American Bankers Association
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*Submitted via Regulations.gov*

Mr. Robert deV. Frierson, Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, NW.
Washington, DC 20551

Re: Docket No. R-1443; RIN 7100-AD90
Appraisals for Higher Risk Mortgage Loans

Ms. Monica Jackson
Office of the Executive Secretary
Bureau of Consumer Financial Protection
1700 G Street, NW
Washington, DC 20552

Re: Docket No. CFPB- 2012-0031;
RIN 3170-AA11;
Appraisals for Higher-Risk Mortgage Loans

Mr. Robert F. Feldman, Executive Secretary
Attention: Comments/Legal ESS
Federal Deposit Insurance Corporation
550 17th Street, NW
Washington, DC 20429

Re: FDIC Truth in Lending Act (Regulation Z)
Appraisals for Higher Risk Mortgage Loans

Mr. Alfred M. Pollard, General Counsel
Attention: Comments /RIN 2590-AA58
Federal Housing Finance Agency
400 7th Street, SW, 8th Floor
Washington, DC 20024

Re: Comments/RIN 2590-AA58
Appraisals for Higher Risk Mortgage Loans

Office of the Comptroller of the Currency
250 E Street, SW
Mail Stop 2-3
Washington, DC 20219

Re: OCC; Docket ID OCC-2012-0013
Appraisals for Higher Risk Mortgage Loans

Dear Sir or Madam:

American Bankers Association (ABA)[1] appreciates the opportunity to comment on the proposed rulemaking (the Proposed Rule) to implement amendments to the Truth in Lending Act (TILA) pertaining to appraisal requirements applicable to “higher-risk mortgages.” These changes are required under Section 1471 of Dodd-Frank Act, which establishes a new section 129H of TILA.

**Overview of Proposed Rule**

The Federal Reserve Board, Bureau of Consumer Financial Protection, Federal Deposit Insurance Corporation, Federal Housing Finance Agency, National Credit Union Administration, and Office of

[1] ABA represents banks of all sizes and charters and is the voice for the nation’s $14 trillion banking industry and its two million employees. The majority of ABA’s members are banks with less than $165 million in assets.

Comptroller of the Currency (collectively, the Agencies) are proposing to amend Regulation Z, which implements the Truth in Lending Act (TILA), and the official interpretation to the regulation. These revisions 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 (the "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. This proposal implements these new appraisal requirements set forth by the Dodd-Frank Act, Title XIV, Subtitle F (Appraisal Activities).

The proposal follows the Act and defines a "higher-risk mortgage" as a closed-end consumer credit transaction secured by a principal dwelling with an APR exceeding certain statutory thresholds. 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. Consistent with the statute, the proposal would exclude "qualified mortgages" from the definition of higher-risk mortgage loan.

Also 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 informational statement regarding the appraisals; 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 and acquired the home within 180 days prior to the consumer's purchase agreement (measured from the date of the consumer's purchase agreement); 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.

**Overview and Summary of Arguments**

ABA thanks the Agencies for issuing a well-crafted rule that accurately implements the statutory amendments concerning appraisals. ABA's comments are summarized as follows—

- ABA supports the specific references to the Uniform Standards of Professional Appraisal Practice when defining "certified or licensed appraiser" under these regulations—such reference will add clarity and order to the definition of this key term.

- Although the proposed "higher-risk mortgage" triggers are similar to existing triggers in the Higher Priced Mortgage Loan rules (HPML), ABA urges that the Agencies craft these triggers so that they match and duplicate, as much as practicable, the HPML formulas under TILA. Uniformity in definitions will greatly decrease regulatory burdens.

- ABA opposes the move to an "All-In" finance charge calculation method. This change would greatly complicate implementation, be of great cost to banks, and offer little benefit to consumer understanding.

- ABA recommends that the Agencies adopt a general exclusion for temporary loans, such as construction and bridge loans.

- ABA recommends an additional exemption to the second appraisal requirement in instances where the initial appraisal was performed by an appraiser that is selected from the lender's list of qualified appraisers. The Agencies should also exempt higher-risk mortgage loans made in certain rural areas from the additional appraisal requirements.

- Agencies should adopt rules that generally mirror FHA's anti-flipping provision where two appraisals will be required. The FHA provisions are well known and well tested—and they generally satisfy the requirements of the Act.

