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Appraisal Subcommittee

Federal Financial Institutions Examination Council

July 12, 2007

Gregory J. Accetta, Chair
Appraisal Standards Board
The Appraisal Foundation
1155 15th St., NW
Suite 1111
Washington, DC 20005

Dear Mr. Accetta:

Thank you for your February 13, 2007 letter regarding the Uniform Standards of Professional Appraisal Practice's ("USPAP") Jurisdictional Exception Rule ("Rule"). In your letter, you requested our interpretation regarding the interplay between the Rule and Title XI of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, as amended ("Title XI"). ASC General Counsel Marc Weinberg has researched this issue. His legal opinion is the basis for this letter.

Background

As stated in your letter, the Rule's inclusion in USPAP predated Title XI's enactment in 1989. The Rule operates as a "conflict of laws" standard. As you stated, "Where there is a conflict between an applicable law and USPAP, an appraiser is exempt from the conflicting part of USPAP, but the remainder of USPAP remains in effect." The purpose of the Rule is to act as a severability or savings clause.

In 1987, the Appraisal Standards Board ("ASB") adopted USPAP to establish uniform standards for performing appraisals in the United States. USPAP, including the Rule, was established in the context of industry self-regulation. Unlike governmentally created statutes or regulations, USPAP was not legally binding. Therefore, at the time of USPAP's adoption in 1987, it was important that USPAP contain the Rule to exempt appraisers operating under USPAP from following USPAP industry practices when those practices conflicted with recognized bodies of law, whether Federal, State, or Municipal.

In 1989, Congress passed Title XI and established a national system for regulating real estate appraisers and appraisals. One of Congress' clear purposes in adopting Title XI was to ensure 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 . . ." 12 U.S.C. 3331.

In Title XI, Congress required the Federal financial institutions regulatory agencies to adopt regulations that, at a minimum, meet the "generally accepted appraisal standards promulgated by the Appraisal Standards Board of the Appraisal Foundation." 12 U.S.C. 3339. The Office of the Comptroller of the Currency ("OCC"), the Board of Governors of the Federal Reserve System ("FRB"), the Federal Deposit Insurance Corporation ("FDIC"), the Office of Thrift Supervision

(“OTS”), and the National Credit Union Administration (“NCUA”) subsequently adopted those regulations.¹ These regulations, among other standards, provided that, “For federally related transactions, all appraisals shall, at a minimum: (a) Conform to generally accepted appraisal standards as evidenced by the Uniform Standards of Professional Appraisal Practice (USPAP) promulgated by the Appraisal Standards Board of the Appraisal Foundation . . . unless principles of safe and sound banking practice require compliance with stricter standards”² In § 1120 of Title XI, 12 U.S.C. 3349, Congress also prohibited the Federal National Mortgage Association and the Federal Home Loan Mortgage Association from knowingly contracting “for the performance of any appraisal by a person who is not a State certified or licensed appraiser in connection with any real estate related financial transaction^[3] . . . to which such association is a party.” State certified or licensed appraisers must perform USPAP-compliant appraisals.

Title XI also created the ASC, authorizing it, among other things, to monitor State appraiser regulatory agencies for the purpose of determining whether their policies, practices, and procedures are consistent with Title XI. The ASC was authorized to sanction States should it find, after hearing, that “the State agency fail[ed] to recognize and enforce the standards, requirements, and procedures prescribed under [Title XI].” 12 U.S.C. 3347. States, therefore, had to incorporate USPAP within their bodies of law, and had to enforce USPAP to comply with Federal law.

It is important to note that Title XI is not the only Federal provision requiring real estate appraisers to perform USPAP-compliant appraisals. Section 142 of the Department of Housing and Urban Development Reform Act of 1989 (“HUD Reform Act”) amended 12 U.S.C. 1708(e) to require, among other things, that appraisals performed in connection with Federal Housing Administration insured properties are “performed in accordance with generally accepted appraisal standards, such as the appraisal standards adopted by the Appraisal Foundation” Federal regulations and other Executive Branch agency issuances require the use of USPAP-compliant appraisals in other Federal programs.⁴

During the December 2006 ASB work session referenced in your letter, I expressed concern that the Rule’s operation could obstruct Congress’ intent in adopting Title XI. Specifically, Congress’ intent, as expressed in Title XI, was that real estate appraisals performed in connection with federally related transactions and certain real estate related financial transactions be completed in accordance with uniform standards. My concern was that the operation of the Rule

¹ These regulations are in 12 C.F.R. part 34, subpart C (OCC); parts 208 and 225, subpart G (FRB); part 323 (FDIC); part 564 (OTS); and part 722 (NCUA). The OCC, FRB, FDIC, and OTS jointly adopted Interagency Appraisal and Evaluation Guidelines in October 1994.

