Introduction

In July 2010, the Dodd-Frank Wall Street Reform and Consumer Protection Act (the Dodd-Frank Act) amended the Equal Credit Opportunity Act (ECOA) to change the requirements regarding providing copies of appraisals and other valuations to applicants/borrowers in mortgage transactions.

The ECOA provisions now provide that applicants receive important information about their home value estimates. In January 2013, to implement these amendments, the Consumer Financial Protection Bureau (CFPB) issued its Disclosure and Delivery Requirements for Copies of Appraisals and Other Written Valuations Under the Equal Credit Opportunity Act (Regulation B) rule, sometimes called the ECOA Valuations Rule.

You may find the entire CFPB explanation of the regulation along with a copy of the regulation and other material here http://www.consumerfinance.gov/regulations/disclosure-and-delivery-requirements-for-copies-of-appraisals-and-other-written-valuations-under-the-equal-credit-opportunity-act-regulation-b/.

In that location you will also find the very good “Small Entity Compliance Guide” (which is helpful even if you are not a small entity) http://files.consumerfinance.gov/f/201305_compliance-guide_ecoa-appraisals-rule.pdf.

This briefing document is intended to be read in conjunction with the Small Entity Compliance Guide since that document provides such a good outline for compliance. We will provide a quick summary and then follow it with some questions and answers covering a few topics which come up frequently.

Quick Summary

- The new regulations were issued in January 2013 and are effective January 18, 2014.

- Under the current rules, Regulation B gives creditors a choice. They may either provide copies of appraisals to applicants, or notify them of their right to make a request for a copy and then provide a copy once requested. The ECOA Valuations Rule changes that.

- The ECOA Valuations Rule requires creditors to disclose to applicants that they have the right to receive copies of appraisals and written valuations. This notice needs to be delivered 3 business
days after the creditor receives an application (similar to the Good Faith Estimates—GFE and Truth in Lending disclosures)

- The ECOA Valuations Rule also requires creditors to automatically (that is, no request is necessary) send a free copy of home appraisals and other written valuations promptly after they are completed, regardless of whether credit is extended, denied, incomplete, or withdrawn.

- Promptly means, “promptly after completion” which is based on “facts and circumstances” (there are several examples in the regulations)– but remember it needs to be delivered no more than 3 business days before closing. (That 3 business days requirement can be waived by the applicant but not the right to receive a copy of the appraisals or other valuations.)

- The copies of valuations may be “delivered” either on paper or electronically

- If electronically, the applicant needs to consent to receiving information electronically (that is what the reference to compliance with the E-Sign Act is about) and qualify by “reasonably demonstrating” the applicant can receive electronic communications. On a practical level, by the time the creditor starts ordering valuation services, the creditor and applicant have settled this question. (As for electronic delivery, the CFPB “assumed that 84 percent of appraisals are sent via e-mail and that these are already being sent in a manner that complies with the E-Sign Act, 15.75 percent of appraisals are sent via the United States Postal Service, and 0.25 percent of appraisals are sent via courier.)

  - Electronic Signatures in Global and National Commerce Act, SEC. 101. GENERAL RULE OF VALIDITY. (c) CONSUMER DISCLOSURES.— (B)—
  “(ii) consents electronically, or confirms his or her consent electronically, in a manner that reasonably demonstrates that the consumer can access information in the electronic form that will be used to provide the information that is the subject of the consent”

- Delivery occurs three business days after mailing or delivering the copy to the last-known address of the applicant, or when evidence indicates the applicant actually received the copies, whichever is earlier. In other words, if you do nothing more or hear nothing from the applicant, then the valuations are considered delivered 3 business days after you send them (whether by mail or by electronic means—which probably means email).

- The new rule applies to all written valuations (not just appraisals) that you develop in connection with an application for a covered transaction. It covers all first liens on “dwellings”, including closed-end mortgage loans and open-end loans, regardless of the purpose of the loan. The loan does not need to be a consumer loan. It is not restricted to owner-occupied properties. Any first lien on a “dwelling” qualifies.
• By the way, a **dwelling** is any residential structure with “one to four units whether or not that structure is attached to real property. The term includes, but is not limited to, individual condominium units, mobile homes, and manufactured homes”. This is more or less the truth-in-lending definition as well.

