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Appraisal Subcommittee

Federal Financial Institutions Examination Council

October 24, 2000

To the State appraiser regulatory agency addressed:

On April 28, 2000, the Appraisal Subcommittee (“ASC”) forwarded to you for your review and comment proposed revisions to *ASC Policy Statement 1: State Regulatory Structure and Independence of Functions*, and *ASC Policy Statement 10: Enforcement*. These proposals were intended to address several of the ASC’s most significant findings from its second cycle of State appraiser regulatory program field reviews, which occurred from 1996 through 1999. We requested that written comments be sent to us by July 31, 2000. We received written comments from 13 States. Most commenters generally supported both proposals.

At its October 11, 2000 meeting, the ASC considered the comments and adopted the Policy Statements, with revisions based on the comments. The adopted proposals will become effective on January 1, 2001. For your information, a summary of the comments and a complete copy of ASC Policy Statements 1 and 10, incorporating the adopted revisions, are enclosed for your convenience. The revisions and comment letters can be found at the ASC’s Web site at <http://www.asc.gov>.

If you have any questions, please contact us.

Sincerely,

Thomas E. Watson, Jr.
Chairman

Enclosures

Summary of Comments

ASC Policy Statement 1

Eleven States provided substantive comments on the proposed revision to ASC Policy Statement 1, with nine supporting its adoption as proposed.¹ One State recommended that we extend the reach of the proposal's ethical standards to persons supporting the activities of Commission or Board Members, including outside consultants. We agree and, to accomplish this result, have added the phrase, "including persons who support Board Member activities," in the first paragraph of the adopted revision.

During the review process, we discovered that the class of persons affected by the proposed revisions to Policy Statement 1 could have been misinterpreted. As proposed, this class contained "Board or commission members and any persons in decision-making positions." To avoid the possible misinterpretation of limiting the class of affected persons to those involved strictly in the complaint resolution process and not in the policymaking process, we have added "policy or" before "decision-making positions" so that the adopted revision reads, "Board or commission members and any persons in policy or decision-making positions."

Two commenters opposed the adoption of the proposed revisions to Policy Statement 1. They believed that only State statutes and regulations govern appraisal board members and responsibilities, *i.e.*, that board member conduct is a matter governed only by State statute.

We do not agree. The Federal Government has a valid interest in ensuring the ethical conduct of Board members. We have discovered instances where Board members and other persons in authority apparently have acted in their own self-interest, financial or otherwise, rather than as public servants and the State failed to correct the inappropriate behavior. Actions of this sort contaminate the fairness of State regulatory and disciplinary processes, erode public confidence in those processes, damage the effectiveness of enforcement procedures, and expose Federal interests, as defined in Title XI of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, as amended, ("Title XI") to higher risk of financial loss. For this reason, we will evaluate whether a State enforces appropriate ethical standards in our determination of whether the State's program meets Title XI's requirements.

We understand that most, if not all, States have adopted ethical standards for public service, and we rely on the States to enforce those standards vigorously. It is important to note that we intend to use these standards only when corresponding State ethical standards do not exist.

ASC Policy Statement 10

Twelve States provided substantive comments on the proposed revision to ASC Policy Statement 10, with nine generally supporting its adoption.² Two States opposed the adoption of the proposed revisions to Policy Statement 10. The following list contains commenters' observations, together with our responses:

¹ One State filed a descriptive comment letter and did not discuss the merits of the proposed revision.

² *Id.*

- Comment – The words based on “review” should be changed to “investigate,” “examine,” or some other synonym. “Review” is a term of art used in the Uniform Standards of Professional Appraisal Practice (“USPAP”), and its use in the Policy Statement should be avoided.

Response – We agree and have changed these references to “analyze” in the adopted revision;

- Comment – The ASC should not *require* States to arrive at final State agency administrative decisions regarding complaints within one year of the complaint filing date. States have different systems, organizations, and legal requirements that make a mandatory performance standard unrealistic and arbitrary.

Response – The proposed language does not *require* that all resolutions be completed within one year. The Policy Statement provides that final decisions *should* occur within one year of the filing date. If resolution does not occur within one year, the State needs to document why the complaint could not be resolved within the one-year time frame³;

- Comment – The use of the term, “third party reviewer,” in the definition of “well-documented,” is vague and subject to varying applications.

Response – We agree and have changed it to “ASC investigators”; and

- Comment – States should not be required to examine every complaint in great detail to discover all potential USPAP violations. State examination should not go beyond the preliminary review and appraiser interview stage. Otherwise, limited staff resources would be wasted.

Response – We agree. We do not intend that State agencies perform exhaustive complaint reviews to identify every possible USPAP violation not identified in the complaint. We do, however, expect States to add apparent USPAP violations, particularly substantive ones, to the complaint when the facts warrant and not to omit addressing violations simply because they were not identified by the complainant.

- Comment – The revisions to Policy Statement 10 deal with matters reserved to the States. No one other than the board, the respondent appraiser or applicant, and the trier of facts need understand the facts and determinations in the matter and the reasons for those determinations. The ASC should not second-guess those persons legally charged with the responsibility of enforcement.

