

A Primer on Customary and Reasonable Fees under TILA

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The Dodd-Frank Act

- The Dodd-Frank Act, created enforceable federal appraisal independence standards as a stand-alone section within the Truth in Lending Act (“TILA”).
- Section 129E(i) of TILA provides:

“(1) IN GENERAL.—Lenders and their agents shall compensate fee appraisers at a rate that is customary and reasonable for appraisal services performed in the market area of the property being appraised. Evidence for such fees may be established by objective third-party information, such as government agency fee schedules, academic studies, and independent private sector surveys.

Fee studies shall exclude assignments ordered by known appraisal management companies.

In the case of an appraisal involving a complex assignment, the customary and reasonable fee may reflect the increased time, difficulty, and scope of the work required for such an appraisal and include an amount over and above the customary and reasonable fee for non-complex assignments.”

Interim Final Regulation

- The Dodd-Frank Act charged the Federal Reserve Board (FRB) with issuing interim final regulations to identify acts or practices that violate appraisal independence standards and to define any term in Section 129E of TILA no later than 90 days after the enactment of the Mortgage Reform Act.
- On October 28, 2010 the FRB published its Interim Final Rule (the “Rule”). The Rule took effect December 27, 2010, and compliance became mandatory April 1, 2011.
 - Title X of the Dodd-Frank Act transferred rulemaking authority to the CFPB on July 21, 2011.
 - The Rule is now codified in 12 C.F.R. § 1026.42.

Interim Final Regulation (continued)

- In the Rule, the FRB concludes that the marketplace should be the primary determiner of the value of “appraisal services”
 - In reaching that conclusion, the FRB relied on Mortgagee Letter 2009-28.
- Consistent with that premise, under the Rule a creditor can:
 - Negotiate with an appraiser for an assignment in good faith; and
 - Communicate to an appraiser rates submitted by other appraisers for that assignment.

The Rule

“In any covered transaction, the creditor and its agents shall compensate a fee appraiser for performing appraisal services at a rate that is customary and reasonable for comparable appraisal services performed in the geographic market of the property being appraised.”

- Covered transaction: an extension of credit that is or will be secured by the consumer’s principal dwelling.
- Fee appraiser: a natural person who is a state-licensed or state certified appraiser hired on a contract or other non-permanent basis to perform appraisal services or entities that perform appraisals are would not be required to register under section 1124 of FIRREA.
- Agents: determined by applicable law; includes an AMC, but not a fee appraiser.
- Appraisal services: compensation for tasks that the fee appraiser performs (not management fees).
- Geographic market: market area
- AMCs: Same as FIRREA, but there is no exemption for smaller AMCs.

The Rule provides two rebuttable presumptions of compliance.

- If the creditor and its agent do not meet either presumption, compliance is determined based on all the facts and circumstances without a presumption of either compliance or violation.

First Presumption of Compliance

- A creditor and its agent are presumed to compensate a fee appraiser at a customary and reasonable rate if the amount of compensation “is reasonably related to recent rates paid for comparable appraisal services performed in the geographic market of the property being appraised, adjusted “as necessary” based on six factors.
- Two-step inquiry:
 - To be customary, the creditor or its agent must identify recent rates for appraisal services in the relevant geographic market:
 - To be reasonable, the fee must be adjusted to account for the six factors that, in addition to the geographic market, affect the level of compensation appropriate in a given transaction.
 - Qualifying for this presumption does not require that a creditor or its agent use third-party information that excludes appraisals ordered by AMCs.
- Creditor/agent may not engage in anti-competitive behavior (price fixing, market allocation, acts of monopolization, other violations of antitrust laws).

First Presumption of Compliance (continued)

Customary:

- *Recent rates:* According to Commentary to the Rule, a creditor or its agent may gather information by using a reasonable method that provides information about rates for appraisal services in the geographic area. A creditor agent may, but is not required to, use or perform a fee survey. The Commentary does not specify what is a “reasonable method” for gathering information about rates without the use of a fee study. “Recent” depends on facts and circumstances but generally is “recent” if charged within 1 year of creditor or agent’s reliance on this information.
- *Appraisal services* are “the services required to perform an appraisal, including defining the scope of work, inspecting the property, reviewing necessary and appropriate public and private data sources (MLS, tax assessment records, public land records), developing and rendering an opinion of value, and preparing and submitting the appraisal report.”
- *Relevant geographic market:* Depending on the facts and circumstances, the relevant geographic market may be a state, metropolitan statistical area (MSA), metropolitan division, area outside of an MSA, county, or other geographical area.