- ABA again asks that regulators be cognizant that the new thresholds and requirements of this proposed rule will lead to a potential Fair Lending impact. We ask that Agencies remain vigilant of the real world impact that these new provisions will have and provide appropriate guidance for banks.

- ABA has important concerns with the new disclosure that the consumer may order their own appraisal, and we recommend simple changes to ensure the consumer is better informed about the particular requirements under this law.

**ABA Comments**

*A. Definition of "Certified or Licensed Appraiser"*:

The Proposed Rule would define "certified or licensed appraiser" as a person who: (1) is certified or licensed by the State agency in the State in which the property that secures the transaction is located; and (2) 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. (§1026.XX(a)(1))

The Proposed Rule does not create specific competency standards, but instead references the USPAP Competency Rule. ABA appreciates this specific reference to USPAP, and urges the Agencies to retain such specific reference in the regulatory text. ABA does not deem it necessary for this regulation to define or specifically address the issue of appraiser competency provided that the USPAP Competency Rule remains.

Federal law and regulations have varying appraiser competency standards. This reference will create a uniform standard for appraiser competency for purposes of Section 129H of TILA.

*B. Coverage Thresholds*

As noted above, the Proposed Rule would set special requirements for "higher-risk mortgages." The thresholds for determining whether a loan qualifies as a higher-risk mortgage loan are set forth under XX(a)(2)(i)(A) and (B).[2]

[2] The proposed triggers provide that a loan is "higher-risk" if the APR on the loan exceeds applicable APOR by 1.5 or more percentage points, for a loan with a principal obligation at consummation that does <u>not</u> exceed the limit in

ABA urges the Agencies to craft the triggers in a manner that is fully compatible with existing Higher Priced Mortgage Loan (HPML) rules under TILA. *See* 12 CFR 1026.35(a). Consistency between the rules pertaining to "higher-risk mortgages" and those applicable to the HPML rules will enable banks to achieve significant cost savings and enable the Consumer Financial Protection Bureau (Bureau) to avoid a negative impact on compliance systems. If there are significant inconsistencies between these two loan segments, banks will be forced to create an entirely new lending segment within existing compliance systems. That outcome can be avoided if the Agencies utilize the same definitions and parameters as are in the existing HPML triggers. We request, therefore, that the proposed triggers be identical in terminology and application.

In the proposal's preamble, the Agencies point out that TILA section 129H(f) defines the term ''higher-risk mortgage'' in a "similar manner" to the existing Regulation Z definition of HPML. However, the preamble points out several important differences between these definitions.

First, the statutory definition of "higher-risk mortgage" expressly excludes loans that meet the definition of a ''qualified mortgage'' (QM) under Section 129C of TILA. While we believe that this definitional difference pertaining to QMs is very important and should be reflected in any final regulation, we do not believe that this difference should be a catalyst for language variances. ABA believes that the exclusion of QM loans could be inserted as a separate (final) provision in a way that leaves the other formulaic language intact. The QM exemption would remove qualifying loans from the scope of these special appraisal provisions, so a mere articulation of this exclusion through a separate subsection would suffice to give it effect.

Second, the statutory definition of "higher-risk mortgage" includes an additional 2.5 percentage point threshold for first-lien jumbo mortgage loans, while the HPML definition contains this threshold only for purposes of applying the requirement to establish escrow accounts for such loans. ABA agrees that this discrepancy complicates the task of creating consistency between the "higher-priced mortgage" and HPML rules. ABA members maintain that the 2.5 percentage point middle tier for loans that exceed the Fannie/Freddie limits serves no practical purpose but to add unnecessary compliance difficulties. Since member banks will rely on the breadth of the QM exemption, the creation of this middle tier will have no practical advantage for lenders or consumers, and thus would be of extremely limited use. Accordingly, ABA recommends that the Agencies consider expanding these protections to all loans over the 1.5 threshold, and adopt a final rule that uses a single trigger point of 1.5 percentage points above APOR for all qualifying first lien loans.

