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# Appraisal Subcommittee

*Federal Financial Institutions Examination Council*

April 23, 2003

David G. Wood, Director  
Financial Markets and Community Investments  
General Accounting Office  
Washington, DC 20548

Dear Mr. Wood:

Thank you for the opportunity to review your draft report titled, *Regulatory Programs – Opportunities to Enhance Oversight of the Real Estate Appraisal Industry* (GAO-03-404). In general, we find that the report presents an appropriate synopsis of the appraiser/appraisal regulatory environment as envisioned by Title XI of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, as amended, (“Title XI”) and implemented by various Federal, State, and private entities. We were pleased to note that, based on information reported to you, real estate appraisals have not been a major factor in the failure of depository institutions since the passage of Title XI. As you know, this was Congress’ primary focus in passing Title XI.

Following are our comments regarding specific items of the report:

- Page 17 – You comment that in reviewing the Appraisal Subcommittee’s (“ASC”) field review reports, you found few or no formal and transparent criteria for determining and reporting States’ compliance levels; that reports were sometimes inconclusive about whether the State was in compliance; and that the rationale for determining compliance was not given. You state that it would be beneficial for the ASC to develop and apply consistent criteria to assess States’ compliance with Title XI.

ASC staff follow the ASC’s *Field Review Manual for State Appraiser Licensing and Certification Regulatory Programs* when conducting field reviews. This manual helps insure consistent review and policy application from State to State. While you are correct that we do not have a formalized rating system under which we apply an overall rating to each State (“how one state measures against other states”), we do employ an informal rating system (*i.e.*, Tier 1 and Tier 2) based on a State’s overall compliance with Title XI. We review each State’s compliance and consider each State on an individual basis, not in comparison with other States. Generally speaking, compliance with Title XI is not an all or nothing situation. We review a State’s compliance with Title XI provisions and consider a number of factors in evaluating the State’s overall level of compliance (*e.g.*, whether a weakness was part of a pattern and practice or an isolated incident; whether the State was aware of the Title XI provision; whether the State exhibits willingness to address the weakness; and, whether the weakness had been noted in previous reviews of that State). We work with each State to address any identified weaknesses and to bring the State into compliance with Title XI.

In the past, the ASC considered developing a rating system that would provide a measure of one State against another, and concluded that such a rating system would not assist our Title XI enforcement efforts. However, based on your recommendations, we will review this issue again.

- Pages 18-20 – You report that the Appraisal Standards Board (“ASB”) and Appraiser Qualifications Board (“AQB”) commented that the ASC’s failure to fund all Appraisal Foundation grant requests has limited activities the two boards believe enhance the quality, timeliness, and usefulness of standards and qualifications.

We do not believe this to be an accurate representation.

- During several years, the Foundation did not use all of the funds authorized in the ASC grant. For example, in 1998, the Foundation used only \$582,000 of \$666,000 authorized; in 1999, the Foundation used only \$646,000 of \$800,000; and in 2000, the Foundation used only \$697,000 of \$750,000;
  - Title XI does not state that we must provide funding for “all” of the Foundation’s Title XI-related expenses. Title XI authorizes the ASC to provide grants to “help defray” the Foundation’s Title XI-related expenses;
  - Over the years, several Foundation grant requests included funding for non-Title XI-related activities. The ASC lacks legal authority under Title XI to fund those activities;
  - The Foundation has funding sources other than the ASC grant; and
  - We are unaware of any initiative that the ASB or AQB has failed to pursue because of grant funding limitations. For example, the Foundation has not requested funding for the “body of knowledge” project mentioned in your report.
- Page 38 – Your third bullet contains a recommendation that the ASC draw on its surplus to provide grants, if necessary, to the Foundation and its boards.

The ASC has discussed projected ASC budgets for the next ten years, including projected grant requests. This initial assessment of ASC financial resources indicated that funding Foundation grant requests might prove problematic in the future as funds from annual net income decline. The ASC is evaluating methods of funding future Foundation grant requests. Using part of existing reserves is one of several available options. However, it is not a long-term solution.

- Existing ASC reserves serve two purposes: providing working capital necessary for the ASC to operate; and providing reserves against unanticipated expenses or uncertain future income. The ASC is evaluating the appropriate amount of reserves to ensure that we can carry out our mission given these uncertainties; and
  - Using ASC reserves to fund Foundation grant requests would be a short-term solution to a long-term need. Depending on the amount of future Foundation grant requests, ASC reserves in excess of those needed to maintain financial viability and responsibility could be exhausted within a short time. Any evaluation of Foundation grant funding needs to consider the long-term financial resources of the ASC. In developing our long-term funding plans and establishing an appropriate reserve level, the ASC will continue its current policy to evaluate and approve Foundation grant requests that fund activities that promote the purpose and intent of Title XI.
- Pages 22-23 – You report that a lack of rulemaking authority and limited enforcement powers hinder ASC efforts to ensure compliance with Title XI.

We agree that general rulemaking authority might facilitate our Title XI enforcement. However, the lack of additional authority has not been an impediment to achieving compliance. We have adopted ten Policy Statements that provide guidance regarding Title XI compliance. ASC Policy Statements are grounded in Title XI provisions and legally are the ASC's formal interpretations of Title XI. As such, the Policy Statements should be given deference in a court of law.

