

■   ■   ■   ■   ■   ■

# Appraisal Subcommittee

*Federal Financial Institutions Examination Council*

## **Background**

Appraiser education standards are the result of a unique appraiser regulatory framework created by Title XI. The appraisal regulatory structure includes the constituent agencies of the Federal Financial Institutions Examination Council (“FFIEC”), the Department of Housing and Urban Development (“HUD”), State agencies, and the Appraisal Foundation through two independent boards, the AQB and the Appraisal Standards Board<sup>1</sup> (“ASB”). As discussed in more detail below, the ASC provides oversight of the appraiser regulatory framework.

### *The Appraiser Qualifications Board*

Neither the FFIEC’s member agencies nor the ASC have regulations, guidelines, or policies establishing appraiser education standards. Instead, § 1116(a) of Title XI, 12 U.S.C. 3345(a), provides that certified real estate appraisers must meet the minimum criteria for certification issued by the AQB.<sup>2</sup> Title XI requires the States, through the State agencies, to ensure that applicants meet the AQB Criteria before becoming certified as appraisers.<sup>3</sup> We have enclosed a copy of *The Real Property Appraiser Qualification Criteria and Interpretations of the Criteria* for your convenience.

Pursuant to Title XI, the AQB established criteria for education courses.<sup>4</sup> These criteria include such provisions as: course materials must be applicable to appraisal activities; applicants must not be given credit for duplicative courses; and, examinations must be proctored.

In June 1991, the AQB recognized that correspondence courses might be a valid method for certified appraisers to meet their continuing education requirements. The AQB consulted with other professions to determine how such courses were approved for other professional designations. The AQB found that many professions did not allow correspondence courses because of the problems inherent in regulating the delivery of such courses.

The AQB, however, determined that it should not prohibit correspondence courses, but that it should impose certain criteria to help ensure the quality of the courses. Using other professions as models, the AQB conditioned its recognition on the following factors: (1) presentation by an accredited college or university (Commission on Colleges or a regional accreditation association) that offers similar programs in other disciplines; (2) successful completion of a written examination administered at a location by an official approved by the college or university; and (3) the course must be appraisal related and equivalent to at least 10 or 15 classroom hours, depending on the appraiser’s level of certification. In November 1992, the AQB expanded the universe of acceptable correspondence courses by recognizing correspondence courses approved for college credit by the American Council on Education’s Program on Non-collegiate Sponsored Instruction (later renamed the American Council on Education or “ACE”).<sup>5</sup>

---

<sup>1</sup> Section 1110 of Title XI, 12 U.S.C. 3339, authorizes the ASB to create uniform standards of professional appraisal practice.

<sup>2</sup> Paragraph (b) of § 1116, 12 U.S.C. 3345(b), requires certified appraisers to pass a State administered examination consistent or equivalent to the Uniform State Certification Examination issued or endorsed by the AQB.

<sup>3</sup> Title XI further requires the States to ensure that certified appraisers comply with the ASB’s Uniform Standards of Professional Appraisal Practice (“USPAP”).

<sup>4</sup> In fact, the AQB created its education criteria before the enactment of Title XI; they were unenforceable until the effective date of Title XI.

<sup>5</sup> Similar provisions were adopted for video and remote TV educational offerings.

The AQB amended these provisions in June 1997 to reflect the advent of advanced computer technology. To that end, the AQB introduced the term, “distance education,” and defined it as “any educational process based on geographical separation between instructor and learner (*e.g.*, CD-ROM, on-line learning, correspondence courses, video teleconferencing, etc.” The amendments applicable to Internet-related courses carried over most of the conditions noted in the previous paragraph, with some minor changes. In addition to ACE, the AQB added its own “Course Approval Program” (“CAP”) as another method for course approval. CAP was established at the request of State agencies and providers of appraisal education. Participation in this program is voluntary. Under the program, the AQB contracts with education experts to review submitted courses. The fees charged by the AQB are passed through to the contracted reviewers except for an amount to cover administrative costs. The first Internet-based courses were approved by the AQB in 1998.

