

## **Home Valuation Code of Conduct: The Impact on Real Estate Agents**

By John Dolgetta

Partner in the law firm of Edward I. Sumber, P.C.

The Home Valuation Code of Conduct (“HVCC”) establishes a code of conduct providing for standards to be followed by lenders, appraisers, real estate agents and other third parties involved in the mortgage process. The HVCC became effective as of May 1, 2009. It is not new legislation passed by Congress but rather an agreement that was entered into by New York State Attorney General Andrew Cuomo, and Fannie Mae and Freddie Mac, also known as government sponsored enterprises (“GSEs”), involving the establishment of “...standards for solicitation, selection, compensation, conflicts of interest and appraiser independence...” relating to the appraisal procedures to be followed in connection with mortgage applications on one to four family homes.

The National Association of Realtors® (“NAR”) made several attempts to delay its implementation in order to provide more time for real estate professionals to prepare for it and because of the adverse consequences that it could have on the already fragile real estate market. Many also believe that the HVCC may have an adverse effect on the real estate market by placing additional burdens and restrictions on an industry that has already been hard hit. Nevertheless, it became effective on May 1, 2009 and as far as is evident, the HVCC does provide protections that are necessary and will not have as dramatic an effect as many had expected.

### **Is the HVCC Binding?**

The HVCC is not legislation, it is an agreement entered into by the GSEs, the Office of Federal Housing Enterprise Oversight (the federal agency which regulates the GSEs) and the New York State Attorney General, which requires all lenders that sell mortgages to the GSEs to abide by its terms. In the event lenders fail to comply with the HVCC, they will be prohibited from selling mortgages for one-to-four family homes to the GSEs. In addition, if a lender is later found to have violated the provisions of the HVCC, after any such mortgage was sold, it will be required to repurchase any participation interest in any mortgage it may have sold to the GSEs.

Lenders that do not intend to sell their mortgages to the GSEs do not have to abide by the HVCC. Section IV-E of the HVCC provides that the HVCC “...do[es] not apply to institutions (including non-banking institutions) that meet the definition of a “small bank” as set forth in 12 U.S.C. § 2908, and which Freddie Mae or Fannie Mae determines would suffer hardship due to the provisions, and which otherwise adhere to this Code of Conduct.” It is important to note that although the HVCC is not “legislation” it is still binding on the parties referred to therein in so far as they are involved in the loan and appraisal process.

## **The “Third Party”: The Realtor’s® Obligations**

In many instances the term “third party” is referred to throughout the HVCC. The term “third party” refers to real estate agents, mortgage brokers or other third parties that have an “influence” over the appraisal process and are involved in the mortgage application. Section III-A of the HVCC entitled “Appraiser Engagement” provides that “[t]he lender will not accept any appraisal report completed by an appraiser selected, retained, or compensated in any manner by any other third party (including mortgage brokers and real estate agents).” Real estate agents cannot serve as a third party between a lender and appraiser and are prohibited from choosing an appraiser.

Section 1-C of the HVCC, however, does permit Realtors and lenders to speak with appraisers to “...(1) provide information or explanation about the basis for a valuation; or (ii) correct objective factual errors in an appraisal report.” While most real estate agents are normally not involved in choosing a real estate appraiser, there may be instances where the real estate agent or broker is familiar with or is affiliated with, through a business relationship or other affiliation, a certain lender, mortgage broker, and/or appraiser and attempts to engage in, or is engaged in, acts that may be perceived to be exerting “improper influence.” If that occurs, the real estate agent or broker should cease such actions or business affiliations immediately or immediately comply with the provisions of the HVCC. The National Association of Realtors® has provided the Realtor® community with a link located at [www.realtor.org/hvcc](http://www.realtor.org/hvcc) so that real estate professionals may be able to access updated information relating to the HVCC.

## **Avoiding “Improper Influence”**

The HVCC prohibits any lender from utilizing any appraisal report that is: “(1) prepared by an appraiser employed by: (a) the lender; (b) an affiliate of the lender; (c) an entity that is owned, in whole or in part, by the lender; or (d) an entity that owns, in whole or in part, the lender” or “(2) prepared by an appraiser (a) employed, (b) engaged as an independent contractor, or (c) otherwise retained by any appraisal company or any appraisal management company affiliated with, or that owns or is owned, in whole or in part by, the lender or an affiliate of the lender.” Section IV-B of the HVCC does, however, provide a list of measures a lender and third party can take to ensure that they are not exerting “improper influence” and are in compliance with the HVCC.

The NAR Regulatory Issue Brief (the “NAR Brief”) published by the National Association of Realtors® Government Affairs Division provides that lenders must establish a “firewall between loan production staff and appraisal staff. Lenders may create this separation by retaining the services of a third party company, such as an [appraisal management company (“AMCs”)], that will select an appraiser for the lender.” The HVCC also allows lenders to establish an internal “firewall” so that they may comply with the requirements. As such, the NAR brief indicates that “Broker Realtors®

that offer services as a lender or affiliated lender or that offer appraiser services must comply fully with the HVCC if there is an expectation that their loans will be purchased by Fannie Mae or Freddie Mac on or after May 1, 2009.”

Section C of the HVCC further provides that:

“In underwriting a loan, the lender shall not use an appraisal report prepared by an entity that is affiliated with, or that owns or is owned, in whole or in part by, another entity that is engaged by the lender to provide other settlement services, as that term is defined in the Real Estate Settlement Procedures Act, 12 U.S.C. § 2601 et seq., for the same transaction, *unless the entity that provides the appraisal*:

(1) has adopted written policies and procedures implementing this Code of Conduct, including, but not limited to, adequate training and disciplinary rules on appraiser independence (including the principles detailed in this Code of Conduct) and has mechanisms in place to report and discipline anyone who violates these policies and procedures;

(2) recognizes that, once the Independent Valuation Protection Institute is established, the Institute will receive complaints for review and referral regarding non-compliance with the Code of Conduct. Referrals and reports shall be made to Fannie Mae and/or Freddie Mac regarding such complaints and the Institute will provide information on the results of its review of such complaints to Fannie Mae and/or Freddie Mac and make them available to the other parties to the Home Value Protection Program and Cooperation Agreement.”

Real estate agents must ensure that they are familiar with the requirements of the HVCC and must ensure that they are in compliance with its provisions. To date, the Independent Valuation Protection Institute referred to above has yet to be formed and was one of the reasons why NAR attempted to delay the implementation of the HVCC.

### **NAR: Keeping Realtors® Updated**

The National Association of Realtors® has prepared a number of publications, blogs and websites dealing with the issues relating to the HVCC, such as HVCC Summary/FAQ, NAR Regulatory Issue Brief prepared for the mid-year meetings held in Washington, D.C. and the Appraisal Insight Blog. NAR also issued several new policy statements at the mid-year meetings where NAR supported “...the empowerment of federal mortgage regulators to adopt standards for AMCs and to promulgate licensing requirements of AMCs to the State through the Financial Institutions Reform and Recovery Act (FIRREA) and other related legislation.” NAR also plans to host a forum

at the 2009 Annual Convention in November to address the issues relating to the HVCC and related topics. It is important that real estate agents review these materials and familiarize themselves with the requirements of the HVCC as well other new pending legislation and issues in this ever-changing and challenging environment.

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