In February 2000, GAO issued a decision (File B-279866.3) that is pertinent to the legal effect of our Policy Statements. In that situation, the ASC and a State disagreed over an interpretation of Title XI and an ASC Policy Statement regarding National Registry fees. GAO concluded that, "ASC's interpretation of section 1109 of FIRREA reflects a reasonable exercise of its discretion in administering section 1109 of FIRREA." GAO based its determination on a U.S. Supreme Court decision stating, "If Congress has explicitly left a gap for the agency administering the statute to fill, there is in effect a delegation of authority to the agency to adopt a regulation or a policy to elucidate the statute. So long as the interpretation comports with the statutory objectives and is not arbitrary or capricious, the administering agency's reasonable policy choices are entitled to deference." [Citations omitted.] Having found such a gap, GAO decided that, "As the entity responsible for administering this legislation, ASC's interpretation of the statute is entitled to great weight and should ordinarily be followed unless there are strong indications from the legislative history or otherwise that its interpretation is arbitrary or inconsistent with the statutory purpose."

You report that the ASC noted that its Policy Statements are nonbinding recommendations. As discussed above, the Policy Statements are grounded in Title XI provisions and are the ASC's formal interpretations of that statute. Moreover, some Title XI provisions require the ASC to make binding statements. For example, § 1122(a)(2) of Title XI, 12 U.S.C. 3351(a)(2), provides that, "A State appraiser certifying or licensing agency shall not impose excessive fees or burdensome requirements, as determined by the Appraisal Subcommittee, for temporary practice under this subsection." ASC Policy Statement 5, which was adopted after public notice and comment pursuant to 5 U.S.C. 552, specifically identifies situations that are "excessive fees or burdensome requirements." Failure by a State to conform to Policy Statement 5 would constitute a direct violation of § 1122(a)(2) of Title XI.

Regarding enforcement powers, while we agree that the ASC's options are limited in number, we have been unable to identify other powers that would effectively improve our enforcement authority. In fact, during your exit conference with the ASC, it was stated that we had always been able to achieve State compliance within the supervisory and enforcement structure that currently exists.

- Page 30-32 – In this section, among other issues, you report that one State and one education provider asserted that both the AQB and the ASC exceeded their authorities regarding education criteria.

As noted in your report, the ASC obtained a formal legal opinion from the Federal Financial Institutions Examination Council's Legal Advisory Group ("LAG") regarding this issue. The ASC requested such an opinion to address the State's and education provider's persistent objections to changes in the AQB's criteria for appraiser certification and the ASC's actions to enforce those criteria. LAG concluded that the AQB and ASC actions appeared to be consistent

with, and authorized by, Title XI. The opinion stated that Title XI gives the AQB wide authority in setting education, experience, and examination criteria for certified appraisers, and that it was not within the ASC's authority to substitute its judgment for that of the AQB in establishing its criteria. The ASC's responsibility was to monitor the AQB decisions to ensure that they were reasonable, and not arbitrary, capricious, or otherwise inconsistent with law.

We emphasize that both the LAG opinion, regarding certified appraisers, and the GAO decision, regarding certified and licensed appraisers, discussed the same considerations (*i.e.*, reasonable, arbitrary, capricious, and consistent with law) and determined that the ASC's actions met those standards when interpreting and enforcing Title XI.

- Page 38 – In your second bullet, you recommend that the ASC explore options for funding or otherwise assisting States in carrying out their Title XI activities.

While we believe that overall State compliance with Title XI would be improved if States had more funding, we do not see the ASC as the answer to that issue. As noted in your report, the ASC's general counsel does not find statutory authority for the ASC to provide funding to the States. Legal issues aside, however, the ASC's only method of obtaining funds to provide funding to States would be to increase the National Registry fee assessed each appraiser. That seems to be an unnecessary and inappropriate action given that each State already has authority to increase the fees that it charges appraisers. Each State is much better positioned to identify its needs and to address fee/income issues to resolve those needs. As you learned during the study, if State appraiser regulatory agencies were allowed to use the fees they collect from appraisers, most States would have adequate funding. Instead, many States send those fees to the general revenue fund and provide only a portion for the State's Title XI-related activities.

Once again, we appreciate the opportunity to review your draft report and provide comments.

Sincerely,

Steven D. Fritts  
Chairman

## Miscellaneous Edits and Corrections

- GAO Highlights – Why GAO Did This Study – The correct statutory reference is “Title XI of the Federal Financial Institutions Reform, Recovery, and Enforcement Act of 1989.”
- Page 4 – In the first line, “praisal” should be “Appraisal”.
- Page 15 – In the last paragraph, the ASC has seven staff members, not six.
- Page 33 – In the last paragraph, “obstacles” should be “obstacle”.
- Page 70 – In the first line, “37” should be deleted.
- Page 70 – In the fourth line, “includes” should be “include”.
- Page 70 – First line of second full paragraph, “AQB” should be “ASB”.
- Page 70 – Third line of second full paragraph, “38” should be deleted.
- Page 70 – Fourth line of second full paragraph, “AQB” should be “ASB”.
- Page 71 – Last line of second paragraph, should read “who teach the National USPAP courses”.