to read as follows:

§ 226.43—Appraisals for higher-risk mortgage loans

(a) *Definitions.* For purposes of this section:

(1) *Certified or licensed appraiser* means a person who is certified or licensed by the State agency in the State in which the property that secures the transaction is located, and who performs the appraisal in conformity with the Uniform Standards of Professional Appraisal Practice and the requirements applicable to appraisers in title XI of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, as amended (12 U.S.C. 3331 *et seq.*), and any implementing regulations, in effect at the time the appraiser signs the appraiser's certification.

(2) Except as provided in paragraph (a)(2)(ii) of this section, *higher-risk mortgage loan* means:

Alternative 1: Annual Percentage Rate—Paragraph (a)(2)(i)

(i) A closed-end consumer credit transaction secured by the consumer's principal dwelling with an annual percentage rate, as determined under 12 CFR 1026.22, that exceeds the average prime offer rate, as defined in 12 CFR 1026.35(a)(2)(ii), for a comparable transaction as of the date the interest rate is set:

(A) By 1.5 or more percentage points, for a loan secured by a first lien with a principal obligation at consummation that does not exceed the limit in effect as of the date the transaction's interest rate is set for the maximum principal obligation eligible for purchase by Freddie Mac;

(B) By 2.5 or more percentage points, for a loan secured by a first lien with a principal obligation at consummation that exceeds the limit in effect as of the date the transaction's interest rate is set for the maximum principal obligation eligible for purchase by Freddie Mac; and

(C) By 3.5 or more percentage points, for a loan secured by a subordinate lien.

Alternative 2: Transaction Coverage Rate—Paragraph (a)(2)(i)

(i) A closed-end consumer credit transaction secured by the consumer's principal dwelling with a transaction coverage rate, as defined in 12 CFR 1026.35(a)(2)(i), that exceeds the average prime offer rate, as defined in 12 CFR 1026.35(a)(2)(ii), for a comparable transaction as of the date the interest rate is set:

(A) By 1.5 or more percentage points, for a loan secured by a first lien with a principal obligation at consummation that does not exceed the limit in effect as of the date the transaction's interest rate is set for the principal obligation eligible for purchase by Freddie Mac;

(B) By 2.5 or more percentage points, for a loan secured by a first lien with a principal obligation at consummation that exceeds the limit in effect as of the date the transaction's interest rate is set for the maximum principal obligation eligible for purchase by Freddie Mac; and

(C) By 3.5 or more percentage points, for a loan secured by a subordinate lien.

(ii) Notwithstanding paragraph (a)(2)(i) of this section, a *higher-risk mortgage loan* does not include:

(A) A qualified mortgage as defined in 12 CFR 1026.43(e).

(B) A reverse-mortgage transaction as defined in 12 CFR 1026.33(a).

(C) A loan secured solely by a residential structure.

(3) *National Registry* means the database of information about State

certified and licensed appraisers maintained by the Appraisal Subcommittee of the Federal Financial Institutions Examination Council.

(4) *State agency* means a ''State appraiser certifying and licensing agency'' recognized in accordance with section 1118(b) of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (12 U.S.C. 3347(b)) and any implementing regulations.

(b) *Appraisals required for higher-risk mortgage loans.* (1) *In general.* A creditor shall not extend a higher-risk mortgage loan to a consumer without obtaining, prior to consummation, a written appraisal performed by a certified or licensed appraiser who conducts a physical visit of the interior of the property that will secure the transaction.

(2) *Safe harbor.* A creditor is deemed to have obtained a written appraisal that meets the requirements of paragraph (b)(1) of this section if the creditor:

(i) Orders that the appraiser perform the written appraisal in conformity with the Uniform Standards of Professional Appraisal Practice and title XI of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, as amended (12 U.S.C. 3331 *et seq.*), and any implementing regulations, in effect at the time the appraiser signs the appraiser's certification;

(ii) Verifies through the National Registry that the appraiser who signed the appraiser's certification was a certified or licensed appraiser in the State in which the appraised property is located as of the date the appraiser signed the appraiser's certification;

(iii) Confirms that the elements set forth in appendix N to this part are addressed in the written appraisal; and

(iv) Has no actual knowledge to the contrary of facts or certifications contained in the written appraisal.

(3) *Additional appraisal for certain higher-risk mortgage loans.* (i) *In general.* A creditor shall not extend a higher-risk mortgage loan to a consumer to finance the acquisition of the consumer's principal dwelling without obtaining, prior to consummation, two written appraisals, if:

(A) The seller acquired the property 180 or fewer days prior to the date of the consumer's agreement to acquire the property from the seller; and

(B) The price at which the seller acquired the property was lower than the price that the consumer is obligated to pay to acquire the property, as specified in the consumer's agreement to acquire the property from the seller, by an amount equal to or greater than *XX.*

(ii) *Different appraisers.* The two appraisals required under paragraph (b)(3)(i) of this section may not be performed by the same certified or licensed appraiser.

(iii) *Relationship to paragraph (b)(1) of this section.* If two appraisals must be obtained under paragraph (b)(3)(i) of this section, each appraisal shall meet the requirements of paragraph (b)(1) of this section.

(iv) *Requirements for the additional appraisal.* In addition to meeting the requirements for an appraisal under paragraph (b)(1) of this section, the additional appraisal must include an analysis of:

(A) The difference between the price at which the seller acquired the property and the price that the consumer is obligated to pay to acquire the property, as specified in the consumer's agreement to acquire the property from the seller;

(B) Changes in market conditions between the date the seller acquired the property and the date of the consumer's agreement to acquire the property; and

(C) Any improvements made to the property between the date the seller acquired the property and the date of the consumer's agreement to acquire the property.

(v) *No charge for the additional appraisal.* If the creditor must obtain two appraisals under paragraph (b)(3)(i) of this section, the creditor may charge the consumer for only one of the appraisals.

(vi) *Creditor's determination under paragraphs (b)(3)(i)(A) and (b)(3)(i)(B) of this section.*

(A) *Reasonable diligence.* A creditor shall exercise reasonable diligence to determine whether the criteria in paragraphs (b)(3)(i)(A) and (b)(3)(i)(B) of this section are met.

