



Clarifying the Muddy Waters Concerning CMAs, BPOs and Appraisals

By: Barry S. Goodman, Esq.

Although you have prepared Comparative Market Analyses (CMAs) for buyers and sellers, lenders may have recently asked you to prepare Broker Price Opinions (BPOs) or even appraisals. Can you, as a real estate licensee, prepare BPOs or appraisals? What is the difference between CMAs, BPOs and appraisals? How does the NATIONAL ASSOCIATION OF REALTORS® (NAR) Code of Ethics affect your ability to prepare CMAs, BPOs or appraisals for other parties?

Although CMAs, BPOs and appraisals can be useful tools for buyers, sellers and lenders, you must understand what rights you have to prepare them in New Jersey. This article therefore will provide you with some background and guidelines for clarifying the muddy waters in which you must operate if you want to provide CMAs, BPOs or appraisals.

Regulations Governing CMAs

The New Jersey Real Estate Commission (NJREC) specifically allows real estate licensees to provide CMAs¹. Although the NJREC does not define a CMA, one definition is that CMAs “are used to help establish a realistic price range for homes. A CMA usually includes a review of comparable properties in the immediate area currently on the market or that have recently sold².”

After clearly stating that a CMA is not an appraisal, the NJREC’s regulations require that every CMA must provide a disclaimer as follows:

Any written comparative market study or analysis (CMA) provided by a licensee to a consumer shall include a statement indicating that the CMA is not an appraisal and should not be considered the equivalent of an appraisal. The said statement shall appear in print as large as the predominant size print in any writing reporting the results of the CMA³.

Thus, there can be no question that real estate licensees in New Jersey are permitted to prepare CMAs for consumers as long as the licensee includes the required statement in the CMA.

Preparation of BPOs

Although neither the NJREC’s regulations nor any other regulations or statutes in New Jersey specifically use the term “BPOs,” federal law does. Under the Dodd-Frank Wall Street Reform and Consumer Protection Act, BPO is defined as:

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, as defined in Section 1125(c).⁴

Dodd-Frank allows lenders to consider BPOs prepared by real estate licensees but prohibits lenders from using BPOs as the primary basis to determine the value of a piece of property for the purpose of loan origination for a residential mortgage loan secured by the property if the purchase is a consumer's principal dwelling.⁵ Thus, Dodd-Frank makes it clear that, under federal law, lenders can use BPOs prepared by real estate licensees under certain circumstances.

It should be noted that, although BPOs historically were prepared for lenders, while CMAs historically were prepared for buyers and sellers, that distinction recently has become blurred. The reality is that CMAs nationally are increasingly being referred to as BPOs.

Limitations on the Preparation of Appraisals

Under the New Jersey Real Estate Appraisers Act, appraisals⁶ typically only can be prepared by licensed or certified appraisers. More specifically, the Appraisers Act prohibits any person who is not certified from referring to any appraisal or other valuation that he or she performs on real estate as a "certified appraisal" and, similarly, if the person is not licensed as an appraiser, from describing such an appraisal or other valuation as a "licensed appraisal."⁷

However, the Appraisers Act specifically provides that it shall not "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."⁸ Thus, not only can such advice be provided by real estate licensees but it can

be used by the property owner or prospective purchaser for whatever purpose he or she deems appropriate.

Significantly, the Appraisers Act permits lenders to use "appraisals" that have not been prepared by certified or licensed appraisers under certain circumstances:

A State or federally chartered bank, savings bank or savings and loan association may obtain and use appraisals made by a person who is not certified or licensed pursuant to [the Real Estate Appraisers Act] in any circumstance 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 used⁹.

Since appraisals can be considered by lenders under such circumstances, it certainly would appear that CMAs and BPOs prepared by real estate licensees also can be considered by those lenders as long as no federal law or regulation requires that a certified or licensed appraiser be used. As noted above, one example of such a requirement would be under the Dodd-Frank Law, which does not permit BPOs to be used as the primary basis for a lender making certain loans. Indeed, real estate licensees may very well be better off not preparing any "appraisals," as opposed to CMAs or BPOs, for a lender in order to avoid violating any federal or other laws of which they are unaware.

