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ADVISORY OPINION

Adopted by the New Jersey
State Board of Real Estate
Appraisers - November 27, 2012

The New Jersey Real Estate Appraisers Board (the "Board") is aware that uncertainty exists regarding the question whether state licensed real estate brokers (the term "broker" is herein used in a generic sense, and includes licensed brokers, salespersons, broker/salespersons and/or agents) may prepare "Brokers' Price Opinions" (hereinafter "BPO"s) without violating New Jersey law. Specifically, the Board has received inquiries whether brokers who prepare BPOs are engaged in the unlicensed practice of appraising, and has also received complaints asking that the Board investigate and/or take legal action against brokers preparing BPOs.

In order to provide general guidance to the public, to include both licensees of the Board and licensees of the Real Estate Commission, the Board issues the following Advisory Opinion. It is the Board's intent, through the issuance of this Advisory Opinion, to provide notice of the Board's position on issues regarding the preparation of BPOs by persons other than licensed or certified appraisers. While the Advisory Opinion is offered to provide general guidance to the public, it is not intended to be, nor may it be considered to constitute, a formal Attorney General's opinion.

For the reasons set forth below, the Board advises that a "BPO" is an "appraisal" under New Jersey law. Given that predicate, anyone other than a licensed appraiser who prepares a BPO engages in the unlicensed practice of appraising, unless he or she prepares the BPO pursuant to a specific statutory exemption (see additional discussion of exemptions below).

An appraisal is defined under New Jersey law to be "an unbiased analysis, opinion or conclusion relating to the nature, quality, value or utility of specified interests in, or aspects of, real estate." N.J.S.A. 45:14F-2. An "appraisal report" is defined to be "any written communication of an appraisal." Id. The Uniform Standards of Professional Appraisal Practice, which are incorporated by reference in their entirety within the Board's regulations, see N.J.A.C. 13:40A-6.1(a), define an "appraisal" generally to be "an opinion of value," and define the term "report" to encompass "any communication, written or oral, of an appraisal

. . ."[1] The Board takes the position, for purposes of the analysis herein, that a written report which communicates an opinion of the value of an interest in real estate is an "appraisal report."

The term BPO is not defined within New Jersey law. The term does not appear in the Real Estate Appraisers Act or in any of the Board's regulations, nor does it appear in the statutes governing the practice of real estate brokers and salesmen, see N.J.S.A. 45:15-1, et seq. or in any regulations adopted by the Real Estate Commission, see N.J.A.C. 11:5-1.1 et seq. A BPO is defined, under federal law (within the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010), to be "an estimate prepared by a real estate broker, agent, or sales person that details the probable selling price of a particular piece of real estate property and provides a varying level of detail about the property's condition, market, and neighborhood, and information on comparable sales, but does not include an automated valuation model." H.R. 4173 at §1126(b). For purposes of the analysis herein, the Board adopts the definition of BPO found in the Dodd-Frank Act. It is the Board's position that any report that details the probable selling price of a property must also be considered to be a report communicating an opinion upon the value of that property. Accordingly, a BPO is an "appraisal" under New Jersey law.

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[1] The full definitions of the terms "appraisal" and "report" within the USPAP (2012-2013 edition) are as follows:

APPRAISAL: (noun) the act or process of developing an opinion of value; an opinion of value

(adjective) of or pertaining to appraising and related functions such as appraisal practice or appraisal services.

Comment: An appraisal must be numerically expressed as a specific amount, as a range of numbers, or as a relationship (e.g., not more than, not less than) to a pervious value opinion or numerical benchmark (e.g., assessed value, collateral value).

REPORT: any communication, written or oral, of an appraisal, appraisal review, or appraisal consulting service that is transmitted to the client upon completion of an assignment.

Comment: Most reports are written and most clients mandate written reports. Oral report requirements (see the RECORD KEEPING RULE) are included to cover court testimony and other oral communications of an appraisal, appraisal review, or appraisal consulting service.

The Real Estate Appraisers Act mandates that appraisals of real property situate in New Jersey can only be performed by state licensed or certified appraisers. Accordingly, unless a specific exemption applies under state law, brokers who prepare BPOs in New Jersey are engaged in the unlicensed practice of appraising.

There are two provisions of the Real Estate Appraisers Act which may operate to exempt brokers preparing BPOs from appraiser licensure requirements. A broker may legally prepare a BPO if the BPO is:

- prepared for the purpose of giving "counsel and advice on pricing, listing, selling and use of real property, directly to a property owner or prospective purchaser, if the intended use of the counsel or advice is solely for the individual knowledge of or use by the property owner or prospective purchaser." N.J.S.A. 45:14F-21(c)[2] ; or

- prepared for a State or federally chartered bank, savings bank, or savings and loan association, in those circumstances "where the underlying transaction is a federally related transaction for which federal law and regulation do not require that a certified or licensed appraiser be used." N.J.S.A. 45:14F-21(f).

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[2] N.J.S.A. 45:14F-21(c) specifically provides:

> Except as otherwise provided in subsection f of this section, no person other than a State licensed real estate appraiser, a state certified real estate appraiser or a person who assists in the preparation of an appraisal under the direct supervision of a State licensed or certified real estate appraiser shall perform or offer to perform an appraisal assignment in regard to real estate located in this State including, but not limited to, any transaction involving a third party, person, government or quasi-governmental body, court, quasi-judicial body or financial institution.
>
> Nothing in P.L. 1991, c. 68 (C.45:14F-1 et seq.) shall be construed to preclude a person not licensed or certified pursuant to this act from giving or offering to give, for a fee or otherwise, counsel and advice on pricing, listing, selling and use of real property, directly to a property owner or prospective purchaser if the intended use of the counsel or advice is solely for the individual knowledge of or use by the property owner or prospective purchaser.