This year, the AQB further amended the criteria. Currently, the AQB Criteria require distance education courses to meet one of three requirements:

- The course must be presented by an accredited college or university that offers distance education programs in other disciplines;
- The course must meet the American Council on Education’s approval for college credit; or
- The course has received approval of the International Distance Education Certification Center (“IDECC”) for the course design and delivery mechanism and, for the content of the course, approval under CAP or the approval of the State agency where the course is being offered.<sup>6</sup>

Of the three options for distance education approval, CAP is the least expensive. The costs of obtaining State agency approval have not yet been determined, but, judging from our experience, State charges likely will vary widely.

In 1999 and 2000, the AQB initiated a project to improve the quality of USPAP education. This AQB initiative resulted from concerns expressed by Federal and State agencies regarding the apparent poor knowledge of USPAP by practicing appraisers. This project included such initiatives as requiring USPAP instructors to take a USPAP instructor course and pass an examination to document their USPAP knowledge. Another initiative was the requirement that, beginning in 2003, all USPAP education providers must teach the AQB’s Uniform USPAP Course, or its equivalent.

These initiatives went through a rigorous public exposure process analogous to formal rulemaking under the Administrative Procedures Act, 5 U.S.C. § 553. On March 14, 2000, the AQB issued for public comment a memorandum entitled, *Request for Comment: Mandating Improved and Consistent USPAP Instruction*; on May 10, 2000, the AQB issued its first Exposure Draft proposing for public comment the above initiatives; and, on September 1, 2000, the AQB issued a second Exposure Draft for public comment. The AQB adopted the initiatives on October 27, 2000. We believe the AQB’s efforts to improve USPAP education were well-reasoned and supportable.

---

<sup>6</sup> The IDECC and State agency approval options were recently adopted by the AQB on October 26, 2001. These new options became effective on November 1, 2001. Previously, this item read, “the [AQB’s] approval through the AQB’s Course Approval Program . . . .”

The AQB's criteria, modeled after other licensed professional association practices, are applied equally to all appraisers and appraiser education providers. A number of education providers currently offer distance education courses that they developed and had approved through one of the acceptable approval methods.

Given the special considerations inherent in distance education delivery methods, we believe there is a clear need for special review of these courses. If individuals are to use the courses to become certified real estate appraisers, or maintain and improve their proficiency, and appraise properties for federally insured financial institutions, the AQB needs to ensure the quality of not only the course material, but also the course delivery method.

*The ASC's duties under Title XI respecting the AQB Criteria*

Title XI requires the ASC, among other things, to ensure that every State's qualification criteria for its certified appraisers meet the AQB's minimum qualification criteria for its credentialing levels.<sup>7</sup> The ASC carries out this obligation in several ways, including conducting on-site reviews of State appraiser regulatory programs. From time to time, the ASC has discovered continuing education courses that were approved by States, but were not approved through any of the methods acceptable under AQB Criteria. In almost all cases, these approvals occurred because State personnel were unaware of the AQB's requirements. The ASC routinely has advised these States to review their continuing education courses for compliance with AQB Criteria and to rescind their approval of noncompliant courses. Because Lee and Grant has never attempted to obtain approval of its distance education courses through any methods acceptable under AQB Criteria, its courses were among the noncompliant group, and States have had to rescind their approvals.

Title XI also requires the ASC to "monitor and review the practices, procedures, activities, and organizational structure of the Appraisal Foundation[.]" including the AQB.<sup>8</sup> The ASC actively performs its oversight responsibility in five ways: (1) its staff attends AQB and other Foundation meetings and work sessions; (2) the staff, and, at times, the ASC as a body, review and, when appropriate, comment on AQB proposals; (3) through the grant process, the ASC reviews prospective and existing AQB projects and reimburses the Foundation for expenses relating to the AQB's Title XI-related activities<sup>9</sup>; (4) the ASC retains a certified public accounting firm to review the Foundation's financial operations each year; and (5) the staff maintains close informal professional communications with AQB members and Foundation staff conducive to the free flow of constructive ideas and concepts. The ASC's general regulatory approach to the Foundation, including the AQB, is to allow the boards to perform their duties under Title XI independently with a great deal of discretion. We generally monitor whether their actions are reasonable, not arbitrary or capricious, and otherwise consistent with law. The ASC monitored and reviewed the AQB's proposal and adoption of the relevant AQB criteria, and found no indication that the AQB was acting unreasonably, in an arbitrary or capricious manner, or otherwise inconsistent with law.