(B) *Inability to make the determination under paragraphs (b)(3)(i)(A) and (b)(3)(i)(B) of this section.* If, after exercising reasonable diligence, a creditor cannot determine whether the criteria in paragraphs (b)(3)(i)(A) and (b)(3)(i)(B) of this section are met, the creditor shall not extend a higher-risk mortgage loan without obtaining, prior to consummation, two written appraisals in accordance with paragraphs (b)(3)(ii) through (v) of this section. However, the additional appraisal shall include an analysis of the factors in paragraph (b)(3)(iv) of this section only to the extent that the information necessary for the appraiser to perform the analysis can be determined.

(c) *Required disclosure.* (1) *In general.* A creditor shall disclose the following statement, in writing, to a consumer who applies for a higher-risk mortgage loan: ''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.''

(2) *Timing of disclosure.* The disclosure required by paragraph (c)(1) of this section shall be mailed or delivered not later than the third business day after the creditor receives the consumer's application. If the disclosure is not provided to the consumer in person, the consumer is presumed to have received the disclosures three business days after they are mailed or delivered.

(d) *Copy of appraisals.* (1) *In general.* A creditor shall provide to the consumer a copy of any written appraisal performed in connection with a higher-risk mortgage loan pursuant to the requirements of paragraph (b) of this section.

(2) *Timing.* A creditor shall provide a copy of each written appraisal pursuant to paragraph (d)(1) of this section no later than three business days prior to consummation of the higher-risk mortgage loan.

(3) *Form of copy.* Any copy of a written appraisal required by paragraph (d)(1) of this section may be provided to the applicant in electronic form, subject to compliance with the consumer consent and other applicable provisions of the Electronic Signatures in Global and National Commerce Act (E-Sign Act) (15 U.S.C. 7001 *et seq.*).

(4) *No charge for copy of appraisal.* A creditor shall not charge the applicant for a copy of a written appraisal required to be provided to the consumer pursuant to paragraph (d)(1) of this section.

(e) *Relation to other rules.* These rules were developed jointly by the Federal Reserve Board (Board), the Office of the Comptroller of the Currency (OCC), the Federal Deposit Insurance Corporation, the National Credit Union Administration, the Federal Housing Finance Agency, and the Consumer Financial Protection Bureau (Bureau). These rules are substantively identical to the OCC's and the Bureau's higher-risk mortgage appraisal rules published separately in 12 CFR part 34, subpart G and 12 CFR 164.20 through 164.21 (for the OCC), and 12 CFR 1026.XX (for the Bureau). The Board's rules apply to all creditors who are State member banks, bank holding companies and their subsidiaries (other than a bank), savings and loan holding companies and their subsidiaries (other than a savings and loan association), and uninsured state branches and agencies of foreign banks. Compliance with the Board's rules satisfies the requirements of 15 U.S.C. 1639h.

8. Appendix N to Part 226 is added to read as follows:

Appendix N to Part 226—Appraisal Safe Harbor Review

To qualify for the safe harbor provided in § 226.43(b)(2) a creditor must check the appraisal report to confirm that the written appraisal:

1. Identifies the creditor who ordered the appraisal and the property and the interest being appraised.
2. Indicates whether the contract price was analyzed.
3. Addresses conditions in the property's neighborhood.
4. Addresses the condition of the property and any improvements to the property.
5. Indicates which valuation approaches were used, and includes a reconciliation if more than one valuation approach was used.
6. Provides an opinion of the property's market value and an effective date for the opinion.
7. Indicates that a physical property visit of the interior of the property was performed.
8. Includes a certification signed by the appraiser that the appraisal was prepared in accordance with the requirements of the Uniform Standards of Professional Appraisal Practice.
9. Includes a certification signed by the appraiser that the appraisal was prepared in accordance with the requirements of title XI of the Financial Institutions Reform, Recovery and Enforcement Act of 1989, as amended (12 U.S.C. 3331 *et seq.*), and any implementing regulations.

9. In Supplement I to part 226, new *Section 226.43—Appraisals for Higher-Risk Mortgage Loans* is added to read as follows:

Supplement I to Part 226—Official Interpretations

* * * * *

Section 226.43—Appraisals for Higher-Risk Mortgage Loans

43(a) Definitions.

43(a)(1) Certified or licensed appraiser.

1. *USPAP.* The Uniform Standards of Professional Appraisal Practice (USPAP) are established by the Appraisal Standards Board of the Appraisal Foundation (as defined in 12 U.S.C. 3350(9)). Under § 226.43(a)(1), the relevant USPAP standards are those found in the edition of USPAP in effect at the time the appraiser signs the appraiser's certification.

2. *Appraiser's certification.* The appraiser's certification refers to the certification that must be signed by the appraiser for each appraisal assignment. This requirement is specified in USPAP Standards Rule 2–3.

3. *FIRREA title XI and implementing regulations.* The relevant regulations are those prescribed under section 1110 of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), as amended (12 U.S.C. 3339), that relate to an appraiser's development and reporting of the appraisal in effect at the time the appraiser signs the appraiser's certification. Paragraph (3) of FIRREA section 1110 (12 U.S.C. 3339(3)), which relates to the review of appraisals, is not relevant for determining whether an appraiser is a certified or licensed appraiser under § 226.43(a)(1).

43(a)(2) Higher-risk mortgage loan.

Paragraph 43(a)(2)(i).

1. *Principal dwelling.* The term ''principal dwelling'' has the same meaning under § 226.43(a)(2) as under 12 CFR 1026.2(a)(24). *See* the Official Staff Interpretations to the Bureau's Regulation Z (Supplement I to Part 1026), comment 2(a)(24)–3.

2. *Average prime offer rate.* For guidance on average prime offer rates, see the Official Staff Interpretations to the Bureau's Regulation Z, comment 35(a)(2)–1.

3. *Comparable transaction.* For guidance on determining the average prime offer rate for comparable transactions, see the Official Staff Interpretations to the Bureau's Regulation Z, comments 35(a)(2)–2 and –4.

4. *Rate set.* For guidance on the date the annual percentage rate is set, see the Official Staff Interpretations to the Bureau's Regulation Z, comment 35(a)(2)–3.

Paragraph 43(a)(2)(ii)(C).

1. *Secured solely by a residential structure.* Loans secured solely by a residential structure cannot be ''higher-risk mortgage loans.'' Thus, for example, a loan secured by a manufactured home and the land on which it is sited could be a ''higher-risk mortgage loan.'' By contrast, a loan secured solely by a manufactured home cannot be a ''higher-risk mortgage loan.''