The Board maintains that the exemption set forth at N.J.S.A. 45:1-21(c) - that is, for the provision of counsel and advice on pricing, listing, selling and use of property - must be interpreted to apply only when a broker is engaged in a transactional relationship with a property owner or identifiable prospective purchaser of a specific property, and when the broker then elects to prepare a BPO directly for the sole use of the individual client. Alternatively stated, the Board suggests that the exemption applies only when the broker has a commercial and/or professional relationship with the prospective purchaser or property owner. Even in those situations, it remains the case that the BPO can only be prepared for the individual knowledge of or use by the property owner or prospective purchaser, and not for any other purpose. The Board points out that any broader interpretation of the statutory exemption could effectively eviscerate appraisal licensure requirements, because it would then provide brokers with potentially limitless authority to prepare appraisals on New Jersey properties.

The second statutory exemption set forth at N.J.S.A. 45:14F-21(f) applies only to state or federally chartered banks, savings banks and/or savings and loan associations, and only to those "federally related transactions" where federal law and regulation do not require the use of a certified or licensed appraiser. While the Board will not herein seek to analyze the scope of the subsection (f) exemption, the specified financial institutions may opt to engage brokers to prepare BPOs upon properties for the specified transactions, and brokers preparing BPOs for use in those circumstances would not violate state law.

Any broker who prepares a BPO for any purpose or user other than those excluded by operation of N.J.S.A. 45:14F-21(c) and/or 45:14F-21(f) engages in the unlicensed practice of appraising. The unlicensed practice of appraising, in turn, is punishable by fines of up to $10,000 for a first violation and $20,000 for each subsequent violation.

Given the ambiguity that has existed prior to the issuance of this Advisory Opinion, the Board has determined that it will exercise prosecutorial discretion, and not seek to penalize or take action(s) against any brokers who may have previously prepared BPOs for impermissible purposes or uses. Brokers are cautioned, however, that they should immediately cease and desist from engaging in the preparation of BPOs for any uses other than those permissible under New Jersey law. Failure to do so may expose a broker to penalties for the unlicensed practice of appraising.

SUPPLEMENT

In order to provide additional guidance, set forth below are additional questions and answers generally regarding appraisals and BPOs. The questions and answers should be considered to provide additional information outlining the position set forth herein, and should thus be considered to be incorporated within, and a part of, this Advisory Opinion.

1) **Can a broker prepare a BPO provided that he or she includes a statement in the BPO that the BPO is not to be considered to be an appraisal?**

A broker can only legally prepare a BPO in New Jersey if the BPO is prepared pursuant to one of the two statutory exemptions discussed above. Neither the inclusion of, nor the failure to include, a "disclaiming" statement in any way alters the analysis whether or not a BPO is in fact an appraisal, nor the analysis whether the BPO can be legally prepared.

2) **What are examples of impermissible uses of a BPO, or impermissible clients for whom a BPO might be prepared?**

While it would be impossible to catalogue a complete list of potential impermissible uses and/or clients, the Board suggests that BPOs prepared for the following uses or clients are likely to be outside the scope of the statutory exemptions, and thus illegal under New Jersey law:

- BPOs prepared for use in tax appeal proceedings;

- BPOs prepared for use in judicial or quasi-judicial proceedings where the value of property is an issue to be determined;

- BPOs prepared for use in determining the value of property for the purpose of loan origination;

- BPOs prepared for mortgage service companies or asset managers for purposes such as loan origination, loan modifications, short sales portfolio valuation, etc.

3) **What are the consequences or potential penalties for preparing a BPO?**

The Board is authorized, under state law, to investigate and to penalize individuals who engage in the unlicensed practice of real estate appraising. The Board has broad investigative powers, and is authorized to hold hearings to determine whether an unlicensed person has engaged in unauthorized practice. Following a hearing, the Board can enter Orders requiring unlicensed persons to cease and desist from continued unlicensed practice, and is authorized to assess penalties of up to $10,000 for a first violation, and up to $20,000 for each subsequent violations.

While the Board cannot order the suspension or revocation of a broker's license, it is possible that licensed brokers or salespersons could be subject to such actions by the Real Estate Commission.

4) **What is a "CMA"? Is a "CMA" the equivalent of a "BPO."?**

The Board declines to seek to interpret the regulations of the Real Estate Commission, but points out that the term "comparative market study or analysis" ("CMA") only appears within one paragraph of those regulations, specifically N.J.A.C. 11:5-6.1(m)(3). The Commission's rules state that a CMA is not an appraisal, and the Commission's regulations state that the term "appraisal" is to be "given its technical meaning as a study and analysis by an appraiser authorized by law to perform appraisals of New Jersey real estate to ascertain fair market value by using a process in which all factors that would fix price in the market place must be considered." N.J.A.C. 11:5-6.1(m)(3). The Commission's rules further provide that any written CMA is to "include a statement that the CMA is not an appraisal and should not be considered the equivalent of an appraisal."

Given that the Real Estate Commission's regulations do not define the term CMA, it is impossible for the Board to take a position whether a CMA would or would not fall within the definition of an appraisal under New Jersey law.