*C. Alternative Calculation Method*

Pursuant to its 2012 TILA-RESPA Proposal, the Bureau is proposing to adopt an "All-In" finance charge calculation for closed-end credit secured by real property or a dwelling. The Bureau is seeking comment on whether and how to account for the implications of a more inclusive (or "All-In") finance charge (FC) on the scope of "higher-risk mortgage" coverage. For example, the Bureau has proposed employing a "transaction coverage rate" (TCR) for the annual percentage rate (APR) as the metric for determining whether a closed-end loan is a "higher-risk mortgage." Under this approach, the TCR would be calculated in a manner similar to that in which the APR is calculated, except that for purposes of the TCR

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effect as of the date the transaction's interest rate is set for the maximum principal obligation eligible for purchase by Freddie Mac. In addition, a loan qualifies if the APR exceeds applicable APOR 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. Finally, a loan is "higher-risk" if the APR on loan exceeds the applicable APOR by 3.5 or more percentage points for a loan secured by a subordinate lien.

calculation the prepaid finance charge would include only charges retained by the creditor, a mortgage broker, or an affiliate of either.

ABA opposes the move to an "All-In" FC calculation method, and we have filed comments voicing such opposition with the Bureau on previous occasions.[3] For the benefit of the other Agencies that are not involved in the HOEPA or RESPA-TILA Integration rulemakings, we provide an overview of those previous comments here. ABA's overarching concerns regarding expansion of the definition of the finance charges are that the proposal has a questionable basis under current law, will impose significant compliance burdens, will make a negligible contribution to consumer understanding, and provides insufficient time for proper analysis of its potential impact.

As a threshold matter, ABA questions the purpose and practicality of the Bureau's proposed expansion of the definition of FC, which also affects the APR. In the course of Dodd Frank Act-mandated mortgage reform, with short and strict statutory deadlines to implement specifically prescribed regulatory changes, not only is the Bureau voluntarily proposing to re-vamp an established compliance requirement that has been largely untouched in decades, but also it proposes to do so in a rush, without due consideration of the need for extended debate and with little regard for administrative due process.

In enacting the reforms under the Dodd Frank Act, Congress was extremely detailed regarding the precise changes that statute requires. The legislation delved deeply into specific elements of underwriting, compensation schemes, affiliations, and other minutiae of mortgage lending and market structure. The Act did not, however, order the wholesale revision of TILA that the Bureau has proposed. Had Congress been in any way inclined to reform TILA, a fundamental pillar of the consumer protection scheme, it would have surely ordered it under such a comprehensive restructuring of mortgage finance activities.

Congress' silence on the issue should be afforded the appropriate weight. First, in enacting the Dodd Frank Act, Congress reshaped and added many triggered laws that depend directly upon the FC and APR calculations. This suggests that legislators understood the impact of their amendments and specifically chose not to alter TILA's FC and APR configurations. Second, the formulas for calculating FC and APR, which TILA sets forth in technical detail, have been the subject of countless policy debates, economic and behavioral studies, and accommodations for state and local needs. The Bureau's "All-In" proposal would discard these formulas in their entirety, and replace them with a completely different methodology. ABA is urging caution before advancing with such wholesale reforms.

Second, with regard to consumer benefit, ABA believes that the overhaul of the FC calculation is a pointless exercise; most stakeholders recognize how difficult it is for mortgage shoppers to understand this disclosure element. Regardless of how this figure is calculated, the FC number plays a limited role in assisting consumers to understand the terms of credit. The Bureau's own research shows that consumers are confused by the APR and FC and do not use the APR when comparing loans. The consumer confusion stems from the facts that the APR figure: (1) differs from, and actually competes with, the interest rate figure, and (2) is a composite or aggregated figure that consumers cannot fully comprehend absent some mathematical dissection.

Third, ABA disagrees with the Bureau's contention that the more inclusive FC definition for closed-end, dwelling-secured credit transactions would be "simpler" for compliance purposes. (*See*, *e.g*., 77 F.R. 49093.) Contrary to the Bureau's assertions in the proposed rule's preamble, the expanded definitions

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[3] *See, e.g.,* http://www.aba.com/Solutions/Mortgage/Documents/ABACommentsonCFPB%27sHOEPAProposalsSep72012.pdf.

will multiply, rather than reduce, the associated compliance burden for financial institutions. ABA rejects the assertion that the new configuration is discernibly "simpler." Proof of the complexity of this more inclusive FC definition lies in the fact that bankers and regulators must now pause and give special consideration to, and construct special regulatory provisions for its incorporation. The Agencies should take these complications into consideration when conducting the regulatory burdens analysis required in connection with this rulemaking. The so-called "simpler" methodology set forth by this proposal forces the need for very contrived regulatory structures that are complex and expensive—and again, not in any way mandated by law.