43(b) Appraisals required for higher-risk mortgage loans.

43(b)(1) In general.

1. *Written appraisal—electronic transmission.* To satisfy the requirement that the appraisal be ''written,'' a creditor may obtain the appraisal in paper form or via electronic transmission.

43(b)(2) Safe harbor.

1. *Safe harbor.* A creditor that satisfies the conditions in § 226.43(b)(2)(i) through (iv) will be deemed to have complied with the appraisal requirements of § 226.43(b)(1). A creditor that does not satisfy the conditions in § 226.43(b)(2)(i) through (iv) does not necessarily violate the appraisal requirements of § 226.43(b)(1).

Paragraph 43(b)(2)(iii).

1. *Confirming elements in the appraisal.* To confirm that the elements in appendix N to this part are included in the written appraisal, a creditor need not look beyond the face of the written appraisal and the appraiser's certification.

43(b)(3) Additional appraisal for certain higher-risk mortgage loans.

1. *Acquisition.* For purposes of § 226.43(b)(3), the terms ''acquisition'' and ''acquire'' refer to the acquisition of legal title to the property pursuant to applicable State law, including by purchase.

43(b)(3)(i) In general.

1. *Two appraisals.* An appraisal that was previously obtained in connection with the seller's acquisition or the financing of the seller's acquisition of the property does not satisfy the requirements of § 226.43(b)(3).

Paragraph 43(b)(3)(i)(A).

1. *180-day calculation.* The time period described in § 226.43(b)(3)(i)(A) is calculated by counting the day after the date on which the seller acquired the property, up to and including the date of the consumer's agreement to acquire the property that secures the transaction. *See also* comments 43(b)(3)(i)(A)–2 and –3. For example, assume that the creditor determines that date of the consumer's acquisition agreement is October 15, 2012, and that the seller acquired the property on April 17, 2012. The first day to be counted in the 180-day calculation would be April 18, 2012, and the last day would be October 15, 2012. In this case, the number of days would be 181, so an additional appraisal is not required.

2. *Date of the consumer's agreement to acquire the property.* For the date of the consumer's agreement to acquire the property under § 226.43(b)(3)(i)(A), the creditor should use the date on which the consumer and the seller signed the agreement provided to the creditor by the consumer. The date on which the consumer and the seller signed the agreement might not be the date on which the consumer became contractually obligated under State law to acquire the property. For purposes of § 226.43(b)(3)(i)(A), a creditor is not obligated to determine whether and to what extent the agreement is legally binding on both parties. If the dates on which the consumer and the seller signed the agreement differ, the creditor should use the later of the two dates.

3. *Date seller acquired the property.* For purposes of § 226.43(b)(3)(i)(A), the date on which the seller acquired the property is the date on which the seller became the legal owner of the property pursuant to applicable State law. *See also* comments 43(b)(3)(vi)(A)–1 and –2 and comment (b)(3)(vi)(B)–1.

Paragraph 43(b)(3)(i)(B).

1. *Price at which the seller acquired the property.* The price at which the seller acquired the property refers to the amount paid by the seller to acquire the property. The price at which the seller acquired the property does not include the cost of financing the property. *See also* comments 43(b)(3)(vi)(A)–1 and (b)(3)(vi)(B)–1.

2. *Price the consumer is obligated to pay to acquire the property.* The price the consumer is obligated to pay to acquire the property is the price indicated on the consumer's agreement with the seller to acquire the property. *See* comment 43(b)(3)(i)(A)–2. The price the consumer is obligated to pay to acquire the property from the seller does not include the cost of financing the property. For purposes of § 226.43(b)(3)(i)(B), a creditor is not obligated to determine whether and to what extent the agreement is legally binding on both parties.

43(b)(3)(iv) Requirements for the additional appraisal.

1. *Determining acquisition dates and prices used in the analysis of the additional appraisal.* For guidance on identifying the date the seller acquired the property, see comment 43(b)(3)(i)(A)–3. For guidance on identifying the date of the consumer's agreement to acquire the property, see comment 43(b)(3)(i)(A)–2. For guidance on identifying the price at which the seller

acquired the property, see comment 43(b)(3)(i)(B)–1. For guidance on identifying the price the consumer is obligated to pay to acquire the property, see comment 43(b)(3)(i)(B)–2.

43(b)(3)(v) No charge for additional appraisal.

1. *Fees and mark-ups.* The creditor is prohibited from charging the consumer for the performance of one of the two appraisals required under § 226.43(b)(3)(i), including by imposing a fee specifically for that appraisal or by marking up the interest rate or any other fees payable by the consumer in connection with the higher-risk mortgage loan.

Paragraph 43(b)(3)(vi) Creditor's determination under paragraphs (b)(3)(i)(A) and (b)(3)(i)(B) of this section.

43(b)(3)(vi)(A) In general.

1. *Reasonable diligence—documentation required.* A creditor acts with reasonable diligence to determine when the seller acquired the property and whether the price at which the seller acquired the property is lower than the price reflected in the consumer's agreement to acquire the property if, for example, the creditor bases its determination on information contained in written source documents, such as:

i. A copy of the recorded deed from the seller.

ii. A copy of a property tax bill.

iii. A copy of any owner's title insurance policy obtained by the seller.

iv. A copy of the RESPA settlement statement from the seller's acquisition (*i.e.,* the HUD–1 or any successor form [140]).

v. A property sales history report or title report from a third-party reporting service.

vi. Sales price data recorded in multiple listing services.

vii. Tax assessment records or transfer tax records obtained from local governments.

viii. An appraisal report signed by an appraiser who certifies that the appraisal was performed in conformity with USPAP that shows any prior transactions for the subject property.

ix. A copy of a title commitment report [141] detailing the seller's ownership of the property, the date it was acquired, or the price at which the seller acquired the property.

x. A property abstract.

2. *Reasonable diligence—oral statements insufficient.* Reliance on oral statements of interested parties, such as the consumer, seller, or mortgage broker, does not constitute reasonable diligence under § 226.43(b)(3)(vi)(A).

43(b)(3)(vi)(B) Inability to make the determination under paragraphs (b)(3)(i)(A) and (b)(3)(i)(B) of this section.

