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# Legislative & Regulatory Update (April, 2010)

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# Overview



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- Outline
  - Federal Issues
    - Financial Regulatory Reform
    - Appraisal Regulatory Modernization
    - HVCC
    - Foreclosure Prevention
    - FHA
    - Green Appraisals
    - SBA Appraisal Threshold
    - IRS Valuation Misstatements
    - Interagency Appraisal & Evaluation Guidelines
  - State Issues
    - Regulation of AMCs
    - Appraiser independence
    - Broker Price Opinions
    - Energy Efficient Appraisal Education Requirements

# Regulatory Reform



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- H.R. 4173 – Wall Street Reform & Consumer Protection Act of 2009
  - Creates the CFPA to address unfair and abusive products and services
  - Financial Stability Council to address systemic risk
  - “Too Big To Fail” – orderly dissolution
  - Investor “say on pay”; regulatory oversight of executive compensation
  - Reform of credit ratings agencies whose overly high ratings of MBS are seen as to blame

# Appraisal Modernization



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- HR 4173 includes all of the provisions of H.R. 1728 – the Mortgage Reform and Anti-Predatory Lending Act of 2009, which was passed by House in April, including many favorable appraisal provisions
  - Modernization of Title XI
  - Gives ASC Regulatory Authority
  - Enforcement resources for state boards
  - State AMC Regulatory requirements
  - National appraisal independence standard
  - Amends RESPA to require fee separation
  - Limit use of BPOs in loan origination

# Appraisal Modernization



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- Requires CFPA to conduct a “Negotiated Rulemaking” to establish appraisal independence standard for residential mortgages within 60 days
- CFPA rules must allow for broker order appraisals as long as broker is licensed and subject to appraiser ind. laws
- CFPA rules must require lenders & AMCs to compensate appraisers at “customary and usual” rates
- Upon adoption of the rules, the HVCC would be sunset

# Regulatory Reform



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- S. 3217 is the companion bill in the Senate
  - Addressed derivatives, bank regulation, consumer protection, but has only one appraisal provision, a GAO study regarding multiple approaches to value and the appraisal process
- We continue to encourage the Senate to include Appraisal provisions
- Amendments will be offered next week
- Conference committee

# HVCC Update



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- In place until November 2010
- Bars mortgage broker ordered appraisals
- Holds lenders accountable for appraisals
- AI indentified concerns in 2008
- Promotes appraisal independence but creates a multitude of challenges for the profession
  - AMC practices
  - Lack of regulation and oversight of AMCs
  - Customary and reasonable fees
  - Effects on quality and safety and soundness

# HVCC Update



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- Some are still calling for a moratorium on HVCC
- Even if the HVCC were to be nullified tomorrow, not much is going to change overnight
- What happens in November, 2010?
  - Probably not much
  - Fannie/Freddie have institutionalized the HVCC as part of Seller/Service Guides
  - Future of Fannie/Freddie under review



# Foreclosure Prevention

- Short sales/Principle reduction
  - HAMP program guidelines give discretion to agencies in establishing valuation rules
  - BPOs are prevalent
  - Appraisal organizations have urged that qualified appraisers be used to avoid conflicts of interest, address increasing fraud
  - SIGTARP agrees, calling for a consistent appraisal standard



- FHA market share has increased substantially
  - Doubled from FY 2007 to FY 2008 (1.2 million loans)
  - Exceeded 2 million in 2009
- Very active on appraisal issues
  - Manufactured Housing (Itemized Value)
  - Market Conditions Form Adoption
    - 2<sup>nd</sup> Appraisal Requirements
  - FHA Appraiser Roster – Certified Appraisers
- Mortgagee Letters 09-28, 09-29, 09-30

- In September, FHA issued Mortgagee Letter 09-28
- Also adopted many HVCC-like provisions
- Prohibits broker or commission staff ordered appraisals
- Requires that “appraisers are compensated at a rate that is customary and reasonable for appraisal services performed in the market area”

- Appraisal fees must be separate from management fees
- AMCs must charge lenders separately for their services and must justify the charges to the lender
- The big question is – What is “customary and reasonable”?

