The Clearing House
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September 29, 2017

Via Electronic Mail

Board of Governors of the Federal Reserve System
20th Street & Constitution Avenue, N.W.
Washington, D.C. 20551
Attn: Ann E. Misback, Secretary

Office of the Comptroller of the Currency
400 7th Street SW., Suite 3E-218
Mail Stop 9W-11
Washington, D.C. 20219
Attn: Legislative and Regulatory Activities Division

Federal Deposit Insurance Corporation
550 17th Street N.W. Washington, D.C. 20429
Attn: Manuel E. Cabeza, Counsel (Room MB-3007)

Re: Notice of Proposed Rulemaking to Exempt Commercial Real Estate Transactions of $400,000 or Less from Appraisal Requirements (Federal Reserve Docket No. R-1568, RIN 7100 AE-81; OCC Docket ID. OCC-2017-0011, RIN 1557-AE-18; and FDIC RIN 3064 AE-56)

Ladies and Gentlemen:

The Clearing House Association L.L.C.[1] appreciates the opportunity to comment on the Notice of Proposed Rulemaking of the Board of Governors of the Federal Reserve System, the Office of the Comptroller of the Currency and the Federal Deposit Insurance Corporation

[1] The Clearing House is a banking association and payments company that is owned by the largest commercial banks and dates back to 1853. The Clearing House Association L.L.C is a nonpartisan organization that engages in research, analysis, advocacy and litigation focused on financial regulation that supports a safe, sound and competitive banking system. Its affiliate, The Clearing House Payments Company L.L.C., owns and operates core payments system infrastructure in the United States and is currently working to modernize that infrastructure by building a new, ubiquitous, real-time payment system. The Payments Company is the only private-sector ACH and wire operator in the United States, clearing and settling nearly $2 trillion in U.S. dollar payments each day, representing half of all commercial ACH and wire volume.

(collectively, the "Agencies") to increase the current appraisal requirement threshold for commercial real estate transactions under Title XI of the Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("Title XI"). We strongly support the Agencies' efforts to reduce regulatory burden and we encourage the Agencies to consider additional modifications to the Title XI appraisal requirements to further reduce unnecessary and burdensome requirements.

I. Background

Title XI requires each of the Agencies to publish appraisal regulations for "federally related transactions" within its jurisdiction.[2] Title XI and the Agencies' regulations require real estate appraisals used in connection with "federally related transactions" to be performed in writing, in accordance with uniform standards, by appraisers meeting certain qualifications and requirements.[3] As a general matter, "federally related transactions" means any transaction by a bank or its affiliates for which a Title XI appraisal is required and which involves (1) the sale, lease, purchase, investment in or exchange of real property, including interests in property, or the financing thereof; (2) the refinancing of real property or interests in real property; or (3) the use of real property or interests in property as security for a loan or investment, including mortgage backed securities (collectively, "real estate related transactions").[4] The Agencies have authority to determine which real estate related transactions are not "federally related transactions."[5]

Currently, a Title XI appraisal is not required for, among other exempt categories, (1) any real estate related transaction that has a transaction value of $250,000 or less or (2) certain real estate-secured business loans ("qualifying business loans") with a transaction value of $1,000,000 or less.[6] With only one exception, the Agencies have not modified the exemptions from the Title XI appraisal requirements for twenty-three years.[7]

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2 *See* 12 U.S.C. § 3342 (describing considerations to be taken into account by agencies in determining whether an appraisal in connection with a federally related transaction is required); *see also* 12 C.F.R. part 34, subpart C (OCC regulations); 12 C.F.R. part 225, subpart G (Federal Reserve regulations); 12 C.F.R. part 323 (FDIC regulations).

3 12 U.S.C. § 3342; 12 C.F.R. § 34.44; 12 C.F.R. § 225.64; 12 C.F.R. § 323.4.

4 *See* 12 U.S.C. § 3350(4) (defining "federally related transaction"); 12 U.S.C. § 3350(5) (defining "real estate related transaction").

5 *See* 12 U.S.C. § 3341(b) (providing that the Agencies may establish a threshold level at or below which a certified or licensed appraiser is not required to perform appraisals for real estate related transactions). Any such real estate related transactions identified by the Agencies are not "federally related transactions" under the statutory or regulatory definitions because they are not required to have Title XI appraisals.