• And for those who were thinking about it, the regulations do not permit the creditor to withhold the sending of copies of appraisals or other valuations just because the applicant has not reimbursed the creditor for those services.
  
  o “The Bureau does not believe that conditioning the creditor’s obligation to provide copies at no additional cost on the applicant’s reimbursement of the costs of the appraisal or other written valuation would be consistent with legislative intent as expressed in ECOA section 701.”

For more detail you need to refer to the actual text of the regulations—which a creditor will want to review before making any final decisions about how it will comply.

**Some Special Questions**

There are two questions that routinely arise about the rule, which we will cover in some detail:

• What is included under providing “a copy of all appraisals and other written valuations developed in connection with an application for credit”?

• How can I deliver the appraisal and other written valuations and when is it considered delivered? Do I need to confirm delivery?
What is included under providing “a copy of all appraisals and other written valuations developed in connection with an application for credit”?

Let’s start with the general rule, and then ask ourselves some questions.

(a) Providing appraisals and other valuations. (1) In general. A creditor shall provide an applicant a copy of all appraisals and other written valuations developed in connection with an application for credit that is to be secured by a first lien on a dwelling. A creditor shall provide a copy of each such appraisal or other written valuation promptly upon completion, or three business days prior to consummation of the transaction (for closed-end credit) or account opening (for open-end credit), whichever is earlier.

- When deciding which appraisals or other valuations to deliver to the applicant, can I just include those on which I relied (or “used”)?

  No. You need to provide all valuations that you as a creditor “developed” in connection with the application.

  If an appraisal or other written valuation is “developed in connection with” an application, then the applicant may benefit from receiving a copy, even if the creditor does not use the valuation.

- While we are asking, we often receive several different versions of an appraisal before we are satisfied with the result. Do we have to provide the applicant with all of those versions, or can we just give them the “final version”?

  Just the final (“latest”) version. It is not an appraisal until you are satisfied with it (after you have performed your reviews and other due diligence).

  The “latest version received” rule thus clarifies that when creditors have multiple versions of a particular appraisal or valuation, they are only required to provide the latest version. The Bureau believes that this guidance will help avoid placing unwarranted burden on creditors and overloading consumers with multiple drafts of a particular appraisal or other written valuation.

  But, you do have to provide the “latest” version of every appraisal or other valuation.

  Comment 14(a)(1)-7 further clarifies that a copy of at least one version of each appraisal or other written valuation must be provided.

- Sometimes we have a final version of an appraisal, but then get another version which is really a revision—maybe a different value, or something else is revised. Do we have to provide the applicant with that revised version?


You need to provide the applicant with the revised version as well (which means they will be receiving at least two different appraisals or valuations).

If a creditor has received multiple versions of an appraisal or other written valuation, the creditor is required to provide only a copy of the latest version received. If, however, a creditor already has provided a copy of one version of an appraisal or other written valuation to an applicant, and the creditor later receives a revision of that appraisal or other written valuation, then the creditor also must provide the applicant with a copy of the revision to comply with § 1002.14(a)(1).

- When we talk about “all appraisals and other written valuations”, I know what an appraisal is, but not sure what “other written valuations” includes.

This is one of the key questions. Let’s start with the definition

(3) Valuation. The term “valuation” means any estimate of the value of a dwelling developed in connection with an application for credit.

And, now some examples from the regulations.

14(b)(3) Valuation.
1. Valuations—examples. Examples of valuations include but are not limited
   i. A report prepared by an appraiser (whether or not licensed or certified) including the appraiser’s estimate or opinion of the property’s value.
   ii. A document prepared by the creditor’s staff that assigns value to the property.
   iii. A report approved by a government-sponsored enterprise for describing to the applicant the estimate of the property's value developed pursuant to the proprietary methodology or mechanism of the government-sponsored enterprise.
   iv. A report generated by use of an automated valuation model to estimate the property’s value.
   v. A broker price opinion prepared by a real estate broker, agent, or sales person to estimate the property’s value.