1. *Lack of information and conflicting information—two appraisals required.* Unless a creditor can demonstrate that the requirement to obtain two appraisals under § 226.43(b)(3)(i) does not apply, the creditor must obtain two written appraisals in compliance with § 226.43(b)(3)(vi)(B). *See also* comment 43(b)(3)(vi)(B)–2. For example:

i. Assume a creditor orders and reviews the results of a title search and the seller's acquisition price was not included. In this case, the creditor would not be able to determine whether the price at which the seller acquired the property was lower than the price the consumer is obligated to pay under the consumer's acquisition agreement, pursuant to § 226.43(b)(3)(i)(B). Before extending a higher-risk mortgage loan, the creditor must either: Perform additional diligence to obtain information showing the seller's acquisition price and determine whether two written appraisals would be required based on that information; or obtain two written appraisals in compliance with § 226.43(b)(3)(vi)(B). *See* also comment 43(b)(3)(vi)(B)-2.

ii. Assume a creditor reviews the results of a title search indicating that the last recorded purchase was more than 180 days before the consumer's agreement to acquire the property. Assume also that the creditor subsequently receives an appraisal report indicating that the seller acquired the property fewer than 180 days before the consumer's agreement to acquire the property. In this case, the creditor would not be able to determine whether seller acquired the property within 180 days of the date of the consumer's agreement to acquire the property from the seller, pursuant to § 226.43(b)(3)(i)(A). Before extending a higher-risk mortgage loan, the creditor must either: Perform additional diligence to obtain information confirming the seller's acquisition date and determine whether two written appraisals would be required based on that information; or obtain two written appraisals in compliance with § 226.43(b)(3)(vi)(B). *See also* comment 43(b)(3)(vi)(B)-2.

2. *Lack of information and conflicting information—requirements for the additional appraisal.* In general, the additional appraisal required under § 226.43(b)(3)(i) should include an analysis of the factors listed in § 226.43(b)(3)(iv)(A) through (C). However, if, following reasonable diligence, a creditor cannot determine whether the criteria in paragraphs (b)(3)(i)(A) and (b)(3)(i)(B) of § 226.43 are met due to a lack of information or conflicting information, the required additional appraisal must include the analyses required under § 226.43(b)(3)(iv)(A) through (C) only to the extent that the information necessary to perform the analysis is known. For example:

i. Assume that a creditor is able, following reasonable diligence, to determine that the date on which the seller acquired the property occurred 180 or fewer days prior to the date of the consumer's agreement to acquire the property. However, the creditor is unable, following reasonable diligence, to determine the price at which the seller acquired the property. In this case, the creditor is required to obtain an additional written appraisal that includes an analysis under paragraphs (b)(3)(iv)(B) and (b)(3)(iv)(C) of § 226.43 of the changes in market conditions and any improvements made to the property between the date the seller acquired the property and the date of the consumer's agreement to acquire the property. However, the creditor is not required to obtain an additional written appraisal that includes analysis under § 226.43(b)(3)(iv)(A) of the difference between the price at which the seller acquired the property and the price that the consumer is obligated to pay to acquire the property.

43(c) Required disclosure.

43(c)(1) In general.

1. *Multiple applicants.* When two or more consumers apply for a loan subject to this section, the creditor is required to give the disclosure to only one of the consumers.

43(d) Copy of appraisals.

43(d)(1) In general.

1. *Multiple applicants.* When two or more consumers apply for a loan subject to this section, the creditor is required to give the copy of each required appraisal to only one of the consumers.

43(d)(4) No charge for copy of appraisal.

1. *Fees and mark-ups.* The creditor is prohibited from charging the consumer for any copy of an appraisal required to be provided under § 226.43(d)(1), including by imposing a fee specifically for a required copy of an appraisal or by marking up the interest rate or any other fees payable by the consumer in connection with the higher-risk mortgage loan.

National Credit Union Administration

Authority and Issuance

For the reasons discussed above, NCUA proposes to amend 12 CFR part 722 as follows:

PART 722—APPRAISALS

10. The authority citation for part 722 is revised to read as follows:

Authority: 12 U.S.C. 1766, 1789 and 3339. Section 722.3(f) is also issued under 15 U.S.C. 1639h.

11. In § 722.3, add paragraph (f) to read as follows:

§ 722.3 Appraisals required; transactions requiring a State certified or licensed appraiser.

* * * * *

(f) *Higher-risk mortgages.* A credit union may not extend credit to a consumer in the form of a higher-risk mortgage as defined in the Truth in Lending Act, 15 U.S.C. 1601 et seq., without meeting the requirements of 15 U.S.C. 1639h and its implementing

[140] The Bureau has developed a successor form to the RESPA settlement statement as explained in the Bureau's proposal for an integrated TILA–RESPA disclosure form. See the Bureau's TILA–RESPA Proposal.

[141] The ''title commitment report'' is a document from a title insurance company describing the property interest and status of its title, parties with interests in the title and the nature of their claims, issues with the title that must be resolved prior to closing of the transaction between the parties to the transfer, amount and disposition of the premiums, and endorsements on the title policy. This document is issued by the title insurance company prior to the company's issuance of an actual title insurance policy to the property's transferee and/or creditor financing the transaction. In different jurisdictions, this instrument may be referred to by different terms, such as a title commitment, title binder, title opinion, or title report.

regulations in Regulation Z, 12 CFR 1026.XX.

Bureau of Consumer Financial Protection

Authority and Issuance

For the reasons set forth in the preamble, the Bureau proposes to amend Regulation Z, 12 CFR part 1026, as follows:

PART 1026—TRUTH IN LENDING ACT (REGULATION Z)

12. The authority citation for part 1026 continues to read as follows:

Authority: 12 U.S.C. 5512, 5581; 15 U.S.C. 1601 *et seq.*

Subpart C—Closed-End Credit

13. New § 1026.XX is added to read as follows:

§ 1026.XX Appraisals for higher-risk mortgage loans.

(a) *Definitions.* For purposes of this section:

(1) *Certified or licensed appraiser* means a person who is certified or licensed by the State agency in the State in which the property that secures the transaction is located, and who performs the appraisal in conformity with the Uniform Standards of Professional Appraisal Practice and the requirements applicable to appraisers in title XI of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, as amended (12 U.S.C. 3331 *et seq.*), and any implementing regulations in effect at the time the appraiser signs the appraiser's certification.