Fourth, in light of the colossal changes underway, and with the heavy burdens on agencies, industry and consumers to accomplish the many changes that the Dodd-Frank Act requires within the limited allotted time, ABA believes that initiating extensive changes to the APR calculation is an ill-advised detour from the main path of mortgage market reform. ABA understands the Bureau's aspirations to create a consumer-friendly way to represent loan costs in a single measure that is superior to the current APR, and does not categorically oppose this broad and perhaps constructive endeavor. That said, ABA believes that the prospects for doing so will entail a more extensive policy debate than can be achieved given a short timeframe. With so much at stake in resurrecting the housing finance market, pursuing APR revisions within the Dodd-Frank Act's priority time-frame constitutes a wasteful diversion of scarce agency and industry resources.

In summary, the Agencies should refrain from complicating the current proposal with more inclusive FC approaches. The Agencies should focus on implementing the statutory requirements before them, and refrain from questionable deviations that add complexity to this endeavor.

*D. Proposed Exemptions*

The Agencies also invited comment on the certain classes of consumer credit transactions that would be excluded from the definition of "higher-risk mortgages": (1) loans that are a QM as defined in § 1026.43(e); (2) reverse-mortgage transactions as defined in § 1026.33(a); and (3) loans secured solely by a residential structure. (*See* 15 U.S.C. 1639h(b)(4)(B) and (f), proposed § 1026.XX(a)(2)(ii).) Specifically, the Agencies are contemplating the additional exclusion of construction loans, bridge loans, and other classes of loans.

ABA commends the Agencies for the explicit exemption of loans that qualify under the QM definition (as proposed in the Federal Reserve Board's Ability to Repay rulemaking). ABA believes this exemption is a correct policy choice as QM loans are, by definition, a segment of loans that carry indicia of safe and sound transactions, and are therefore not characterized as "higher-risk" mortgages. This exclusion will be of critical importance to bankers as they advance to implement the very difficult provisions of the Ability to Repay rules.

Further, ABA strongly supports exempting transactions that are secured exclusively by residential structures. As the Bureau recognizes, this exemption is based on the practical and correct consideration that property appraisals and valuations are not at play in instances where real estate is not concerned. ABA agrees with the Agencies that TILA section 129H was intended to apply only to loans secured at least in part by real estate. See 15 U.S.C. 1639h.

Finally, ABA strongly recommends that the Agencies adopt a general exclusion for temporary loans, such as construction and bridge loans. These transactions are inherently temporary or provisional, and they serve the purpose of facilitating a final and permanent long-term financing for the home. We note that weighing down these temporary finance transactions with burdensome operational requirements provides

little value to the consumer. We note that most other mortgage-related regulations, particularly RESPA and TILA, make special accommodations for temporary loans, recognizing their impermanent and transient nature. We are dubious as to whether the imposition of additional disclosure requirements on these transactions will result in any benefit to the consumer given that the valuation performed after the initial construction phase, or after the bridge financing, achieves the same objective.

*E. Safe Harbor*

As the Agencies note in the preamble to the Proposed Rule, the statute 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). The Agencies concede that conclusive verification of FIRREA title XI compliance (which itself incorporates USPAP) poses problems. To address compliance uncertainties, 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.

ABA strongly commends the Agencies for this proposal to establish a safe harbor to ensure that the written appraisals are fully compliant. As the agencies recognize, absent a safe harbor the Proposed Rule would impose a significant liability risk as well as cost and compliance burdens on creditors making higher-risk mortgage loans. ABA strongly supports the inclusion of the safe harbor to maintain regulatory clarity and flexibility.

*F. Requirement for Additional Appraisal in Certain "Higher-Risk Mortgages"*

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). 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" is to finance the acquisition of the consumer's "principal dwelling."

ABA has several comments with respect to this section. First, in response to the Agencies' invitation to comment on the possible exemption of classes of "higher-risk mortgages" from the additional appraisal requirement to serve the public interest and promote creditors' safety and soundness, ABA encourages the Agencies to consider enacting an exemption for cases in which the initial appraisal was performed by an appraiser that is selected from the lender's list of qualified appraisers. The statutory second-appraisal requirements are intended to guard against improper property flipping schemes, an intent that ABA supports. However, these preventive measures would appear unnecessary in instances in which the valuation for a "higher-risk mortgage" was performed by the lender or buyer, rather than by a seller-selected appraiser (the party that would "flip" the property). In such instances, where the initial appraisal is already guaranteed to include all the necessary indicia of propriety required to guard against a dishonest "flip," there can be no improper collusion between the seller and the party appraising the property.