So, it would be fair to say that these examples are valuations

- **Appraisals**, whether full Uniform Residential Appraisal Reports, drive-bys, desktop appraisals or any other “traditional” appraisal
  - **Reviews**, but only if they include an opinion of value different from the original appraisal (since that would be considered an appraisal as well)
- **“Evaluations”** under the Interagency Appraisal and Evaluation Guidelines
- **Valuations returned by Fannie Mae or Freddie Mac** in response to an underwriting submission such as through Desktop Underwriter or Loan Prospector
  - Note that the regulations talk about “A report approved by a government-sponsored enterprise for describing to the applicant the estimate of the property’s value developed pursuant to the proprietary methodology or mechanism of the government-sponsored enterprise.”
• This just means that the GSE’s have a public version of their proprietary valuations that you can provide to an applicant.
  o Automated Valuation Models (AVM’s)
  o Broker Price Opinions (BPO’s)

More importantly, it does not matter whether the “valuation” is one that the lender is permitted to rely upon for funding a mortgage under the various regulations governing appraisals and evaluations or not.

For example, under the Interagency Appraisal and Evaluation Guidelines a lender would not be able to rely on either a BPO or AVM absent additional information, but they still are considered “valuations” for purposes of this regulation. Send them on.

• When we talk about “all appraisals and other written valuations”, what items would not be considered valuations.

Again, let’s look at the regulations. And, of course, they have some examples for things that are not considered valuations.

3. Other documentation. Not all documents that discuss or restate a valuation of an applicant’s property constitute a “valuation” for purposes of § 1002.14(b)(3). Examples of documents that discuss the valuation of the applicant’s property or may reflect its value but nonetheless are not “valuations” include but are not limited to:
   i. Internal documents that merely restate the estimated value of the dwelling contained in an appraisal or written valuation being provided to the applicant.
   ii. Governmental agency statements of appraised value that are publically available.
   iii. Publicly-available lists of valuations (such as published sales prices or mortgage amounts, tax assessments, and retail price ranges).
   iv. Manufacturers’ invoices for manufactured homes.
   v. Reports reflecting property inspections that do not provide an estimate or opinion of the value of the property and are not used to develop an estimate or opinion of the value of the property.

There are two common threads here. First, the values derived or reported were not really “developed in connection with an application for credit”. They were just part of information that a lender might gather or record as part of the process, but never ripened into a valuation. The second thread is that some of these examples are not specific enough to the property to really act as a valuation. Again, information that was not enough to amount to a valuation.

• Naturally, there are some items which seem to fall somewhere in between. What about these examples? (Now the questions are getting harder.)

• Freddie Mac is now returning its Home Value Explorer® (HVE®) value to a lender when the lender uploads an appraisal to the Uniform Collateral Data Portal (UCDP). Is that a valuation?
No (okay, probably not). There are two different ways to answer this. First, this is not a value that the creditor has “developed in connection with an application for credit”. The creditor did not develop it, the just got it as part of the process. In fact, by the time the creditor receives this feedback, the appraisal has already been completed and uploaded to the Uniform Collateral Data Portal. In delivering the HVE value, Freddie Mac is not asserted that the HVE value is the value, but providing it for comparison and review.

Second, in light of the definition of a valuation and the notion of “developed in connection” the commentary to the regulations talk about this kind of issue.

This deletion also addresses industry commenters’ concerns that internal review documents, such as quality checks, fraud checks, automated underwriting determinations that do not estimate the value of the dwelling (such as certain GSE tools that simply suggest another valuation is excessive), or expressions of criticism of a valuation, should not be treated as themselves being valuations.

That is all nice, but it can also be argued that the Freddie Mac HVE delivered as part of the results from the UCDP is a valuation. Whether it is or is not, reasonable minds can differ (and will). In fact, there is some gossip that the CFPB and Freddie Mac are actually discussing this question.

Why does it matter? If a creditor comes to the conclusion that the HVE response is a valuation, all that means is that the creditor will then deliver a copy of that report to the applicant along with all of the other valuations. If not, then the creditor will not. In either case, their position is defensible.

- **How about FNC’s Property Scan or QC Vigilance? Are those valuations, considering that they do include a value?**

Now this is a good question. Let’s put this into a little bit of context, based on the comments in the regulations.