- New FAQs released in April
  - May require Congressional clarification with no standard thus far established
- Related Issue – New RESPA Rules
  - Functions of AMCs blurred within the FAQs
  - On one hand, AMCs are presented as processing and administrative functions but on another they're allowed to be reported on the Appraisal Line of the HUD-1
  - Professional organizations have urged AMCs be classified clearly as processing and administrative functions

# Green Appraisal Amendment

- H.R. 2336, the Green Resources for Energy Efficient Neighborhoods
  - An amendment developed and supported by the Appraisal Institute would
    - Define any property with energy efficient features as a “complex” appraisal
    - Require that certain information (HERS ratings, energy labels, plans and specs) be provided to appraisers in a timely basis by lenders/underwriters
  - Amendment approved and now moves to the House Floor where it may become part of the Financial Reform or Energy debates

- Small Business Administration appraisal threshold (HR 3854)
  - House SBA reauthorization bill includes a proposal to increase the appraisal threshold from \$250,000 to \$400,000
  - Appraisal organizations oppose provision and are pushing back
    - Met with committees
    - Part of LDAC lobbying talking points
    - Have received positive feedback

- *IRS Memorandum on Penalty for Gross Valuation Misstatements Attributable to Incorrect Appraisals*
  - Memo dated August 18, 2009
  - New penalty lesser of the greater of 10 percent of the amount of the underpayment or \$1,000, or 125 percent of gross income received for appraisal assignment
  - Reputation more significant than fines
  - Hearing held in February; concerns expressed and changes likely

# Interagency Appraisal and Evaluation Guidelines



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- Proposed in November 2008
- Final Guidelines have not been released
- Update of Guidelines issued in 1994



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# State Issues

# Overview



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- Outline
  - Roll out of Board funding model legislation
  - AMC Legislation (just briefly)
  - Broker Price Opinions
  - Broker Opinions of Value
  - Appraiser independence requirements
  - Energy efficient appraisal requirements

# Board Funding

- Funding for enforcement work of state appraiser boards has been a perennial problem since the enactment of FIRREA
- Resources available for enforcement vary widely
- Some states have large enforcement staff (investigators, deputy AGs, etc.)
- Other states have very limited resources & must share enf. resources

# Board Funding

- There are some states where the boards are entirely self-sufficient and are allowed to keep all of their revenue for use in administration and enforcement.
  - Missouri: “All fees and charges payable under this chapter shall be collected by the division of professional registration and transmitted to the department of revenue for deposit in the state treasury to the credit of the "Real Estate Commission Fund...Money in this fund shall not be transferred and placed to the credit of general revenue until the amount in the fund at the end of the biennium exceeds two times...”

# Board Funding

- In other states all of the money raised by the board in the form of fees, fines, etc. is put into the state general fund
  - Maryland: “Except as otherwise provided by law, the Commission shall pay all money collected under this title into the General Fund of the State.”

# Board Funding

- There have also been instances where Governor's have in times of need unilaterally “swept” money out the board's coffers in order to assist in resolving unrelated fiscal issues.
  - Despite law governing funding, Gov. Bush in Florida swept board funds
- The various boards & commissions control a lot of \$. Some Governors want to prevent over-regulation by over funding.

# Board Funding



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- AI has reviewed all 50 state funding statutes and has found that, generally:
  - 16 states have strong statutes
  - 15 are moderate
  - 11 are weak
  - 7 don't deal with issue at all

# Board Funding



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- Of course, there is the federal effort to get more \$ for enforcement to states via grants from the ASC
  - Funded through increase in ASC share of registration fee from \$25 to no less than \$40 (authorization to go as high as \$80)
- There is a need for many states to enact legislation to bring funding statute into the “strong” category

# Board Funding



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- Announcing that AI-ASA-ASFMRA-NAIFA have developed model legislation to ensure that all monies raised by the board/agency remain, and are not swept.
- Key provision: “Money in this Fund shall not be transferred or placed to the credit of the general revenue.”

# Board Funding

- We realize that this legislation will be difficult to enact in a time of fiscal crisis
  - Maryland has been trying to change their funding statute. There has been no appetite in the legislature
- Important to plant the seed now, so that when the budget picture is brighter, the legislation can be enacted.
- There is a direct public protection issue

# Board Funding



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- Copies of the model legislation are available here
- AI-ASA-ASFMRA-NAIFA look forward to working with regulators and board members on the enactment of this very important “field leveling” legislation.

# AMCs (just briefly)

- To date, ten states have enacted laws to bring AMCs under the regulatory authority of state appraiser board
  - AR, CA, IN, LA, NV, NM, OR, VA, WA and UT
- Two state legislatures approved bills this week – FL and AZ (awaiting signatures)
- At least 10 other states are currently considering it
  - Legislation is close to being enacted in MN, & VT
- Much more on AMC legislation on Mon.