Response –The ASC must be able to understand the facts and determinations in enforcement matters and the reasons for those determinations. That understanding is essential to the ASC’s duty under Title XI to determine whether: (1) State agency policies, practices, and procedures are consistent with Title XI; (2) State agencies recognize and enforce Title XI’s standards, requirements, and procedures; and (3) State agency decisions concerning appraisal standards and

³ For example, if a complaint resolution were delayed for more than a year because of a State statutory requirement, that fact would need to appear in the case’s file documentation. The same would be true if complaint processing were delayed because of problems coordinating with other government officers, such as attorneys or administrative law judges.

supervision are made in a manner consistent with Title XI's purposes.⁴ Title XI requires the effective supervision of State certified or licensed appraisers. That, among other things, means that appraisers accused of wrongdoing are held accountable promptly for their actions by State agencies and, if appropriate, removed from the National Registry by the ASC to ensure that they cannot perform appraisals in connection with federally related transactions and other real estate related financial transactions, such those involving FannieMae, FreddieMac, and the Department of Housing and Urban Development. Long delays in resolving complaints frustrate this basic Federal purpose and expose federally insured financial institutions to higher risks.

⁴ 12 U.S.C. 3347(a) and (b)(1) and (3). *See also* 12 U.S.C. 3331, which defines Title XI's purpose.

Statement 1: State Regulatory Structure and Independence of Functions

The ASC does not impose any particular organizational structure upon the States. It is recognized that each State may have legal, fiscal, regulatory or other valid constraints that determine the structure and organization of its State agency. States, however, should adopt and maintain an organizational structure for appraiser certification, licensing and supervision that avoids conflicts of interest or the appearance of such conflicts. Ideally, States should maintain totally independent State agencies answerable only to the governor or a cabinet level official who has no regulatory responsibility for real estate licensing/certification, promotion, development or financing functions (“realty related activities”). A State, however, may choose to locate its State agency within an existing regulatory body. Any State with its appraiser regulatory function in a department that regulates realty related activities must ensure that adequate safeguards exist to protect the independence of the appraiser regulatory function.

A State agency may be headed by a board, commission or individual. The organizational structure should provide maximum insulation for the State agency from the influence of any industry or organization whose members have a direct or indirect financial interest in the outcome of the agency’s decisions.

Persons appointing officials to a State agency should not be associated or affiliated with an affected industry, *i.e.*, they should not have a direct or indirect financial interest in realty related activities. A State agency head, appointed by the governor and confirmed by the State legislature, would generally be considered independent.

The ASC believes that, as a matter of sound public policy, State appraiser boards or commissions should adequately represent the broad public interest by providing the public with a meaningful opportunity to participate in the agency’s decision making process. A State agency should not be dominated in any way by any industry or profession and its board or commission should have one or more qualified public members. The ASC believes that domination of the State agency by representatives of affected industries would be inappropriate and inconsistent with Title XI. The ASC, however, recognizes that members of the appraisal industry should be significantly represented on the appraiser board or commission and believes that a board or commission may contain a majority of appraisers and still adequately represent the broad public interest. A State agency, board or commission, however, should reflect the interests of the State’s entire community of appraisers and the general public and not the interests of any professional appraiser organization.

An individual heading a State agency should not be actively engaged in the appraisal business or in any realty related activity during his or her term of office or employment and for a reasonable period thereafter.

The ASC strongly urges that State agency decisions, especially those relating to license or certificate issuance, revocation and disciplinary actions, not be made by State officials who also are responsible for realty related activities. State officials should accept and implement the actions of the appraiser board unless they are inconsistent with the public interest and trust. Additionally, such State agency decisions should be final administrative actions subject only to appropriate judicial review.

Board or commission members and any persons in policy or decision-making positions (collectively, “Board Members”), including persons who support Board Member activities, must perform their responsibilities consistent with the highest ethical standards of public service as implemented by pertinent State statutes and regulations. In the absence of such statutes and regulations, the ASC expects Board Members to comply with the following general principles:

- Public service is a public trust, requiring Board Members to place loyalty to the Federal and State Constitutions, statutes, regulations, and these ethical principles above private gain;
- Board Members shall not engage in financial transactions using nonpublic information or allow the improper use of such information to further any private interest;
- Board Members shall not solicit or accept any gift or other item of monetary value (other than nominal value) from any person or entity seeking official action from, doing business with, or conducting activities regulated by the State agency, or whose interests may be substantially affected by the performance or nonperformance of the Board Member's duties;
- Board Members shall put forth an honest effort in the performance of their duties;
- Board Members shall not knowingly make unauthorized commitments or promises of any kind purporting to bind the State agency;
- Board Members shall not use public office for private gain;
- Board Members shall act impartially and not give preferential treatment to any individual or private organization; and
- Board Members shall endeavor to avoid any actions creating the appearance of impropriety or that they may be violating the law or engaging in unethical or wrongful conduct or practices. Whether particular circumstances create such an appearance shall be determined from the perspective of a reasonable person with knowledge of the relevant facts.⁵ [Paragraph added 10/11/00, effective 1/1/01.]