6 12 C.F.R. § 34.43; 12 C.F.R. § 225.63; 12 C.F.R. § 323.3. Although appraisals are not required for the two exemptions described above, "appropriate" evaluations are required pursuant to the Agencies' regulations. *Id*. Other exemptions outlined in the Agencies' regulations include: (1) the "abundance of caution" exemption (extension of credit is well supported by income or other collateral and real estate is being taken

II. Support for Current Proposal; Additional Modifications for Consideration

We strongly support updating the Agencies' appraisal regulations to reduce regulatory burden, including by increasing the threshold for requiring an appraisal from $250,000 to $400,000 for "federally related transactions" involving commercial real estate. We believe that the Agencies' consideration of inflation indices and analysis of call report data support such an increase. Moreover, as noted in the Agencies' proposal, because commercial real estate prices have increased since 1994, a smaller percentage of commercial real estate transactions are currently exempted from the appraisal requirements than when the threshold was established.

We believe, however, that a number of other amendments and clarifications with respect to the Agencies' appraisal regulations would provide additional regulatory relief without risk of raising safety and soundness concerns. Since the appraisal regulations were first adopted in 1990, the types of real estate related transactions in which banks and their affiliates engage have evolved and diversified. Due to the complex and often global nature of certain types of real estate related transactions, compliance with the Agencies' appraisal requirements under these circumstances, which were not contemplated at the time of the original rulemaking, is often impractical, unduly burdensome and not meaningfully protective of federal financial and public policy interests. In addition, appropriate risk management and credit analysis, combined with safety and soundness requirements built into other applicable regulatory schemes, provide banks with ample comfort with respect to many types of real estate transactions without the need for a Title XI appraisal.

Some examples that highlight the above considerations and related proposals for relief are discussed below.

A. Non-U.S. Real Estate Transactions

Real estate related transactions with a nexus to real property located outside of the United States are not currently exempt from the Agencies' appraisal requirements. Examples of non-

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as additional collateral); (2) unsecured loans; (3) liens not related to the real estate's value; (4) certain lease transactions; (5) renewals, refinancing and other subsequent transactions (evaluations are required); (6) purchase, sale of loans, loans secured by an interest in real estate, etc. (exemption is intended to support secondary markets); (7) government issued or guaranteed loans; (8) loans that qualify for sale to, for example, Fannie Mae or Freddie Mac; (9) transactions by regulated institutions as fiduciaries; and (10) circumstances in which the Agencies determine that appraisals are unnecessary to protect federal financial and public policy interests or the safety and soundness of financial institutions.

[7] *See* 59 Fed. Reg. 29482 (June 7, 1994). In 1998, the Federal Reserve amended its appraisal regulations to permit bank holding companies and their nonbank subsidiaries to underwrite and deal in mortgage backed securities without demonstrating that the loans underlying the securities are supported by appraisals that meet the Federal Reserve's appraisal requirements. 63 Fed. Reg. 65330 (Nov. 27, 1998).

U.S. real estate transactions that are technically subject to the appraisal requirements under the current language of the Agencies' regulations include the following:

1. A U.S. bank makes a loan in the United States, and the loan is partially secured by real estate located in the United Kingdom.

2. The London branch of a U.S. bank makes a loan in the United Kingdom, and the loan is secured by real estate located in the United Kingdom.

3. A U.K.-chartered bank that is a subsidiary of a U.S. bank holding company makes a loan in the United Kingdom, and the loan is secured by real estate located in the United Kingdom.

It is not feasible to identify appraisers for non-U.S. real estate transactions that are licensed or certified by a U.S. state, as currently required by the appraisal regulations. Requiring a Title XI appraisal is also unnecessary from a credit risk perspective in circumstances such as the first example above where the loan may be secured by multiple pieces of real estate, only a portion of which are located outside of the United States, making obtaining appraisals for all individual pieces of collateral a superfluous exercise.[8] In addition, requiring U.S. banking organizations to comply with requirements that are stricter than local market practice imposes a competitive disadvantage on the U.S. institutions and can result in conflicting legal requirements, particularly in circumstances such as the third example above where the lending institution has a primary regulator outside of the United States.