---

<sup>7</sup> See §§ 1103(a)(1), 12 U.S.C. 3332(a)(1); 1116(a), 12 U.S.C. 3345(a); and 1116, (12 U.S.C. 3347) of Title XI. Two types of certification exist: certified residential real estate appraiser and certified general real estate appraiser.

<sup>8</sup> See § 1103(b) of Title XI, 12 U.S.C. 3332(b).

<sup>9</sup> Section 1109(b)(4), 12 U.S.C. 3338(b)(4), requires the ASC "to make grants in such amounts as it deems appropriate to the Appraisal Foundation, to help defray those costs of the foundation relating to the activities of its Appraisal Standards and Appraiser Qualifications Boards." The expense reimbursement process provides the ASC with significant, real world leverage to ensure that the activities of the Foundation and its independent Boards are reasonable and consistent with Title XI.

## Lee & Grant and Its Contentions

No one seriously objected to the AQB's longstanding distance education requirements, the new initiatives, or its authority to adopt such requirements, until October 2000, when, after the AQB's second Exposure Draft, Lee & Grant began a telephone, fax, and letter writing campaign. Various communications have been sent to the ASC, FFIEC agency principals and Inspector General offices, members of Congress, the Attorney General of the United States, and the Federal Trade Commission, among others.

On or about October 4, 2000, Mr. Patten spoke by telephone with Thomas E. Watson, Chairman of the ASC, about Lee & Grant's concerns regarding the AQB's distance education standards and the then-proposed USPAP education improvement initiatives. In a follow-up letter of that date, he requested the ASC's views "on the necessity for the AQB also approving a course that a State has approved." And, he asserted that Lee & Grant's " 'National Program for USPAP Instruction' effectively addresses . . . concerns [regarding the current level of USPAP education]." While he did not assert at that time that the AQB was without legal authority to take the proposed actions, he enclosed a copy of a comment letter from the Georgia Real Estate Appraisers Board to the AQB opposing adoption of the AQB's first Exposure Draft. There, the Georgia Board stated that, "Title XI does not authorize the AQB to establish minimum requirements for continuing competency for appraisers nor to regulate or establish minimum requirements for instructors." Instead, those powers resided in the States. On October 24, 2000, at Mr. Watson's request, ASC staff thanked Mr. Patten for his letter, but, because the AQB was to discuss, and perhaps adopt, the initiatives three days later, did not think it appropriate at that time to comment on his concerns.

In early May 2001, then-FFIEC and FDIC Chair Tanoue received an April 29, 2001 letter from U.S. Congresswoman Cynthia A. McKinney. Lee & Grant is one of her constituents. Representative McKinney asked the FFIEC to "respond to the need and purpose for the [AQB standards discussed above], and to inform [her] of any waivers that may exist for these programs." In a May 29, 2001 letter, Chair Tanoue responded, describing the AQB and explaining, in some detail, the statutory and regulatory bases for the AQB's legal authority to establish educational standards. Congresswoman McKinney did not respond to that letter.

The ASC received a May 16, 2001 letter, by fax, from Lee & Grant asking, "[w]ould you kindly advise us what legal authority permits the AQB to set requirements for appraiser continuing education." The ASC responded in a May 23, 2001 letter. There, the ASC stated:

Title XI's legislative history shows that Congress clearly intended the AQB to establish minimum education criteria for certification. In fact, the legislative history for the Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA") shows that Congress knew of the Appraisal Foundation's certification qualifications, including its education requirements, and specifically approved them. Following is an excerpt from the April 13, 1989 report on FIRREA by the Senate's Committee on Banking, Housing, and Urban Affairs<sup>10</sup>:

---

<sup>10</sup> S. Rep. No.19, 101<sup>st</sup> Congress, 1<sup>st</sup> Sess. (1989), at 35-36.