> The Bureau also does not believe it would be appropriate to define the term “automated valuation model” in comment 14(b)(3)-1. When in receipt of a particular computer-generated report that may provide an estimate of the value of the dwelling, the creditor ultimately must make its own judgment of whether that report meets the definition of valuation in § 1002.14(b)(3). The final rule cannot foresee all the types of computer-generated reports that might include valuations. Moreover, comment 14(b)(3)-1 is merely intended as a list of examples of valuations. Page 85

Note that the CFPB does not believe that just because a report might include an estimate of value, it does not mean that it is automatically a “valuation”. In our case, just because FNC’s Property Scan, QC Vigilance (or any other product whether from FNC or from another party) might have an estimate of value, does not mean it is a valuation.
To decide, it would be helpful to see how those reports are used, since we always have to start back with the definition of a valuation.

Valuation. The term “valuation” means any estimate of the value of a dwelling developed in connection with an application for credit.

Is this product an estimate of the value “developed in connection with an application for credit”? Or, was the estimate of value incidental to the main purpose of the product?

FNC’s Property Scan is described this way

This review and reporting tool evaluates a subject property and its neighborhood without an appraisal. With Property Scan, you’ll view property characteristics, sales histories, tax information, a location map, neighborhood homogeneity and conformity measures, as well as details on land use, price, age, and recent foreclosure activity.

As part of the complete product, it does include an estimated value based on FNC’s internal automated valuation model, although that “estimated value” is not called out in any special way, or highlighted as a value. As a matter of practice, FNC clients tend to order Property Scan after ordering an appraisal. They use Property Scan information to compare to the information in the appraisal to check and validate the appraised value (as a review tool). Occasionally clients order Property Scan in advance of a transaction to assist loan officers evaluate whether the likely value of a particular parcel of property would support the mortgage loan that the applicant wants. Property Scan is a nice tool to help a loan officer know what the likely values are in the neighborhood and to have at least one benchmark value. Whatever value that a loan officer might place on a property in gathering the information in an application will not be used or even considered in the actual valuation of the property for purposes of a loan.

As a result, it can fairly easily be argued that a Property Scan report is not a valuation.

How about QC Vigilance?

FNC’s QC Vigilance is described this way.

This Web-based quality control tool helps reviewers quickly gauge the quality of the appraisal backing a loan by thoroughly analyzing the comparables. The user compares the subject property and comparables listed on the appraisal to those found in the National Collateral Database™ (NCD). QCV offers an interactive map plotting the subject and comps (from the appraisal and from the NCD) and a thorough report.

As part of the complete product, it does not include an estimated value based on FNC’s internal automated valuation model. QC Vigilance is specifically intended to be a review tool. That means, as a matter of practice, FNC clients order QC Vigilance after ordering an appraisal and actually run the QC Vigilance against the appraisal. Again, clients use QC Vigilance information to compare to the information in the appraisal to check and validate the appraised value (as a review tool).
Even more than with Property Scan, it can fairly easily be argued that a QC Vigilance report is not a valuation.

In summary, it can be argued that neither Property Scan nor QC Vigilance is a valuation. But, these conclusions are ones where reasonable minds can differ (and will).

Why does it matter? If a creditor comes to the conclusion that either of those reports is a valuation, all that means is that the creditor will then deliver a copy of that report to the applicant along with all of the other valuations. If not, then the creditor will not. In either case, their position is certainly defensible.

- When I send the appraisal to the applicant do I have to send everything, including all of the exhibits and attachments, or can I just send the body of the appraisal?

The whole thing.

2. Attachments and exhibits. The term “valuation” includes any attachments and exhibits that are an integrated part of the valuation.

Now, the “whole thing” does not include all of those extra ingredients that an appraiser might bolt onto the appraisal: copies of E & O insurance, appraiser licenses, invoices and so on. Those are not really an “integrated part of the valuation”.
How can I deliver the appraisal and other written valuations and when is it considered delivered? Do I need to confirm delivery?

The appraisals and other written valuations may be delivered on paper or in electronic form. When the appraisals and other valuations are provided in electronic form, there are some special rules.

(5) Copies in electronic form. The copies required by § 1002.14(a)(1) may be provided to the applicant in electronic form, subject to compliance with the consumer consent and other applicable provisions of the Electronic Signatures in Global and National Commerce Act (E-Sign Act) (15 U.S.C. 7001 et seq.).

