

19. In Supplement I to part 1026, under *Section 1026.35—Prohibited Acts or Practices in Connection with Higher-Priced Mortgage Loans*:

A. Under *35(a) Definitions*, the heading and paragraphs 1, 2, and 3 are republished.

B. New *35(c) Appraisals for higher-priced mortgage loans* is added.

C. New *Appendix O—Illustrative Written Source Documents for Higher-Priced Mortgage Loan Appraisal Rules* is added.

The revisions, additions, and removals read as follows:

SUPPLEMENT I TO PART 1026—OFFICIAL INTERPRETATIONS

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Section 1026.35—Requirements for Higher-Priced Mortgage Loans

35(a) Definitions.

Paragraph 35(a)(1).

1. *Comparable transaction.* A higher-priced mortgage loan is a consumer credit transaction secured by the 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 is set by the specified margin. The table of average prime offer rates published by the Bureau indicates how to identify the comparable transaction.

2. *Rate set.* A transaction’s annual percentage rate is compared to the average prime offer rate as of the date the transaction’s interest rate is set (or “locked”) before consummation. Sometimes a creditor sets the interest rate initially and then re-sets it at a different level before consummation. The creditor should use the last date the interest rate is set before consummation.

3. *Threshold for “jumbo” loans.* Section 1026.35(a)(1)(ii) provides a separate threshold for determining whether a transaction is a higher-priced mortgage loan subject to § 1026.35

when the principal balance exceeds the limit in effect as of the date the transaction's rate is set for the maximum principal obligation eligible for purchase by Freddie Mac (a "jumbo" loan). The Federal Housing Finance Agency (FHFA) establishes and adjusts the maximum principal obligation pursuant to rules under 12 U.S.C. 1454(a)(2) and other provisions of Federal law. Adjustments to the maximum principal obligation made by FHFA apply in determining whether a mortgage loan is a "jumbo" loan to which the separate coverage threshold in § 1026.35(a)(1)(ii) applies.

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35(c)—Appraisals.

35(c)(1) Definitions.

35(c)(1)(i) 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 § 1026.35(c)(1)(i), the relevant USPAP standards are those found in the edition of USPAP and that are 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 § 1026.35(c)(1)(i).

35(c)(2) Exemptions.

Paragraph 35(c)(2)(ii).

1. *Secured by new manufactured home.* A transaction secured by a new manufactured home, regardless of whether the transaction is also secured by the land on which it is sited, is not a “higher-priced mortgage loan” subject to the appraisal requirements of § 1026.35(c).

Paragraph 35(c)(2)(iii).

1. *Secured by a mobile home.* For purposes of the exemption in § 1026.35(c)(2)(iii), a mobile home does not include a manufactured home, as defined in § 1026.35(c)(1)(ii).

Paragraph 35(c)(2)(iv).

1. *Construction-to-permanent loans.* Section 1026.35(c) does not apply to a transaction to finance the initial construction of a dwelling. This exclusion applies to a construction-only loan as well as to the construction phase of a construction-to-permanent loan. Section 1026.35(c) does apply, however, to permanent financing that replaces a construction loan, whether the permanent financing is extended by the same or a different creditor, unless the permanent financing is otherwise exempt from the requirements of § 1026.35(c). *See* § 1026.35(c)(2). When a construction loan may be permanently financed by the same creditor, the general disclosure requirements for closed-end credit (§ 1026.17) provide that the creditor may give either one combined disclosure for both the construction financing and the permanent financing, or a separate set of disclosures for each of the two phases as though they were two separate transactions. *See* § 1026.17(c)(6)(ii) and comment 17(c)(6)-2. Section 1026.17(c)(6)(ii)

addresses only how a creditor may elect to disclose a construction-to-permanent transaction. Which disclosure option a creditor elects under § 1026.17(c)(6)(ii) does not affect the determination of whether the permanent phase of the transaction is subject to § 1026.35(c). When the creditor discloses the two phases as separate transactions, the annual percentage rate for the permanent phase must be compared to the average prime offer rate for a transaction that is comparable to the permanent financing to determine coverage under § 1026.35(c). When the creditor discloses the two phases as a single transaction, a single annual percentage rate, reflecting the appropriate charges from both phases, must be calculated for the transaction in accordance with § 1026.35 and appendix D to part 1026. The annual percentage rate must be compared to the average prime offer rate for a transaction that is comparable to the permanent financing to determine coverage under § 1026.35(c). If the transaction is determined to be a higher-priced mortgage loan not otherwise exempt under § 1026.35(c)(2), only the permanent phase is subject to the requirements of § 1026.35(c).

35(c)(3) Appraisals required.

35(c)(3)(i) 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.

35(c)(3)(ii) Safe harbor.