² NCUA’s regulation does not include the phrase beginning with “unless.”

³ Section 1121(5) of Title XI, 12 U.S.C. 3350(5), defines real estate related financial transaction as, “any transaction involving – (A) the sale, lease, purchase, investment in or exchange of real property, or the financing thereof; (B) the refinancing of real property or interests in real property; and (C) the use of real property or interests in property as security for a loan or investment, including mortgage-backed securities.”

⁴ See, e.g., 49 C.F.R. part 24 (Department of Transportation, Uniform Relocation Assistance and Real Property Acquisition for Federal and Federally-assisted Programs); and 7 C.F.R. part 762 (Department of Agriculture, Farm Service Agency). See also, Office of Management and Budget (“OMB”) Circular Number A-129 Revised, part III.A. (Policies for Federal Credit and Non-Tax Receivables) and OPM Bulletin No. 92-06 (Guidance on Real Estate Appraisal Standards and Practices).

could allow any non-Federal governmental jurisdiction to modify, change, or render inapplicable USPAP provisions, thus reducing the uniformity Congress intended.

Discussion

Under Article VI, Paragraph 2 of the U. S. Constitution, Federal law reigns supreme when an irreconcilable conflict exists between Federal law and State law. Title XI and the HUD Reform Act were adopted by Congress and, as such, are clearly “Federal law.” “Federal law” also encompasses all other Federal rules, regulations, and Executive Branch issuances requiring the use of USPAP-compliant appraisals.

Because the ASB is an entity within the Appraisal Foundation, it is not a governmental body. The ASB’s uniform standards, *i.e.*, USPAP, however, by virtue of Title XI, are Federal law. As a result, USPAP compliance, when required by Title XI and other Federal statutes, regulations and Executive Branch agency issuances, “reigns supreme” over conflicting State or local laws.

USPAP defines a “Jurisdictional Exception” as “an assignment condition that voids the force of a part or parts of USPAP, when compliance with part or parts of USPAP is contrary to law or public policy applicable to the assignment.” The Rule states, “If any part of USPAP is contrary to law or public policy of *any* jurisdiction^[5], only that part shall be void and of no force or effect in that jurisdiction.” [Emphasis added.] The Comment to the Rule states, in part, that it is “a saving or severability clause intended to preserve the balance of USPAP if one or more of its parts are determined to be contrary to law or public policy of a jurisdiction.” The second paragraph of the Comment is significant because it states that, “law means a body of rules with binding legal force established by controlling governmental authority. This broad meaning includes, *without limitation*, federal and state constitutions; legislative and court-made law; and administrative rules, regulations, and ordinances.” [Emphasis added.]

The plain meaning of the Rule, in our view, is inconsistent with the Constitutional principle that Federal law reigns supreme. The Rule would allow any State or local jurisdiction to change USPAP (the “uniform standards” incorporated in Title XI) in any manner it deemed appropriate. Carried to an extreme, the Rule would allow a jurisdiction to exempt transactions completely from USPAP, and yet allow the appraiser performing the appraisal in that jurisdiction to be in compliance with USPAP, an illogical result in light of USPAP’s purposes under Federal law.

We believe that operation of the Rule, as written, cedes authority for uniform standards to entities other than the ASB, in contradiction to Title XI, the HUD Reform Act, and Congress’ intent when it enacted those statutes. Moreover, the operation of that Rule also is inconsistent with Federal regulations and Executive Branch issuances requiring the use of USPAP-compliant appraisals in Federal programs.

Conclusion

Therefore, we believe that the ASB needs to revisit the propriety of retaining the Rule in its present form. We recommend that the ASB consider retiring the Rule because it no longer serves a useful and appropriate purpose because it was established when USPAP compliance was

⁵ The Rule defines “jurisdiction as “the legal authority to legislate, apply, or interprets law in any form at the federal, state, and local levels of government.”

voluntary. If the ASB believes that USPAP should contain a severability or savings clause, more appropriate wording could be used to accomplish that result. The ASB also could consider narrowing the scope of the Rule to deal with transactions that do not require the appraisal services of a State licensed or certified real estate appraiser under Federal law.

Please contact us if you have further questions.

Sincerely,

Ben Henson
Executive Director