We have already discussed the rules under E-Sign in our Quick Summary. Essentially, the consumer (applicant) needs to consent to receiving information through electronic means and at some point needs to “reasonably demonstrate[] that the consumer can access information in the electronic form”. Since we are well into the application process by the time we decide how we are going to deliver the appraisal, the creditor will have already established whether the consumer consents to receive information electronically and whether the consumer has already demonstrated that he or she can receive information electronically.

(It might be helpful to note that the Consumer Financial Protection Bureau (CFPB) estimates that most appraisals sent to applicants today are sent electronically.)

In the proposal, the Bureau assumed that 84 percent of appraisals are sent via e-mail and that these are already being sent in a manner that complies with the E-Sign Act, 15.75 percent of appraisals are sent via the United States Postal Service, and 0.25 percent of appraisals are sent via courier. The final rule adopts this assumption, recognizing that some creditors, as reflected in comments received on the proposal, may elect not to provide copies electronically in compliance with the E-Sign Act (and therefore these copies would be provided as part of the 16 percent of copies that are sent via the postal service or courier).

• When is the appraisal or other valuation considered to be delivered?

The regulations are clear that delivery occurs no later than three business days after mailing or delivering to the last known address. The last known address would apply to both mailing and to electronic delivery.

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, whichever is earlier. Delivery to or actual receipt by the applicant by electronic means must comply with the E-Sign Act, as provided for in § 1002.14(a)(5).

Note, it is 3 business days not 3 calendar days.

• What is this part about the “actual receipt by the applicant” Do I have to confirm that the applicant received the valuations?
Good question. This language has caused a fair amount of confusion. Some people read this and said they had to confirm receipt. Not so.

This language is in the “timing” section.

4. Timing. Section 1002.14(a)(1) requires that the creditor “provide” copies of appraisals and other written valuations to the applicant “promptly upon completion,” or no later than three business days before consummation (for closed-end credit) or account opening (for open-end credit), whichever is earlier.

   i. For purposes of this timing requirement, “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, whichever is earlier. Delivery to or actual receipt by the applicant by electronic means must comply with the E-Sign Act, as provided for in § 1002.14(a)(5).

The timing section relates to whether the creditor has delivered the appraisal or other valuation within the timing requirements.

In this case, as we have indicated, if the creditor does nothing, the appraisal or other valuation is deemed to have occurred three business days after it was sent. So, for checking to see if the creditor met the timing requirement, that is enough.

But, what happens if time is tight and three business days is too much. The loan is about to close and the creditor wants to make it under the wire. If the creditor can show that the applicant received the appraisal or other valuation in less than three business days, then the creditor gets credit for the shorter time.

How does that work? Suppose the creditor sends the applicant an email with the appraisal today, and the applicant sends back a reply email that says, thanks, I got it. Then the creditor has “evidence” indicating the actual receipt and when actual receipt occurred.

- Are you sure we do not have to confirm receipt?

The regulations already include a presumption of delivery (“Delivery occurs three business days after mailing or delivering the copies to the last-known address of the applicant.”). To add an additional requirement would make that provision meaningless.

That does not mean that you cannot decide to take the additional action to confirm delivery.

- And you say the last known address is enough?

Yes. That is enough. Now it is an interesting question regarding which happens if the creditor receives the copy of the appraisal back (bad mailing address) or the email bounces back.
regulations do not really talk about how much due diligence the creditor needs to apply to figuring out whether the applicant has a different address or not. This will more likely occur when the loan is not made, than if it is.

Still, it would seem reasonable that the creditor would need to make some good faith effort to figure out a better address.

On the other hand, if you send to the last known address and it does not come back, you have complied.

- You say electronic delivery and keep saying email. Is there another way to deliver electronically?

There is, but it has its own problems.

Another way to provide people with notice of things (including disclosures) is to send them an email that contains a link to a place on a website, where they can pick up their statements, disclosures, order confirmations and so on. In many ways, this is actually more secure than sending an email. But (there is always a “but”), what if the person does not click on the link to the website? In that case, then no delivery has occurred—which would frustrate the creditor’s efforts to comply.

So, no links. You only get the protection of the regulation if you email it. That works even if the person does not look at the email (or for the matter, opens the envelope you mailed).