(2) Except as provided in paragraph (a)(2)(ii) of this section, *higher-risk mortgage loan* means:

Alternative 1: Annual Percentage Rate—Paragraph (a)(2)(i)

(i) A closed-end consumer credit transaction secured by the consumer's principal dwelling with an annual percentage rate, as determined under § 1026.22, that exceeds the average prime offer rate, as defined in § 1026.35(a)(2)(ii), for a comparable transaction as of the date the interest rate is set:

(A) By 1.5 or more percentage points, for a loan secured by a first lien with a principal obligation at consummation that does not exceed the limit in effect as of the date the transaction's interest rate is set for the maximum principal obligation eligible for purchase by Freddie Mac;

(B) By 2.5 or more percentage points, for a loan secured by a first lien with a principal obligation at consummation that exceeds the limit in effect as of the date the transaction's interest rate is set for the maximum principal obligation eligible for purchase by Freddie Mac; and

(C) By 3.5 or more percentage points, for a loan secured by a subordinate lien.

Alternative 2: Transaction Coverage Rate—Paragraph (a)(2)(i)

(i) A closed-end consumer credit transaction secured by the consumer's principal dwelling with a transaction coverage rate, as defined in § 1026.35(a)(2)(i), that exceeds the average prime offer rate, as defined in § 1026.35(a)(2)(ii), for a comparable transaction as of the date the interest rate is set:

(A) By 1.5 or more percentage points, for a loan secured by a first lien with a principal obligation at consummation that does not exceed the limit in effect as of the date the transaction's interest rate is set for the maximum principal obligation eligible for purchase by Freddie Mac;

(B) By 2.5 or more percentage points, for a loan secured by a first lien with a principal obligation at consummation that exceeds the limit in effect as of the date the transaction's interest rate is set for the maximum principal obligation eligible for purchase by Freddie Mac; and

(C) By 3.5 or more percentage points, for a loan secured by a subordinate lien.

(ii) Notwithstanding paragraph (a)(2)(i) of this section, a *higher-risk mortgage loan* does not include:

(A) A qualified mortgage as defined in § 1026.43(e).

(B) A reverse-mortgage transaction as defined in § 1026.33(a).

(C) A loan secured solely by a residential structure.

(3) *National Registry* means the database of information about State certified and licensed appraisers maintained by the Appraisal Subcommittee of the Federal Financial Institutions Examination Council.

(4) *State agency* means a ''State appraiser certifying and licensing agency'' recognized in accordance with section 1118(b) of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (12 U.S.C. 3347(b)) and any implementing regulations.

(b) *Appraisals required for higher-risk mortgage loans.* (1) *In general.* A creditor shall not extend a higher-risk mortgage loan to a consumer without obtaining, prior to consummation, a written appraisal of the property to be mortgaged. The appraisal must be performed by a certified or licensed appraiser who conducts a physical visit of the interior of the property that will secure the transaction.

(2) *Safe harbor.* A creditor is deemed to have obtained a written appraisal that meets the requirements of paragraph (b)(1) of this section if the creditor:

(i) Orders that the appraiser perform the appraisal in conformity with the Uniform Standards of Professional Appraisal Practice and title XI of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, as amended (12 U.S.C. 3331 *et seq.*), and any implementing regulations, in effect at the time the appraiser signs the appraiser's certification;

(ii) Verifies through the National Registry that the appraiser who signed the appraiser's certification was a certified or licensed appraiser in the State in which the appraised property is located as of the date the appraiser signed the appraiser's certification;

(iii) Confirms that the elements set forth in appendix N to this part are addressed in the written appraisal; and

(iv) Has no actual knowledge to the contrary of facts or certifications contained in the written appraisal.

(3) *Additional appraisal for certain higher-risk mortgage loans.* (i) *In general.* A creditor shall not extend a higher-risk mortgage loan to a consumer to finance the acquisition of the consumer's principal dwelling without obtaining, prior to consummation, two written appraisals, if:

(A) The seller acquired the property 180 or fewer days prior to the date of the consumer's agreement to acquire the property from the seller; and

(B) The price at which the seller acquired the property was lower than the price that the consumer is obligated to pay to acquire the property, as specified in the consumer's agreement to acquire the property from the seller, by an amount equal to or greater than *XX.*

(ii) *Different appraisers.* The two appraisals required under paragraph (b)(3)(i) of this section may not be performed by the same certified or licensed appraiser.

(iii) *Relationship to paragraph (b)(1) of this section.* If two appraisals must be obtained under paragraph (b)(3)(i) of this section, each appraisal shall meet the requirements of paragraph (b)(1) of this section.

(iv) *Requirements for the additional appraisal.* In addition to meeting the requirements for an appraisal under paragraph (b)(1) of this section, the additional appraisal must include an analysis of:

(A) The difference between the price at which the seller acquired the property and the price that the consumer is obligated to pay to acquire the property, as specified in the consumer's agreement to acquire the property from the seller;

(B) Changes in market conditions between the date the seller acquired the property and the date of the consumer's agreement to acquire the property; and

(C) Any improvements made to the property between the date the seller acquired the property and the date of the consumer's agreement to acquire the property.

(v) *No charge for the additional appraisal.* If the creditor must obtain two appraisals under paragraph (b)(3)(i) of this section, the creditor may charge the consumer for only one of the appraisals.

(vi) *Creditor's determination under paragraphs (b)(3)(i)(A) and (b)(3)(i)(B) of this section.*

(A) *Reasonable diligence.* A creditor shall exercise reasonable diligence to determine whether the criteria in paragraphs (b)(3)(i)(A) and (b)(3)(i)(B) of this section are met.

(B) *Inability to make the determination under paragraphs (b)(3)(i)(A) and (b)(3)(i)(B) of this section.* If, after exercising reasonable diligence, a creditor cannot determine whether the criteria in paragraphs (b)(3)(i)(A) and (b)(3)(i)(B) of this section are met, the creditor shall not extend a higher-risk mortgage loan without obtaining, prior to consummation, two written appraisals in accordance with paragraphs (b)(3)(ii) through (v) of this section. However, the additional appraisal shall include an analysis of the factors in paragraph (b)(3)(iv) of this section only to the extent that the information necessary for the appraiser to perform the analysis can be determined.

(c) *Required disclosure.* (1) *In general.* A creditor shall disclose the following statement, in writing, to a consumer who applies for a higher-risk mortgage loan: ''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.''

