HVCRE CHANGES
and Other Federal Codes, Restrictions and Guidelines to Commercial Real Estate Lending

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Niles Holmes has participated in various facets of the real estate business since 1984. After receiving his master's degree in real estate, Niles was employed as a commercial real estate appraiser and completed all of the educational requirements for the MAI designation. Subsequently, Niles was employed by a large life insurance company for five years as an investment officer. His duties included real estate lending, foreclosures, workouts, management and sales of acquired properties covering a five state territory. Niles' legal experience also includes serving as the general counsel of a publicly traded small business lending concern and mortgage REIT. Niles was formerly a shareholder in the Dallas office of Winstead P.C. where he served as a member of the firm's opinion committee and as Chairman of the Real Estate Lending Practice Group. Niles is Board Certified in Commercial Real Estate Law by the Texas Board of Legal Specialization. Niles is Board Certified in Commercial Real Estate Law by the Texas Board of Legal Specialization and is "av" rated by Martindale Hubbell for more than 10 consecutive years. Niles has been named as a *Super Lawyer* for the State of Texas for the years of 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017 and 2018. In 2015, 2016, 2017 and 2018, Niles and Niles Holmes PC was named as a *Best Lawyer* and *Best Law Firm in Texas* by the U.S. News and World Report. Niles is a frequent speaker and program coordinator specializing in commercial real estate lending topics including workouts, financial covenants and tenant in common lending. These educational and professional experiences give Niles a unique business and legal perspective to any transaction. Niles understands his client's needs and he provides his clients with an intelligent and strong advocate who is service oriented. Niles strives to accomplish his client's desires with an efficient and timely resolution. In light of Niles' business experiences, it is no surprise that his practice primarily relates to borrower and lender representation in lending, foreclosure, servicing and workout transactions.

Education

Southern Methodist University, Dedman School of Law
J.D., cum laude, 1992
Order of the Coif; Southwestern Law Journal; Staff SMU Law Review Editor;
American Jurisprudence Award – Real Estate
Texas A&M University; M.Agr., in Land Economics and Real Estate, 1984
Texas A&M University; B.S., Animal Science, 1982

Professional Memberships & Affiliations

State Bar of Texas; Dallas Bar Association; Texas Association of Bank Counsel; The College of the State Bar of Texas, American College of Mortgage Attorneys, Fellow

Community & Civic Involvement

Lakepoint Baptist Church, Rockwall, Texas

Presentation Topics

- Author/Speaker, Financial Covenants for Commercial Real Estate Lending Transactions, Mortgage Lending Institute, University of Texas School of Law (October 2012)
- Author/Speaker, Evolving Loan Structures, Mortgage Lending Institute, University of Texas School of Law (September 2011)
- Author/Speaker, Drafting Creative Financing Documents, Advanced Real Estate Drafting Course (March 2011)
- Author/Speaker, Real Estate Workouts, Advanced Real Estate Drafting Course (March 2010)
- Author/Speaker, Commercial Lending Coordinator, Financial Covenants for Lawyers, Advanced Real Estate Law Course (July 2004)
- Author/Speaker, Preforeclosure Documentation II (This time it is getting personal!), Advanced Real Estate Drafting Course (March 2004)
- Author/Speaker, Commercial Lending Coordinator, Workouts in the 21st Century, Advanced Real Estate Law Course (July 2003)
- Author/Speaker, Program Coordinator, Preforeclosure Documentation, Advanced Real Estate Drafting Course (March 2003)
- Author/Speaker, Form of Lender's Texas Title and Survey Objection Letter, Advanced Real Estate Drafting Course (March 2002)
- Author/Speaker, Texas Annotated Deed of Trust, Mortgage Lending Institute, University of Texas School of Law (October 1999)
- Author, Purchase and Sale Agreements, CLE International (October 1994)

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I. INTRODUCTION

The scope of this paper will be limited to a short review of the original Obama era Dodd-Frank legislation and how it was modified by the recently enacted Trump era Economic Growth, Regulatory Relief, and Consumer Protection Act including the amelioration of the prior much maligned HVCRE rules. Also, this paper will include explanation of the recent effectiveness of the beneficial ownership requirements for legal entity customers.