First Presumption of Compliance (continued)

Reasonable: Adjustment as necessary based on six factors:

- Type of property (*e.g.*, detached/attached single family, condo, coop, manufactured housing);
- Scope of work (exterior/interior inspection, number of comparables required);
- The time in which the appraisal services are required to be performed;
- Fee appraiser qualifications (state license/certification);
- Fee appraiser experience and professional record; and
- Fee appraiser work quality (*i.e.*, past work quality).

Additionally, the creditor or its agents must not engage in any anti-competitive acts in violation of state or federal law that affect the compensation paid to fee appraisers, including: (i) entering into any contracts or engaging in any conspiracies to restrain trade through methods such as price fixing or market allocation, or (ii) engaging in any acts of monopolization such as restraining any person from entering the relevant geographic market or causing any person to leave the relevant geographic market.

Second Presumption of Compliance

- A creditor and its agent are presumed to compensate a fee appraiser at a customary and reasonable rate if the creditor or its agent establishes a fee by relying on information about rates that is based on:
 - Objective third-party information (fee schedules, studies, and surveys) prepared by independent third parties (government agencies, academic institutions, and private research firms); and
 - Recent rates paid (within the past year) to a representative sample of providers of appraisal services in a geographic market or the fee schedules of those providers;
- Objective third-party information must exclude compensation paid to fee appraisers for appraisals ordered by AMCs.

No Presumption of Compliance Based on Fee Appraiser Certification

- Documentation signed by appraiser indicating that an “agreed” rate is “customary and reasonable” does not create a presumption of compliance
 - Need objective factors
- Volume-based discounts are not prohibited, so long as compensation is customary and reasonable
 - Is further guidance needed?

Enforcement: Penalties

- Section 129E sets forth substantial penalties for violations of the customary and reasonable fee provisions:
 - First offense: \$10,000 per day that a violation continues
 - Subsequent offense(s): \$20,000 per day that a violation continues
 - Civil penalties are in addition to other enforcement provisions in Section 130
- Civil penalties are not limited to creditors – they are available against “each person who violates Section 129E.
- State enforcement: Section 1042 of the Dodd-Frank Act preserves the enforcement powers of the states.
 - The statute is not meant to preempt state consumer financial protection laws, absent conflict with federal laws or regulations. State consumer financial protection laws that offer greater protection than federal law are not considered to conflict with federal laws. 12 U.S.C. § 5551 (Dodd-Frank Act § 1041).
 - State Attorneys General and regulators can bring civil actions to enforce provisions of Title X of the Dodd-Frank Act. 12 U.S.C. § 5552 (Dodd-Frank Act § 1042).

Minimum AMC Standards

- Section 1473 of the Dodd-Frank Act requires the Agencies (OCC, FRB, FDIC, NCUA, CFPB, and FHFA) to adopt standards for states to apply in the registration and supervision of AMCs.
- In April 2014, the Agencies proposed minimum standards with five principal requirements:
 - Registration with and supervision by the state appraiser certifying and licensing agency;
 - Use only of state-licensed or state-certified appraisers for federally related transactions;
 - Establishment of and compliance with processes and controls to ensure the selection of independent appraisers who possess “the education, expertise, and experience necessary to competently complete the appraisal assignment for the particular market and property type”;
 - Direction of appraisers to perform assignments in accordance with the Uniform Standards of Professional Appraisal Practice; and
 - **Establishment of and compliance with processes and controls designed to ensure compliance with the appraisal independence requirements of Section 129E(a)-(i) of TILA and implementing regulations.**

Customary and Reasonable Fees under State Law

- The AMC laws of more than a dozen states incorporate customary and reasonable fee requirements.
 - Most are by reference to Section 129E of TILA (Alabama, Maryland, Montana, Nebraska);
 - Some authorize the appraisal board to engage in rulemaking on the issue (Illinois, Louisiana, Mississippi);
- Some states have undertaken surveys and/or requested information from registered AMCs (e.g., Louisiana, Mississippi).

TRID and Appraisal Fees

- Effective August 1, 2015, the CFPB promulgated rules for integrated mortgage disclosures under TILA and the Real Estate Settlement Procedures Act (TILA-RESPA Integrated Disclosure “TRID”).
- Creditor must deliver or place in the mail the Loan Estimate (LE) no later than the third business day after receiving the consumer’s application.
- Creditors are responsible for ensuring that figures in the LE are made in good faith.
 - Generally, if the charge paid or imposed on the consumer exceeds the amount originally disclosed on the LE, it is not in good faith.
 - Certain categories of fees, including required services by providers selected by the lender, are subject to a “zero percent tolerance” for purposes of determining good faith compliance with the new requirements.
 - This includes appraisal fees.

Conclusion

Any questions?