(2) *Timing of disclosure.* The disclosure required by paragraph (c)(1) of this section shall be mailed or delivered not later than the third business day after the creditor receives the consumer's application. If the disclosure is not provided to the consumer in person, the consumer is presumed to have received the disclosures three business days after they are mailed or delivered.

(d) *Copy of appraisals.* (1) *In general.* A creditor shall provide to the consumer a copy of any written appraisal performed in connection with a higher-risk mortgage loan pursuant to the requirements of paragraph (b) of this section.

(2) *Timing.* A creditor shall provide a copy of each written appraisal pursuant to paragraph (d)(1) of this section no later than three business days prior to consummation of the higher-risk mortgage loan.

(3) *Form of copy.* Any copy of a written appraisal required by paragraph (d)(1) of this section may be provided to the applicant in electronic form, subject to compliance with the consumer consent and other applicable provisions of the Electronic Signatures in Global and National Commerce Act (E-Sign Act) (15 U.S.C. 7001 *et seq.*).

(4) *No charge for copy of appraisal.* A creditor shall not charge the applicant for a copy of a written appraisal required to be provided to the consumer pursuant to paragraph (d)(1) of this section.

(e) *Relation to other rules.* These rules were developed jointly by the Federal Reserve Board (Board), the Office of the Comptroller of the Currency (OCC), the Federal Deposit Insurance Corporation, the National Credit Union Administration, the Federal Housing Finance Agency, and the Bureau. These rules are substantively identical to the Board's and the OCC's higher-risk mortgage appraisal rules published separately in 12 CFR 226.43 (for the Board), 12 CFR part 34, subpart G and 12 CFR 164.20 through 34.21 (for the OCC).

14. New Appendix N to Part 1026 is added to read as follows:

Appendix N to Part 1026—Appraisal Safe Harbor Review

To qualify for the safe harbor provided in § 1026.XX(b)(2) a creditor must check to confirm that the written appraisal:

1. Identifies the creditor who ordered the appraisal and the property and the interest being appraised.
2. Indicates whether the contract price was analyzed.
3. Addresses conditions in the property's neighborhood.
4. Addresses the condition of the property and any improvements to the property.
5. Indicates which valuation approaches were used, and includes a reconciliation if more than one valuation approach was used.
6. Provides an opinion of the property's market value and an effective date for the opinion.
7. Indicates that a physical property visit of the interior of the property was performed.
8. Includes a certification signed by the appraiser that the appraisal was prepared in accordance with the requirements of the Uniform Standards of Professional Appraisal Practice.
9. Includes a certification signed by the appraiser that the appraisal was prepared in accordance with the requirements of title XI of the Financial Institutions Reform, Recovery and Enforcement Act of 1989, as amended (12 U.S.C. 3331 *et seq.*), and any implementing regulations.

15. In Supplement I to part 1026, new *Section 1026.XX—Appraisals for Higher-Risk Mortgage Loans* is added to read as follows:

Supplement I to Part 1026—Official Interpretations

* * * * *

Section 1026.XX—Appraisals for Higher-Risk Mortgage Loans

XX(a) Definitions.

XX(a)(1) Certified or licensed appraiser.

1. *USPAP.* The Uniform Standards of Professional Appraisal Practice (USPAP) are established by the Appraisal Standards Board of the Appraisal Foundation (as defined in 12 U.S.C. 3350(9)). Under § 1026.XX(a)(1), the relevant USPAP standards are those found in the edition of USPAP in effect at the time the appraiser signs the appraiser's certification.

2. *Appraiser's certification.* The appraiser's certification refers to the certification that must be signed by the appraiser for each appraisal assignment. This requirement is specified in USPAP Standards Rule 2–3.

3. *FIRREA title XI and implementing regulations.* The relevant regulations are those prescribed under section 1110 of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), as amended (12 U.S.C. 3339), that relate to an appraiser's development and reporting of the appraisal in effect at the time the appraiser signs the appraiser's certification. Paragraph (3) of FIRREA section 1110 (12 U.S.C. 3339(3)), which relates to the review of appraisals, is not relevant for determining whether an appraiser is a certified or licensed appraiser under § 1026.XX(a)(1).

XX(a)(2) Higher-risk mortgage loan.

Paragraph XX(a)(2)(i).

1. *Principal dwelling.* The term ''principal dwelling'' has the same meaning under § 1026.XX(a)(2) as under § 1026.2(a)(24). *See* comment 2(a)(24)–3.

2. *Average prime offer rate.* For guidance on average prime offer rates, see comment 35(a)(2)–1.

3. *Comparable transaction.* For guidance on determining the average prime offer rate for comparable transactions, see comments 35(a)(2)–2 and –4.

4. *Rate set.* For guidance on the date the annual percentage rate is set, see comment 35(a)(2)–3.

Paragraph XX(a)(2)(ii)(C).

1. *Secured solely by a residential structure.* Loans secured solely by a residential structure cannot be ''higher-risk mortgage loans.'' Thus, for example, a loan secured by a manufactured home and the land on which it is sited could be a ''higher-risk mortgage loan.'' By contrast, a loan secured solely by a manufactured home cannot be a ''higher-risk mortgage loan.''

XX(b) Appraisals required for higher-risk mortgage loans.

XX(b)(1) In general.

1. *Written appraisal—electronic transmission.* To satisfy the requirement that the appraisal be ''written,'' a creditor may obtain the appraisal in paper form or via electronic transmission.

XX(b)(2) Safe harbor.

1. *Safe harbor.* A creditor that satisfies the conditions in § 1026.XX(b)(2)(i) through (iv) will be deemed to have complied with the appraisal requirements of § 1026.XX(b)(1). A creditor that does not satisfy the conditions in § 1026.XX(b)(2)(i) through (iv) does not necessarily violate the appraisal requirements of § 1026.XX(b)(1).

Paragraph XX(b)(2)(iii).

1. *Confirming elements in the appraisal.* To confirm that the elements in appendix N to this part are included in the written appraisal, a creditor need not look beyond the face of the written appraisal and the appraiser's certification.

XX(b)(3) Additional appraisal for certain higher-risk mortgage loans.

1. *Acquisition.* For purposes of § 1026.XX(b)(3), the terms ''acquisition'' and ''acquire'' refer to the acquisition of legal title to the property pursuant to applicable State law, including by purchase.

XX(b)(3)(i) In general.