B. Mortgage Backed Securities and Pools of Mortgages

Transactions involving mortgage backed securities and pools of mortgages also pose logistical issues when banks seek to comply with the Agencies' appraisal regulations in those contexts. The underlying loans in these transactions often were originated many years before, making existing appraisals largely irrelevant.

Since 1998, the Federal Reserve's appraisal regulations have exempted from the appraisal requirements transactions involving underwriting or dealing of mortgage backed securities.[9] As recognized by the Federal Reserve in adopting the final rule, in most mortgage backed securities transactions, the underlying loans have demonstrated their ability to perform over a period of time and appraisals obtained at origination become increasingly less relevant to an investor's

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[8] We also recommend that the Agencies consider clarifying that the "abundance of caution" exemption applies where a loan is secured by multiple properties—for example, where the borrower is a REIT or a hotel operator—and not just where sufficient non-real estate collateral exists to secure the loan.

[9] 12 C.F.R. § 225.63(a)(12).

decision to purchase the related securities "because the market assumptions upon which the appraisals were based may have become obsolete."[10]

The Agencies should exempt mortgage backed securities from the appraisal requirements regardless of where such securities are permissibly held by banking organizations (and not just on the basis of banks underwriting or dealing in such securities). Such an exemption would not risk raising safety and soundness concerns for a number of reasons. Investors often consider structural factors when evaluating a particular mortgage backed securities transaction, such as the presence of a first loss tranche and overcollateralization.[11] Further, other regulatory requirements applicable to banking organizations' ownership of or investments in securities require banks to adhere to safe and sound banking practices while engaging in such activities.[12]

For the same reasons mortgage backed securities should be exempted from the appraisal requirements, pools of mortgages acquired by banking organizations should not be subjected to the appraisal requirements. Banks typically consider factors other than the underlying real property, such as past performance of the loan pool and the structural factors described above, when evaluating such interests. Loan pools, including pools of non-performing loans, are generally priced at a significant discount that takes into account performance history, and banking organizations typically review and rely on valuations not necessarily meeting the Title XI appraisal requirements when deciding whether or not to enter into the transaction. In addition, in the case of transactions involving pools of non-performing loans, the relevant records may be missing or incomplete and/or the borrower may be unavailable or unwilling to facilitate access to the property for a new appraisal. Exempting such transactions from the Agencies' appraisal requirements would have market benefits due to the resulting enhanced liquidity of these types of loans.

C. Community Development

In order to facilitate banks' support for community development initiatives, the Agencies should create an exemption from the appraisal requirements for loans made to community development organizations that are not themselves subject to the Agencies' appraisal regulations.[13] Although banks making such loans generally require that the credit facility benefit

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[10] 63 Fed. Reg. 65330, 65332 (Nov. 27, 1998).

[11] In addition, parties to these transactions can often rely on appraisal-related representations to ensure that proper appraisals were conducted at the time of origination. Such representations are often unavailable, however, in the context of non-U.S. transactions, which further supports our recommendation that the Agencies' exempt non-U.S. real estate transactions from the appraisal requirements applicable to U.S. transactions.

[12] *See, e.g.*, 12 C.F.R. part 1.

[13] Some community development organizations are financial institutions independently subject to the appraisal regulations. In such cases, banks may rely on the exemption available for extensions of credit

from a security interest in the underlying community development organization-originated loans and related real estate collateral, banks lend to such organizations primarily to support public welfare, and the credit analysis undertaken prior to extending the loan is typically based on the organization's cash flows rather than the value of the real estate security the organization holds. In addition, banks are separately required under Community Reinvestment Act regulations to engage in community development investing and lending in a manner consistent with safe and sound banking practices.[14]

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The Clearing House appreciates the opportunity to comment on the proposal. If you have any questions, please contact the undersigned by phone at (202) 649-4628 or by email at John.Court@theclearinghouse.org.

Respectfully submitted,

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secured by loans secured by real estate or an interest in real estate, provided that each loan originated by the community development organization met the Agencies' regulatory requirements for appraisals at the time of origination. *See, e.g.*, 12 C.F.R. § 225.63(a)(8).

[14] *See, e.g.*, 12 C.F.R. part 228.