II. DODD FRANK

A. Obama Era Dodd Frank

In a politically charged reaction to the 2007-2009 financial crisis, Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act C.P.L. 11-203, (**"Dodd Frank 1.0"**)[1] and regulations created and strengthened rules under then existing authority including a broad overhaul of financial regulation. As a result of well intentioned legislation created during a crisis, the goals were not achieved and the unintended consequences of overcorrection and overly burdensome regulations affecting all banking platforms including the infamous Volcker rule and Basel III's capital requirements applied to a majority of most banking lenders. The Volcker Rule is essentially a ban on proprietary trading and investment fund relationships. The Basel III capital requirements are standards agreed to by national bank regulatory as part of the "new world order" international bank regulatory framework.[2]

B. Trump Era Dodd Frank Correction

In reaction and correction to the Obama Dodd Frank Act, the Congress passed and on May 24, 2018 President Trump signed the Economic Growth, Regulatory Relief, and Consumer Protection Act (**"Dodd Frank 2.0"**)[3] which modifies aspects of Dodd Frank 1.0 in six titles. These sections generally include mortgage lending, regulatory relief for smaller community banks, consumer protection, regulatory relief for large banks and regulatory relief for capital formation. Title I ameliorates or provides exclusions from some mortgage lending rules including the qualified mortgage criteria under the Ability –to-Repay Rule for banks and credit unions with less than $10 billion in assets. Title II provides community bank regulatory relief. These include the under $10 billion banks and credit unions are now exempt from the Volcker Rule. Also, certain banks that meet the new Community Bank Leverage Ratio are now exempt from certain risk based capital ratios and leverage requirements. Title III actually provides for additional consumer protections including additional requirements affecting credit reporting agencies. Title IV provides regulatory relief for many of the larger banks in the $100 billion to $250 billion asset range. These institutions are now subject only to supervisory stress tests in lieu of Dodd Frank 1.0's enhanced prudential regulation which only remains applicable to $250 billion banks. Title V provides further regulatory relief from securities regulations including an exception of some securities exchanges from state securities regulation and less registration and disclosure requirements. Title VI also provides additional consumer protection for student loan borrowers including the mandatory exclusion of defaulted private student loan debt from credit reporting. Generally,

[1] Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (*Dodd-Frank Act: P.L. 111-203, 124 Stat 1376*).

[2] *US Implementation of the Basel Capital Regulatory Framework. Congressional Research Service* Darryl E. Getter 2014 (https://fas.org/sgp/crs/misc/R42744.pdf).

[3] *See* Pub. L. No. 115-174 (2018), available at https://www.congress.gov/115/bills/s2155/BILLS-115s2155enr.pdf.

proponents herald Trump's Dodd Frank 2.0 as a necessary regulatory relief that encourages economic growth and effective consumer protection. Conversely, detractors assert that the new legislation eliminates crucial protection for the sole benefit of large banks.

III. HVCRE v. HVCRE-ADC

The origins of the HVCRE concept is Basel III. Basel III is the Third Basel Accord which is the third formulation of the Basel Committee on Banking Supervision. This esteemed group was established by the Group of Ten in 1975. This group's mission is to establish standards, guidelines and best practice recommendations for countries to utilize in their national banking regulations. In response to worldwide 2008 financial crisis, Basel III recommended worldwide regulatory guidelines for stress testing capital adequacy and control risks of market liquidity.[4] The United States agreed to implement these requirements with United States centric modifications.[5]

A. HVCRE 1.0

In 2013, the Board of Governors of the Federal Reserve System, the Office of the Comptroller of the Currency and the Federal Deposit Insurance Company established variable risk weighting for commercial real estate loan classes of 100% and 150%. A commercial real estate loan related to acquisition, development or construction (**"ADC"**) of real estate was designated as High Volatility Commercial Real Estate (**"HVCRE"**) with a 150% capital adequacy risk weighting. This designation requires an applicable banking institution to reserve capital in the amount of 150% of the typical required capital. This results in a dramatic decrease in the profit yield of such loans and in the aggregate as ratios increase the activities of financial institutions become more restricted. The statutory definition of HVCRE exposure means a **"credit facility that, prior to conversion to permanent financing, finances or has financed the acquisition, development or construction (ADC) of real property**.[6] These regulations do not apply to private funds, insurance companies or EB-5 lenders. There are exemptions and exceptions for regulatory lenders to avoid the HVCRE classification. The **exception** for commercial real estate projects is simply phrased as:

An ADC loan is not treated as an HVCRE loan if the facility finances:

(1) One-to-four family residential properties;

(2) Real property that:

(i) [community development), and

(ii) [SBA]

(3) [agricultural land]

(4) Commercial real estate projects in which:

The **loan-to-value ratio** is less than or equal to the applicable maximum supervisory loan-to value ratio ***[80 percent for Commercial, multifamily and other non-residential]*** in the FDIC's real estate lending standards at 12 CFR part 365, subpart A (state nonmember banks), 12 CFR Section 390.264 (2015) and 12 CFR Section 390.265 (2015) (state savings associations);

[4] *US Implementation of the Basel Capital Regulatory Framework. Congressional Research Service* Darryl E. Getter 2014 (https://fas.org/sgp/crs/misc/R42744.pdf) p.12-13.

[5] *US Implementation of the Basel Capital Regulatory Framework. Congressional Research Service* Darryl E. Getter 2014 (https://fas.org/sgp/crs/misc/R42744.pdf).

[6] 12 CFR Section 324.2 (emphasis added)

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Also available as part of the eCourse
Answer Bar: The Ins and Outs of Commercial Real Estate Loans and Title Insurance

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