

K&L GATES

Recent Developments in AMC Regulation

Collateral Risk Network

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DODD-FRANK IMPLEMENTATION

The Dodd-Frank Wall Street Reform and Consumer Protection Act:

- Requires the CFPB, federal banking regulators (FRB, FDIC, NCUA and OCC), and the FHFA to establish minimum AMC standards by regulation. AMCs must:
 - Register with and be subject to supervision by the state appraisal board of each state in which a company operates (excluding a subsidiary which is owned and controlled by a federally regulated financial institution);
 - Verify that only licensed or certified appraisers are used for federally related transactions;
 - Require that appraisals the AMC coordinates comply with the USPAP; and
 - Require that appraisals are conducted independently and free from inappropriate influence and coercion, as under the appraisal independence standards of Section 129E of TILA
- Requires all states to enact AMC laws meeting such standards

CURRENT STATE AMC REGULATION

- 38 states have enacted AMC statutes
 - Only 13 of those meet the minimum standards
- Four become effective in 2014: Delaware, Virginia, West Virginia, and Wyoming
- Holdouts must enact legislation following adoption of AMC minimum standards by federal regulators
 - Only Massachusetts, New Jersey, and South Carolina have pending legislation
 - Other states appear to be delaying legislation or rulemaking to be able to take federal standards into consideration

DODD-FRANK DEFINITION OF AN AMC

In connection with valuing properties collateralizing mortgage loans or mortgages incorporated into a securitization, any external third party authorized either by a creditor of a consumer credit transaction secured by a consumer's principal dwelling or by an underwriting of or other principal in the secondary mortgage markets, that oversees a network or panel of more than 15 certified or licensed appraisers in a State or 25 or more nationally within a given year: (A) to recruit, select or retain appraisers; (B) to contract with licensed or certified appraisers to perform appraisal assignments; (C) to manage the process of having an appraisal performed, including providing administrative duties such as receiving appraisal orders and appraisal reports to creditors and underwriters, collecting fees from creditors and underwriters for services provided, and reimbursing appraisers for services performed; or (D) to review and verify the work of appraisers.

STATE LAW DEFINITIONS OF AN AMC

- Some state laws parallel the Dodd-Frank definition:
 - In connection with valuing properties collateralizing mortgage loans or mortgages incorporated into a securitization, any external third party authorized either by a creditor in a consumer credit transaction secured by a consumer's principal dwelling that oversees a network or panel of licensed or certified appraisers or by an underwriter of, or other principal in, the secondary mortgage markets that oversees a network or panel of licensed or certified appraisers.
 - Not all state versions of the definition include a threshold number of appraisers in a state/nationally or incorporate specific appraisal management services in which the entity must engage.
- States with such a definition are: Alabama, Colorado, Maryland, Mississippi, Montana, Nebraska, North Dakota, South Dakota, Texas, and Wyoming.

STATE LAW DEFINITIONS OF AN AMC

- At least six states define an AMC to include a mortgage technology company or similar entity
- Other states cover “appraisal management services”:
 - Employing or contracting with appraisers to perform services for clients
 - Receiving requests for appraisal services and submitting them to appraisers for performance
 - Appraisal review and quality control (QC) processes
 - Collecting and submitting payments
 - Transmitting completed appraisal reports to clients
- Some include a catch-all for any activity as an intermediary between an appraiser and a client
- Most states implicitly or expressly cover activities involving residential *or* commercial real estate

STATE LAW EXEMPTIONS

- Wholly owned and controlled subsidiaries of federally regulated financial institutions
- State and federally regulated financial institutions, including internal business units and departments
 - AMC statutes may not define “financial institution,” leaving unclear who is eligible for a particular exemption
- Appraisal firms (those directly performing appraisal services)

REGISTRATION REQUIREMENTS

- Certifications
 - Verification of appraisers' credentials and competency
 - Require compliance with USPAP
 - Review of appraisals for compliance with USPAP and state standards
 - Record retention
 - Adherence to appraisal independence standards of Section 129E of TILA (customary and reasonable fees)
- Fees
 - States increasingly include associated fees (appraiser panel membership, fingerprinting)
 - National AMC registry fees
- Surety bond/letter of credit
 - New legislation adding requirements or increasing bond amounts (South Dakota, Virginia)

REGISTRATION REQUIREMENTS

Owners, controlling persons, and other personnel

- Reporting of ownership shares and relationship
 - Supplementary registration forms
- No action against appraiser credential
 - May extend to any professional credential
- Designation of controlling person/other responsible individual
 - In some states, must be a licensed appraiser (North Carolina)
 - Duty to notify regulator upon change
- Background investigations

INVESTIGATIONS

- As part of the registration/renewal process, a few states (e.g., Montana, Nebraska) require an AMC report pending disciplinary action.
- Colorado recently removed the requirement to report pending disciplinary actions from its renewal application.
- Failure to do so may result in disciplinary action, including the revocation of the AMC's license/registration.
- Some states broadly interpret the requirement to permit citation for unprofessional conduct (not specific to AMC law).