1. *Safe harbor.* A creditor that satisfies the safe harbor conditions in § 1026.35(c)(3)(ii)(A) through (D) complies with the appraisal requirements of § 1026.35(c)(3)(i). A creditor that does not satisfy the safe harbor conditions in

§ 1026.35(c)(3)(ii)(A) through (D) does not necessarily violate the appraisal requirements of § 1026.35(c)(3)(i).

2. *Appraiser's certification.* For purposes of § 1026.35(c)(3)(ii), the appraiser's certification refers to the certification specified in item 9 of appendix N. *See also* comment 35(c)(1)(i)-2.

Paragraph 35(c)(3)(ii)(C).

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.

35(c)(4) Additional appraisal for certain higher-priced mortgage loans.

1. *Acquisition.* For purposes of § 1026.35(c)(4), the terms "acquisition" and "acquire" refer to the acquisition of legal title to the property pursuant to applicable State law, including by purchase.

35(c)(4)(i) In general.

1. *Appraisal from a previous transaction.* 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 to obtain two written appraisals under § 1026.35(c)(4)(i).

2. *90-day, 180-day calculation.* The time periods described in § 1026.35(c)(4)(i)(A) and (B) are 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. 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 from April 17 would be 181, so an additional appraisal is not required.

3. *Date seller acquired the property.* For purposes of § 1026.35(c)(4)(i)(A) and (B), 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.

4. *Date of the consumer's agreement to acquire the property.* For the date of the consumer's agreement to acquire the property under § 1026.35(c)(4)(i)(A) and (B), 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 § 1026.35(c)(4)(i)(A) and (B), 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.

5. *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.

6. *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. 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 § 1026.35(c)(4)(i)(A) and (B), a creditor is not obligated to determine whether and to what extent the agreement is legally binding on both parties. *See also* comment 35(c)(4)(i)-4.

35(c)(4)(ii) Different certified or licensed appraisers.

1. *Independent appraisers.* The requirements that a creditor obtain two separate appraisals under § 1026.35(c)(4)(i), and that each appraisal be conducted by a different licensed or certified appraiser under § 1026.35(c)(4)(ii), indicate that the two appraisals must be conducted independently of each other. If the two certified or licensed appraisers are affiliated, such as by being employed by the same appraisal firm, then whether they have conducted the appraisal independently of each other must be determined based on the facts and circumstances of the particular case known to the creditor.

35(c)(4)(iii) Relationship to general appraisal requirements.

1. *Safe harbor.* When a creditor is required to obtain an additional appraisal under § 1026(c)(4)(i), the creditor must comply with the requirements of both § 1026.35(c)(3)(i) and § 1026.35(c)(4)(ii) through (v) for that appraisal. The creditor complies with the requirements of § 1026.35(c)(3)(i) for the additional appraisal if the creditor meets the safe harbor conditions in § 1026.35(c)(3)(ii) for that appraisal.

35(c)(4)(iv) Required analysis in the additional appraisal.

1. *Determining acquisition dates and prices used in the analysis of the additional appraisal.* For guidance on identifying the date on which the seller acquired the property, see comment 35(c)(4)(i)-3. For guidance on identifying the date of the consumer's agreement to acquire the property, see comment 35(c)(4)(i)-4. For guidance on identifying the price at which the seller acquired the property, see comment 35(c)(4)(i)-5. For guidance on identifying the price the consumer is obligated to pay to acquire the property, see comment 35(c)(4)(i)-6.

35(c)(4)(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 § 1026.35(c)(4)(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-priced mortgage loan.

35(c)(4)(vi) Creditor's determination of prior sale date and price.

35(c)(4)(vi)(A) In general.

1. *Estimated sales price.* If a written source document describes the seller's acquisition price in a manner that indicates that the price described is an estimated or assumed amount and not the actual price, the creditor should look at an alternative document to satisfy the reasonable diligence standard in determining the price at which the seller acquired the property.

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 § 1026.35(c)(4)(vi)(A).

3. *Lack of information and conflicting information—two appraisals required.* If a creditor is unable to demonstrate that the requirement to obtain two appraisals under § 1026.35(c)(4)(i) does not apply, the creditor must obtain two written appraisals before extending a higher-priced mortgage loan subject to the requirements of § 1026.35(c). *See also* comment 35(c)(4)(vi)(B)-1. For example:

i. Assume a creditor orders and reviews the results of a title search, which shows that a prior sale occurred between 91 and 180 days ago, but not the price paid in that sale. Thus, based on the title search, the creditor would not be able to determine whether the price the consumer is obligated to pay under the consumer's acquisition agreement is more than 20 percent higher than the seller's acquisition price, pursuant to § 1026.35(c)(4)(i)(B). Before extending a higher-

priced mortgage loan subject to the appraisal requirements of § 1026.35(c), the creditor must either: (1) perform additional diligence to ascertain the seller's acquisition price and, based on this information, determine whether two written appraisals are required; or (2) obtain two written appraisals in compliance with § 1026.35(c)(4). *See also* comment 35(c)(4)(vi)(B)-1.