1. *Two appraisals.* An appraisal that was previously obtained in connection with the seller's acquisition or the financing of the seller's acquisition of the property does not satisfy the requirements of § 1026.XX(b)(3).

Paragraph XX(b)(3)(i)(A).

1. *180-day calculation.* The time period described in § 1026.XX(b)(3)(i)(A) is calculated by counting the day after the date on which the seller acquired the property, up to and including the date of the consumer's agreement to acquire the property that secures the transaction. *See also* comments XX(b)(3)(i)(A)–2 and –3. For example, assume that the creditor determines that date of the consumer's acquisition agreement is October 15, 2012, and that the seller acquired the property on April 17, 2012. The first day to be counted in the 180-day calculation would be April 18, 2012, and the last day would be October 15, 2012. In this case, the number of days would be 181, so an additional appraisal is not required.

2. *Date of the consumer's agreement to acquire the property.* For the date of the consumer's agreement to acquire the property under § 1026.XX(b)(3)(i)(A), the creditor should use the date on which the consumer and the seller signed the agreement provided to the creditor by the consumer. The date on which the consumer and the seller signed the agreement might not be the date on which the consumer became contractually obligated under State law to acquire the property. For purposes of § 1026.XX(b)(3)(i)(A), a creditor is not obligated to determine whether and to what extent the agreement is legally binding on both parties. If the dates on which the consumer and the seller signed the agreement differ, the creditor should use the later of the two dates.

3. *Date seller acquired the property.* For purposes of § 1026.XX(b)(3)(i)(A), the date on which the seller acquired the property is the date on which the seller became the legal owner of the property pursuant to applicable State law. *See also* comments XX(b)(3)(vi)(A)–1 and –2 and comment (b)(3)(vi)(B)–1.

Paragraph XX(b)(3)(i)(B).

1. *Price at which the seller acquired the property.* The price at which the seller acquired the property refers to the amount paid by the seller to acquire the property. The price at which the seller acquired the property does not include the cost of financing the property. *See also* comments XX(b)(3)(vi)(A)–1 and (b)(3)(vi)(B)–1.

2. *Price the consumer is obligated to pay to acquire the property.* The price the consumer is obligated to pay to acquire the property is the price indicated on the consumer's agreement with the seller to acquire the property. *See* comment XX(b)(3)(i)(A)–2. The price the consumer is obligated to pay to acquire the property from the seller does not include the cost of financing the property. For purposes of § 1026.XX(b)(3)(i)(B), a creditor is not obligated to determine whether and to what extent the agreement is legally binding on both parties.

XX(b)(3)(iv) Requirements for the additional appraisal.

1. *Determining acquisition dates and prices used in the analysis of the additional appraisal.* For guidance on identifying the date the seller acquired the property, see comment XX(b)(3)(i)(A)–3. For guidance on identifying the date of the consumer's agreement to acquire the property, see comment XX(b)(3)(i)(A)–2. For guidance on identifying the price at which the seller acquired the property, see comment XX(b)(3)(i)(B)–1. For guidance on identifying the price the consumer is obligated to pay to acquire the property, see comment XX(b)(3)(i)(B)–2.

XX(b)(3)(v) No charge for additional appraisal.

1. *Fees and mark-ups.* The creditor is prohibited from charging the consumer for the performance of one of the two appraisals required under § 1026.XX(b)(3)(i), including by imposing a fee specifically for that appraisal or by marking up the interest rate or any other fees payable by the consumer in connection with the higher-risk mortgage loan.

Paragraph XX(b)(3)(vi) Creditor's determination under paragraphs (b)(3)(i)(A) and (b)(3)(i)(B) of this section.

XX(b)(3)(vi)(A) In general.

1. *Reasonable diligence—documentation required.* A creditor acts with reasonable diligence to determine when the seller acquired the property and whether the price at which the seller acquired the property is lower than the price reflected in the consumer's agreement to acquire the property if, for example, the creditor bases its determination on information contained in written source documents, such as:

i. A copy of the recorded deed from the seller.

ii. A copy of a property tax bill.

iii. A copy of any owner's title insurance policy obtained by the seller.

iv. A copy of the RESPA settlement statement from the seller's acquisition (*i.e.,* the HUD–1 or any successor form [142]).

v. A property sales history report or title report from a third-party reporting service.

vi. Sales price data recorded in multiple listing services.

vii. Tax assessment records or transfer tax records obtained from local governments.

viii. A written appraisal signed by an appraiser who certifies that the appraisal was performed in conformity with USPAP that shows any prior transactions for the subject property.

ix. A copy of a title commitment report [143] detailing the seller's ownership of the property, the date it was acquired, or the price at which the seller acquired the property.

x. A property abstract.

2. *Reasonable diligence—oral statements insufficient.* Reliance on oral statements of interested parties, such as the consumer, seller, or mortgage broker, does not constitute reasonable diligence under § 1026.XX(b)(3)(vi)(A).

XX(b)(3)(vi)(B) Inability to make the determination under paragraphs (b)(3)(i)(A) and (b)(3)(i)(B) of this section.

1. *Lack of information and conflicting information—two appraisals required.* Unless a creditor can demonstrate that the requirement to obtain two appraisals under § 1026.XX(b)(3)(i) does not apply, the creditor must obtain two written appraisals in compliance with § 1026.XX(b)(3)(vi)(B). *See also* comment XX(b)(3)(vi)(B)–2. For example:

i. Assume a creditor orders and reviews the results of a title search and the seller's acquisition price was not included. In this case, the creditor would not be able to determine whether the price at which the seller acquired the property was lower than the price the consumer is obligated to pay under the consumer's acquisition agreement, pursuant to § 1026.XX(b)(3)(i)(B). Before extending a higher-risk mortgage loan, the creditor must either: perform additional diligence to obtain information showing the seller's acquisition price and determine whether two written appraisals would be required based on that information; or obtain two written appraisals in compliance with § 1026.XX(b)(3)(vi)(B). *See* also comment XX(b)(3)(vi)(B)–2.

ii. Assume a creditor reviews the results of a title search indicating that the last recorded

[142] The Bureau has developed a successor form to the RESPA settlement statement as explained in the Bureau's proposal for an integrated TILA–RESPA disclosure form. See the Bureau's 2012 TILA–RESPA Proposal.