Second, because of the difficulty in finding qualified appraisers in rural areas, ABA believes that the Agencies should exempt higher-risk mortgage loans made in such rural areas from the additional appraisal requirements. ABA observes that in many rural counties across the United States, there are no certified appraisers that reside in the area. Often, appraisers must come from out of town and travel 100 miles or more, with considerable costs and various weeks of advance engagement to complete the valuation project. Because rural areas are not hot-spots for property flipping activities, ABA believes that

such an exemption could be reasonably tailored to fit within the overall consumer protection objectives of this rule.

Third, to simplify compliance with the second-appraisal provisions, ABA believes the Agencies should adopt the FHA anti-flipping provision to require a second appraisal if: (1) resale of the property is between 1 and 90 days following the sellers acquisition of the property AND the resale price is 20% or more above the sellers purchase price; or (2) resale of the property is between 91 and 180 days following the seller's acquisition and the resale price is 100% or more above the seller's acquisition cost. The FHA guidelines underlying this provision reflect well-known restrictions that are both time tested and protective of consumers. As the FHA provisions meet the Dodd-Frank Act's standards, ABA believes they could be adopted in lieu of the second appraisal rules advanced in this portion of the rulemaking.

Fourth, while the ABA supports the decision to not impose additional conditions or restrictions on the identity of the appraisers providing additional written appraisals, it requests that the Agencies provide some clarification with regard to this flexibility. Specifically, ABA requests that the Agencies specify that a different licensed or certified appraiser providing the additional written appraisal may be an employee or independent contractor of the same appraisal management company as the appraiser providing the primary appraisal. Allowing this would not dilute the requirement as each appraiser is subject to appraisal independence requirements.

Fifth, ABA respectfully requests that the Agencies consider the potential fair lending implications of the second-appraisal requirements. The additional requirements imposed under this proposed rule would therefore have a higher impact on loans that have lower principal balances – which are generally more prevalent in certain protected communities. It would be unfortunate if the additional time and costs associated with these proposed requirements negatively affect protected classes that are most in need of financing, while subjecting lenders to disparate impact enforcement. ABA asks that "disparate impact" concerns be addressed in any final rulemaking.

ABA members have expressed great concern about the fair lending implications brought about by the compendium of mortgage reform laws in general. Our banks understand that low-to-moderate income families and minorities are likely to suffer disproportionately from the costs and effects associated with these new regulatory provisions. Going forward, ABA asks that regulators be cognizant of the real world impact that these new provisions will have on communities across America. Our members have expressed great concern about the potential impact on low-to-moderate income families and minorities. Both lenders and policymakers must remain alert to this point.

### *G. Required Disclosure for "Higher-Risk Mortgages"*

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."* The Proposed Rule would generally mirror RESPA and TILA disclosures, requiring that they be provided within three days of application.

ABA has two important concerns with this disclosure proposal. First, member banks believe that a disclosure that promises a "prompt" delivery of an appraisal, where the Proposed Rule would not define the term "prompt," may create confusion on behalf of and lead to disputes with borrowers. Second, ABA is concerned that the disclosure language advising the borrower that he or she may pay for an additional appraisal for his or her own use may cause misunderstanding about the lender's responsibility to use that

borrower-ordered appraisal. As drafted, the proposed language may imply that if the borrower orders an additional appraisal, then that appraisal could substitute the lender-ordered appraisal. We believe the disclosure must clarify that a lender has no obligation to use or review the borrower-ordered appraisal.

To allay these concerns, ABA offers the following possible language for this disclosure—

> *"We may order an appraisal to determine the property's value and charge you for this appraisal. We will give you a copy of any appraisal, at least three days before settlement. We will provide 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; however, we are prohibited by law to consider an additional appraisal not ordered by the lender when making a credit decision."*

**Conclusion**

ABA appreciates the difficult task that faces the Agencies in developing regulations to implement new Section 129H of TILA. While the Proposed Rule in many ways successfully incorporates important details that were created by the Dodd Frank Act, further revision of several issues on which the Agencies specifically invited comment are necessary to avoid the adoption of rules that will have unintended impacts on both industry and consumers.

Should you have any questions regarding ABA's comments, please contact the undersigned or Rod J. Alba, at Ralba@aba.com. We would welcome the opportunity to further discuss any of our above comments as the Agencies continue the implementation process.

Sincerely,

Robert R. Davis