SUBSTANTIVE REQUIREMENTS: CONDUCT RELATING TO APPRAISERS

- Verification of geographic competency
 - May be incorporated into engagement letter

- Process for appraisers' addition to/removal from appraiser panel
 - Usually intended to protect appraisers from coercive removal, but requirements may apply to any action
 - Grace period ranges from zero days (usually in connection with exertion of improper influence) to 30, 60, or 90 days
 - Some states require a fee to add an appraiser to or remove an appraiser from a panel (Montana, Texas)
 - Reporting violations of USPAP or other applicable state standards

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SUBSTANTIVE REQUIREMENTS: FEES

- Required disclosure of fees
 - Cannot prohibit appraiser from disclosing fee for appraisal assignment
 - Must require separate statement in appraisal report of appraisal and AMC fees

- Payment timelines
 - Generally 30 to 60 days, with reasonable exceptions (breach of contract, substandard services)

- Customary and reasonable fees
 - Required under Dodd-Frank
 - States are attempting to interpret the requirement outside of the scope of the FRB's final interim rule (Louisiana)

PROHIBITED CONDUCT: APPRAISERS

- Influencing or attempting to influence the development, reporting, result, or review of an appraisal through coercion, extortion, collusion, compensation, instruction, inducement, intimidation, bribery, or any other means:
 - The list of activities constituting such influence generally mirrors that found in the Appraisal Independence Requirements

- Other prohibited conduct:
 - Altering, modifying, or otherwise changing a completed appraisal report (unless required by federal or state guidelines)
 - Prohibiting communication between the appraiser and any party who the appraiser reasonably believes has information pertinent to completion of an appraisal assignment (client, intended user, etc.)
 - Requiring that an appraiser indemnify the AMC (except for activity connected to the appraiser's performance of appraisal services)

PROHIBITED CONDUCT: OTHER

- Using an appraisal report for a client other than the one with whom the AMC originally contracted without the original client's written consent
- Failing to separately disclose (or prohibiting the appraiser from disclosing) to the client appraisal and appraisal management fees
- Ordering Broker Price Opinions (BPOs) or Automated Valuation Models (AVMs)
 - Not permitted as the primary basis for evaluating market value in connection with the origination of a loan secured by a consumer's primary dwelling
 - States are stepping back from this requirement (Arkansas HB 2056)

AUDIT/QUALITY CONTROL

- States have varying thresholds (under statute/rule) for appraisal review:
 - General requirement (Alabama, Illinois, Minnesota, Pennsylvania)
 - At least two Standard 3 appraisal reviews per year and/or coverage under risk-based review process (Colorado)
 - “Representative sample” (North Carolina)
 - “Statistically significant” (North Dakota, Oklahoma)
 - 5 percent (Kansas, Texas)

- Variation makes development of a “one size fits all” approach impossible for AMCs, increasing compliance costs and effort

AUDIT/QUALITY CONTROL

- Many also require individuals performing appraisal reviews to be licensed or otherwise qualified
 - In the same state (Alabama, Georgia, Kentucky)
 - In any state (Missouri)
 - “Appropriately trained and qualified” in appraisal performance, as determined by regulators (Arizona)

- Some states have different standards for:
 - QC reviews (generally excluded from licensing requirement)
 - Employees and independent contractors (North Carolina)
 - Out-of-state reviewers (California)

ISSUES WITH AMC REGULATION

- Customary and reasonable fees: part of appraisal independence standards of Section 129E of TILA
- A few states (Kentucky, Louisiana) have attempted to interpret and enforce Dodd-Frank's appraisal independence standards through rulemaking
 - Months-long commentary process with Louisiana Real Estate Appraisers Board ended prematurely without hearing on controversial rule that appears inconsistent with the FRB's final interim rule interpreting customary and reasonable
 - Ongoing issue with states believing that reference to Section 129E of TILA in AMC statute provides authority to interpret/enforce federal law

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