# BPOs

- Broker Price Opinions
  - Proliferation in the use of BPOs as valuation tools for foreclosures, short sales, loan modifications, portfolio valuation
  - Our analysis - In at least 22 states, the ability of a broker or salesperson to perform a BPO may be limited to the real estate listing or purchase process (State BPO Laws)
  - Not illegal to order a BPO, but it may be illegal for the broker to complete the assignment

# BPOs

- Concern that there may be a coordinated, national campaign to expand the ability of a real estate professional to do a BPO outside of the real estate listing process, including to loan origination
- Already seen two states (NE, MS) where legislation has been proposed/enacted
- State Boards need to remain vigilant for any proposed legislation/regulation on this topic

# BPOs

- Nebraska has enacted legislation that expands the use of BPOs/CMAs to:
  - “Originating, extending, renewing, or modifying a loan in a transaction other than an FRT”, except that a BPO/CMA “may not be used as the sole basis to determine the value of the real estate”
  - Many residential loans & some business loans in NE can now be originated with a BPO & an AVM, or a BPO and another evaluation
  - Previously, agents & brokers were limited to providing BPOs for listing purposes only

# BPOs

- Nebraska
  - Even though federal policy permits BPOs for loan modification, state law prohibited agents & brokers from doing them
  - BPOs can now used for all Nebraska loan modifications
  - Agents & brokers can provide BPOs for portfolio valuation purposes

# BPOs



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- The campaign is being coordinated
- Bankers argue that evaluations are already being done by internal bank staff
- Its purely a dollars and cents issue
- Bankers argue that BPOs are permitted under federal law, therefore the states cannot prohibit them

# BPOs

- All of the professional appraiser organizations opposed the NE & MS leg.
- Arguments in opposition to legislation:
  - Now is not the time to loosen collateral valuation stds.
  - BPOs are largely unregulated and are performed with little oversight and training
  - There are no USPAP-like enforceable standards for BPOs
  - Agent/broker conflict of interest concerns – “flopping”
  - An agent/broker’s E & O insurance may not cover BPOs

# BPOs



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- Proposed improvements to BPO legislation
  - Require specific training for agents/brokers that want to do BPOs
  - Require proof of E & O coverage
  - Co-signed by broker if done by an agent
  - Agent or broker cannot have had any interest in the property for last 5 years or subsequent year
  - Continuing education requirements

# BOVs



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- BOV = Broker Opinion of Value
- Some “for profit” entities that train agents and brokers to perform commercial BOVs
- Encourage agents & brokers to do commercial BOVs for portfolio valuation
  - Attempting to capitalize on \$1.4 trillion in commercial loan renewals in the coming years
  - Including agents who have had NO previous comm. exp.
- Federal Reserve staff opinion – Commercial BPOs do not satisfy definition of “evaluation”

# BOVs



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- Training includes NOI calculation, development of cap. rate, and DCF analysis – all on **4 hours of training**
- These are topics that are all elements of a valuation service
- If it walks like an appraisal, talks like an appraisal, and smells like an appraisal...It is an appraisal.

# BOVs

- In mandatory licensing states, any “opinion of value” must be done by a licensed appraiser
- State appraiser boards in man. states need to take aggressive enforcement action against anyone (not just agents & brokers) who provides a BOV

# BOVs

- The Nevada Commission of Appraisers has taken successful enforcement action against two agents who developed BOVs.
  - “By providing a report for lending purposes which included an opinion of value, Respondent has engaged in unlicensed activity” *Administrator vs. Blackhorse-Smith*
    - Resulted in a \$5,000 fine but no loss of agent’s license
  - “By providing a written opinion of value for tax assessment purposes and for which he received compensation, Respondent has engaged in unlicensed activity” *Administrator vs. Freggiaro*
    - Resulted in a \$2,700 fine, but no loss of agent’s license
- Successful enforcement action is possible

# “Green” Education



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- Several states looked at educational requirements regarding appraisal of energy efficient features
- Applicable to both residential & comm.
  - Washington State – wanted to require appraisers to take annual CE in appraising of “green features”
  - New Mexico – Looked at requirements for appraisers to consider green features as part of an appraisal assignment

# “Green” Education



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- Several states looked at it in 2009
  - CT – require appraisers to consider energy efficient features
  - TX/VT – exempt energy efficient features from ad valorem tax
  - NV – Annual CE in appraisal of “green” features
- Something to keep an eye out for in 2010/2011
- Corollary to federal efforts

# “Green” Education



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- Already required by USPAP & URAR
- Mandates may be prescriptive
  - There is always a need for more education
  - The appraisal profession has responded with several education programs already
- If appraisers want to differentiate themselves or specialize in the valuation of green features they should be allowed to obtain that competitive advantage

# Contacts



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