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 a written appraisal indicating that the seller acquired the property between 91 and 180 days before the consumer's agreement to acquire the property. In this case, unless one of these sources is clearly wrong on its face, 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 § 1026.35(c)(4)(i)(B). Before extending a higher-priced mortgage loan subject to the appraisal requirements of § 1026.35(c), the creditor must either: (1) perform additional diligence to ascertain the seller's acquisition date and, based on this information, determine whether two written appraisals are required; or (2) obtain two written appraisals in compliance with § 1026.35(c)(4). *See also* comment 35(c)(4)(vi)(B)-1.

35(c)(4)(vi)(B) Inability to determine prior sales date or price – modified requirements for additional appraisal.

1. *Required analysis.* In general, the additional appraisal required under § 1026.35(c)(4)(i) should include an analysis of the factors listed in § 1026.35(c)(4)(iv)(A) through (C). However, if, following reasonable diligence, a creditor cannot determine whether the conditions in § 1026.35(c)(4)(i)(A) or (B) are present due to a lack of information or conflicting information, the required additional appraisal must include the analyses required

under § 1026.35(c)(4)(iv)(A) through (C) only to the extent that the information necessary to perform the analyses is known. For example, assume that a creditor is able, following reasonable diligence, to determine that the date on which the seller acquired the property occurred between 91 and 180 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 § 1026.35(c)(4)(iv)(B) and (c)(4)(iv)(C) 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 § 1026.35(c)(4)(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.

35(c)(4)(vii) Exemptions from the additional appraisal requirement.

Paragraph 35(c)(4)(vii)(C).

1. *Non-profit entity.* For purposes of § 1026.35(c)(4)(vii)(C), a “non-profit entity” is a person with a tax exemption ruling or determination letter from the Internal Revenue Service under section 501(c)(3) of the Internal Revenue Code of 1986 (26 U.S.C. 501(c)(3)).

Paragraph 35(c)(4)(vii)(H).

1. *Bureau table of rural counties.* The Bureau publishes on its website a table of rural counties under § 1026.35(c)(4)(vii)(H) for each calendar year by the end of that calendar year. *See comment 35(b)(2)(iv)-1.* A property securing an HPML subject to § 1026.35(c) is in a rural county under § 1026(c)(4)(vii)(H) if the county in which the property is located is on the table of rural counties most recently published by the Bureau. For example, for a transaction occurring

in 2015, assume that the Bureau most recently published a table of rural counties at the end of 2014. The property securing the transaction would be located in a rural county for purposes of § 1026(c)(4)(vii)(H) if the county is on the table of rural counties published by the Bureau at the end of 2014.

35(c)(5) Required disclosure.

35(c)(5)(i) 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.

2. *Appraisal independence requirements not affected.* Nothing in the text of the consumer notice required by § 1026.35(c)(5)(i) should be construed to affect, modify, limit, or supersede the operation of any legal, regulatory, or other requirements or standards relating to independence in the conduct of appraisers or restrictions on the use of borrower-ordered appraisals by creditors.

35(c)(6) Copy of appraisals.

35(c)(6)(i) 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.

35(c)(6)(ii) Timing.

1. *“Provide.”* For purposes of the requirement to provide a copy of the appraisal within a specified time under § 1026.35(c)(6)(ii), “provide” means “deliver.” Delivery occurs three business days after mailing or delivering the copies to the last-known address of the applicant, or

when evidence indicates actual receipt by the applicant (which, in the case of electronic receipt, must be based upon consent that complies with the E-Sign Act), whichever is earlier.

2. *“Receipt” of the appraisal.* For appraisals prepared by the creditor’s internal appraisal staff, the date of “receipt” is the date on which the appraisal is completed.

3. *No waiver.* Regulation B, 12 CFR 1002.14(a)(1), allowing the consumer to waive the requirement that the appraisal copy be provided three business days before consummation, does not apply to higher-priced mortgage loans subject to § 1026.35(c). A consumer of a higher-priced mortgage loan subject to § 1026.35(c) may not waive the timing requirement to receive a copy of the appraisal under § 1026.35(c)(6)(i).

35(c)(6)(iv) 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 § 1026.35(c)(6)(i), 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-priced mortgage loan.

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Appendix O—Illustrative Written Source Documents for Higher-Priced Mortgage Loan Appraisal Rules

1. *Title commitment report.* 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.