[143] The ''title commitment report'' is a document from a title insurance company describing the property interest and status of its title, parties with interests in the title and the nature of their claims, issues with the title that must be resolved prior to closing of the transaction between the parties to the transfer, amount and disposition of the premiums, and endorsements on the title policy. This document is issued by the title insurance company prior to the company's issuance of an actual title insurance policy to the property's transferee and/or creditor financing the transaction. In different jurisdictions, this instrument may be referred to by different terms, such as a title commitment, title binder, title opinion, or title report.

purchase was more than 180 days before the consumer's agreement to acquire the property. Assume also that the creditor subsequently receives a written appraisal indicating that the seller acquired the property fewer than 180 days before the consumer's agreement to acquire the property. In this case, the creditor would not be able to determine whether seller acquired the property within 180 days of the date of the consumer's agreement to acquire the property from the seller, pursuant to § 1026.XX(b)(3)(i)(A). Before extending a higher-risk mortgage loan, the creditor must either: perform additional diligence to obtain information confirming the seller's acquisition date and determine whether two written appraisals would be required based on that information; or obtain two written appraisals in compliance with § 1026.XX(b)(3)(vi)(B). *See also* comment XX(b)(3)(vi)(B)–2.

2. *Lack of information and conflicting information—requirements for the additional appraisal.* In general, the additional appraisal required under § 1026.XX(b)(3)(i) should include an analysis of the factors listed in § 1026.XX(b)(3)(iv)(A) through (C). However, if, following reasonable diligence, a creditor cannot determine whether the criteria in paragraphs (b)(3)(i)(A) and (b)(3)(i)(B) of § 1026.XX are met due to a lack of information or conflicting information, the required additional appraisal must include the analyses required under § 1026.XX(b)(3)(iv)(A) through (C) only to the extent that the information necessary to perform the analysis is known. For example:

i. Assume that a creditor is able, following reasonable diligence, to determine that the date on which the seller acquired the property occurred 180 or fewer days prior to the date of the consumer's agreement to acquire the property. However, the creditor is unable, following reasonable diligence, to determine the price at which the seller acquired the property. In this case, the creditor is required to obtain an additional written appraisal that includes an analysis under paragraphs (b)(3)(iv)(B) and (b)(3)(iv)(C) of § 1026.XX of the changes in market conditions and any improvements made to the property between the date the seller acquired the property and the date of the consumer's agreement to acquire the property. However, the creditor is not required to obtain an additional written appraisal that includes analysis under § 1026.XX(b)(3)(iv)(A) of the difference between the price at which the seller acquired the property and the price that the consumer is obligated to pay to acquire the property.

XX(c) Required disclosure.

XX(c)(1) In general.

1. *Multiple applicants.* When two or more consumers apply for a loan subject to this section, the creditor is required to give the disclosure to only one of the consumers.

XX(d) Copy of appraisals.

XX(d)(1) In general.

1. *Multiple applicants.* When two or more consumers apply for a loan subject to this section, the creditor is required to give the copy of each required appraisal to only one of the consumers.

XX(d)(4) No charge for copy of appraisal.

1. *Fees and mark-ups.* The creditor is prohibited from charging the consumer for any copy of an appraisal required to be provided under § 1026.XX(d)(1), including by imposing a fee specifically for a required copy of an appraisal or by marking up the interest rate or any other fees payable by the consumer in connection with the higher-risk mortgage loan.

Federal Housing Finance Agency

Authority and Issuance

For the reasons stated in the Supplementary Information, and under the authority of 15 U.S.C. 1639h and 12 U.S.C. 4511(b), 4526, and 4617, the Federal Housing Finance Agency proposes to add Part 1222 to subchapter B of chapter XII of title 12 of the Code of Federal Regulations as follows:

Chapter XII—Federal Housing Finance Agency

Subchapter B—Entity Regulations

PART 1222—APPRAISALS

Subpart A—Requirements for Higher-Risk Mortgages

Authority: 12 U.S.C. 4511(b), 4526, and 4617; 15 U.S.C. 1639h (TILA).

§ 1222.1 Purpose and scope.

This subpart cross-references the requirement that creditors extending credit in the form of higher-risk mortgage loans comply with Section 129H of the Truth-in-Lending Act (TILA), 15 U.S.C. 1639h, and its implementing regulations in Regulation Z, 12 CFR 1026.XX. Neither the Banks nor the Enterprises is subject to Section 129H of TILA or 12 CFR 1026.XX. Originators of higher-risk mortgage loans, including Bank members and institutions that sell mortgage loans to the Enterprises, are subject to those provisions. A failure of those institutions to comply with Section 129H of TILA and 12 CFR 1026.XX may limit their ability to sell such loans to the Banks or Enterprises or to pledge such loans to the Banks as collateral, to the extent provided in the parties' agreements.

§ 1222.2 Reservation of authority.

Nothing in this subpart A shall be read to limit the authority of the Director of the Federal Housing Finance Agency to take supervisory or enforcement action, including action to address unsafe and unsound practices or conditions, or violations of law. In addition, nothing in this subpart A shall be read to limit the authority of the Director to impose requirements for any purchase of higher-risk mortgage loans by an Enterprise or a Federal Home Loan Bank, or acceptance of higher-risk mortgage loans as collateral to secure advances by a Federal Home Loan Bank.

Subparts B to Z—[Reserved]

By order of the Board of Governors of the Federal Reserve System.

August 14, 2012.

Margaret McCloskey Shanks,

Associate Secretary of the Board.

Dated: August 13, 2012.

Richard Cordray,

Director, Bureau of Consumer Financial Protection.

This rule is being proposed by the FDIC jointly with the other agencies as mandated by section 129H of the Truth in Lending Act as added by section 1471 of the Dodd-Frank Wall Street Reform and Consumer Protection Act.

By order of the Board of Directors.

Dated at Washington, DC, this 13th day of August, 2012.

Robert E. Feldman,

Executive Secretary. Federal Deposit Insurance Corporation.

Dated August 14, 2012.

Edward J. DeMarco,

Acting Director, Federal Housing Finance Agency.

By the National Credit Union Administration Board.

Dated: August 14, 2012.

Jon J. Canerday

Acting Secretary of the Board

Dated: August 13, 2012.

Thomas J. Curry,

Comptroller of the Currency.

[FR Doc. 2012–20432 Filed 8–28–12; 4:15 pm]

BILLING CODE 4810–AM–P; 4810–33–P; 6210–01–P; 6714–01–P; 7535–01–P