NAR's Code of Ethics

Article 11 of NAR's Code of Ethics prohibits REALTORS[®] from undertaking "to provide specialized professional services concerning a type of property or service that is outside their field of competence unless they engage the assistance of one who is competent on such types of property or service, or unless the facts are fully disclosed to the client." Standard of Practice 11-1 then explains that REALTORS[®] are permitted to provide opinions of value or price to third parties provided certain information is included as follows:

When REALTORS® prepare opinions of real property value or price, other than in pursuit of a listing or to assist a potential purchaser in formulating a purchase offer, such opinions shall include the following unless the party requesting the opinion requires a specific type of report or different data set:

- 1) identification of the subject property
- 2) date prepared
- 3) defined value or price
- 4) limiting conditions, including statements of purpose(s) and intended user(s)
- 5) any present or contemplated interest, including the possibility of representing the seller/landlord or buyers/tenants
- 6) basis for the opinion, including applicable market data
- 7) if the opinion is not an appraisal, a statement to that effect.

Thus, subject to applicable laws, REALTORS® are permitted to provide such opinions or value of price as long as they have the necessary competence, which could include but is not necessary limited to: knowledge of the market place where the property is located, experience with the property type that is being evaluated, and adequate access to necessary information concerning comparable prices or values. As a result, NAR now has a "Broker Price Opinion Resource (BPOR)" certification for REALTORS® who prepare BPOs.

Practical Tips

Although the NJREC's regulations only refer to CMAs and not to BPOs, it is strongly recommended that, if a real estate licensee prepares a BPO, the licensee should include the CMA statement required by the NJREC advising that the BPO is not an appraisal and should not be considered the equivalent of an appraisal. If the BPO is being prepared for a lender online, such language can be placed in the comment section of the BPO before it is sent to the lender

In addition, under the Real Estate Licensing Act, all payments for real estate related services provided by salespersons must be made to the broker. As a result, salespersons are not permitted to receive any payment directly for providing BPOs, CMAs or appraisals.

Finally, an issue has arisen whether or not a real estate licensee should provide appraisers with BPOs, CMAs or comparable sales or prices that the licensee has prepared. Real estate licensees have a fiduciary duty to their clients

to provide such analyses or opinions to an appraiser whenever it is deemed to be in the best interest of their clients. Certainly, this could include where there is a "fly by" appraisal by an appraiser who is not familiar with the area, resulting in an appraisal that does not reflect the true value of the property. Although it is then up to the appraiser whether or not to use this additional information, a thorough appraiser would most likely want to have as much relevant information available in order to ensure that the appraisal is as accurate as possible.

Conclusion

Real estate licensees therefore are allowed under certain circumstances to prepare CMAs, BPOs and even appraisals. However, caution should be exercised not to provide such price or value opinions in circumstances that are not permitted under state law, federal law and NAR's Code of Ethics. ■

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¹ See N.J.A.C. 11:5-6.1(m)3.

² NAR's Instructor and Student Manual entitled "BPOs: The Agent's Role in the Evaluation Process," at p. 109, quoting <http://www.mrktusa.com/glossary.htm>.

³ N.J.A.C. 11:5-6.1(m)3.

⁴ H.R. 4173 at §1126(b).

⁵ H.R. 4173 at §1126(a).

⁶ The NJREC defines "appraisal" as used in its regulations as having "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. In addition, "appraisal" is defined in the Real Estate Appraisers Act as meaning "an unbiased analysis, opinion or conclusion relating to the nature, quality, value or utility of specified interest in, or aspects of, real estate. An appraisal may be classified by subject matter into either a valuation or an analysis. A 'valuation' means an estimate of the value of real estate or real property and an 'analysis' means a study of real estate or real property other than a valuation." N.J.S.A. 45:14F-2.

⁷ N.J.S.A. 45:14F-21a, b.

⁸ N.J.S.A. 45:14F-21c.

⁹ N.J.S.A. 45:14F-21f.