⁵ These principles are based on 5 CFR § 2635.101(a) and (b), titled *Basic obligation of public service*.

Statement 10: Enforcement

A. The Scope of State Agency Enforcement Programs

In the ASC's view, Title XI intends that States supervise all of the activities and practices of persons who are certified or licensed to perform real estate appraisals in connection with all real estate appraisals involving real estate related financial transactions, and not just federally related transactions. The Federal agencies and all employers of appraisers must rely on the States to effectively regulate, supervise and discipline their certified and licensed appraisers -- in other words, to assure their professional competence. Accordingly, a State agency with knowledge of inappropriate behavior by a certified or licensed appraiser committed in connection with an appraisal of a non-federally related transaction should take appropriate action to investigate that behavior and to discipline the appraiser.

As noted, other Federal statutes and regulations require the use of State certified or licensed appraisers in certain real estate transactions. A few State statutes, however, do not require the use of certified and licensed appraisers in those circumstances. The ASC recommends that State statutes or regulations authorize the State agency or another appropriate State authority to take action, as necessary, against an uncertified or unlicensed person who performs an appraisal for which a State certified or licensed appraiser is required under Federal statute or regulation. The ASC believes that, to preserve the integrity of the system for regulating the appraisal process, States should have sufficient legal tools, *e.g.*, a State law prohibiting a person from misrepresenting his or her professional status and authority, to take such actions.

B. Audit of Experience and Education Submissions

While the ASC has no preference for any specific methodology, State agencies, at a minimum, should have a reliable means of validating both education and experience credit claimed for certification or licensing. The ASC believes the lack of routine verification procedures is both an invitation to potential fraud and a threat to the integrity of a State's appraiser regulatory program.

C. Exemptions

Title XI and other Federal statutes and regulations specifically require the use of only State certified or licensed appraisers in connection with the appraisal of certain real estate-related financial transactions. A State may not exempt any individual or group of individuals from meeting the State's certification or licensing requirements if the individual or group member performs an appraisal where Federal statutes and regulations require the use of a certified or licensed appraiser. For example, an individual who has been exempted by the State from its appraiser certification or licensing requirements because he or she is an officer, director, employee or agent of a federally regulated bank, thrift or credit union would not be permitted to perform an appraisal in connection with a federally related transaction. States with exemption provisions should take steps to ensure that the provisions are not being used or interpreted to avoid the use of certified or licensed appraisers in transactions governed by Federal law.

D. Supervising Uncertified and Unlicensed Appraiser Assistants

Title XI provides that an individual who is not a State certified or licensed appraiser may assist in the preparation of an appraisal if the assistant is under the direct supervision of a licensed or certified appraiser and the final appraisal is approved and signed by that appraiser. The ASC believes that this provision should not be used to legitimize situations where one or more uncertified or unlicensed persons are not actively and directly supervised by a certified or licensed appraiser during the preparation of the significant aspects of the appraisal process, and the certified or licensed appraiser

does not substantively review the appraisal in accordance with USPAP's requirements. The ASC believes that any cursory review should not qualify as direct supervision and that such activities would violate the intent and purposes of Title XI. The ASC, therefore, urges State agencies to ensure that their appraiser regulatory programs can identify situations where direct supervision is not present and to take appropriate steps to remedy them.

E. Effective, Consistent, Documented, and Timely Enforcement Process [Section added 10/11/00, effective 1/1/01.]

Each State agency must ensure that its entire system for processing and investigating complaints and sanctioning appraisers is administered in an effective, consistent, equitable, and well-documented manner. For the purposes of this paragraph, "well-documented" means that relevant documentation pertaining to a matter exists, and it will enable ASC investigators to understand the facts and determinations in the matter and the reasons for those determinations. Absent special documented facts or considerations, substantially similar cases must result in similar dispositions. State agencies must analyze each complaint to determine whether additional violations, especially those relating to USPAP, should be added to the complaint. Persons analyzing complaints for USPAP compliance must be knowledgeable about appraisal, appraisal methodology, and USPAP.

Dismissal of an alleged USPAP violation due to an "absence of harm to the public" is inconsistent with Title XI's purpose. That purpose "is to provide that Federal financial and public policy interests in real estate related transactions will be protected by requiring that real estate appraisals utilized in connection with federally related transactions are performed . . . in accordance with uniform standards, by individuals whose competency has been demonstrated and whose professional conduct will be subject to effective supervision." Financial loss or the lack thereof is not an element in determining whether there is a USPAP violation; the extent of such loss, however, should be a factor in determining the appropriate level of discipline. It is critical that State agencies investigate allegations of USPAP violations, and, if allegations are proven, take appropriate disciplinary or remedial action.

State agencies need to process complaints of appraiser misconduct or wrongdoing on a timely basis. Absent special documented circumstances, final State agency administrative decisions regarding complaints should occur within one year of the complaint filing date.