The Committee, in addressing the problem, decided to build upon work already being done by responsible elements of the appraisal industry. The non-profit Appraisal Foundation, established in 1987, represents the major elements of the U.S. appraisal industry.

\* \* \*

Under its auspices, . . . an independent Qualifications Board has recommended minimum requirements for *education*, experience, *continuing education*, a code of ethics and tests for use in certifying appraisers.<sup>[11]</sup> [Emphasis added.]

\* \* \*

[Appraisal] rules would, at a minimum, have to meet generally accepted real estate appraisal and certification standards as evidenced by those promulgated by the Appraisal Foundation.

\* \* \*

The Committee believes this structure will assure not only quality appraisal standards and qualified appraisers, but create appropriate enforcement and monitoring mechanisms to assure compliance with the standards.

The States, under Title XI, must implement and enforce the AQB's minimum criteria for certification. *See, e.g.*, § 1118 of Title XI. One of the ASC's central tasks is to ensure that the States comply with this statutory duty.

In a June 1, 2001 letter to the ASC, Lee & Grant responded, and, among other things, continued to assert that the AQB had “no real legal authority” to set requirements for continuing education, including distance education.<sup>12</sup>

Lee & Grant then faxed an October 23, 2001 memorandum to all “Members of U.S. Congress, Attorney General of the United States, Anti-trust Division of the U.S. Department of Justice, Congressional Budget Office, Federal Trade Commission, Members of the [FFIEC],

---

<sup>11</sup> Almost identical language appeared in the congressional debate at 135 Cong. Rec. S 4,084-139, 4095 (daily ed. April 18, 1989).

<sup>12</sup> Lee & Grant sent copies of its June 1st letter to all FFIEC members, ASC members, and Georgia Congresswoman McKinney and Senators Cleland and Miller. The FFIEC, on August 22, 2001, received a joint August 16, 2001 letter from Senators Cleland and Miller, asking “whether the FFIEC approves the fee structure [for AQB course approval] and what guidelines are used in determining the costs for approval of these courses.” They also requested “the specific criteria . . . and full methodology employed in computing these fees.” In separate, but substantively identical, September 17, 2001 letters, FFIEC Chairman Powell responded to the Senators, stating that the FFIEC and ASC do not review or approve the AQB's fee structure.”

Members of the [ASC], and State Real Estate Appraiser Boards” calling for an investigation of the AQB.<sup>13</sup> In the attachments to this fax, Lee & Grant restated its contentions:

In [Title XI], Congress granted the AQB authority to set “minimum criteria for certification” for real estate appraisers. The AQB has used this phrase . . . to grant itself the right to meddle extensively in the education the various States mandate for their real estate appraisers, often with the result of earning revenues for The Appraisal Foundation, its parent.

Two policies of the AQB stand out as particularly objectionable. One is its tactic of pressuring schools providing on-line education to obtain AQB approval for each course, at a substantial fee. The second is the requirement it voted to enact that all schools must use a course on [USPAP] that its parent, the Foundation, owns. AQB alleges that current education on USPAP is seriously deficient and only the Foundation’s course or one approved by the AQB can correct that.

\* \* \*

[E]fforts to bring about change have failed. A major reason is the ASC, which [Title XI] requires [to] monitor the Foundation, appears unwilling to do so. Appeals from APA and [Lee and Grant] to the ASC to live up to its statutory responsibilities have gone largely unheeded.

Finally, FFIEC and FDIC Chairman Donald E. Powell, on November 27, 2001, received a letter dated November 26<sup>th</sup> from Lee & Grant reiterating its contentions.<sup>14</sup> In this letter, Lee & Grant further explored the ASC’s failure to monitor the AQB: “The unprofessional conduct of the AQB and, . . . The Appraisal Foundation, is not something you and your Subcommittee should be protecting. But protect you do by your inaction” and “Let the Foundation bilk the appraisal industry, under the permissive gaze of its lapdog Appraisal Subcommittee.”

## **The ASC’s Position**

First, the ASC continues to believe that the AQB has acted within its legal authority under Title XI. Title XI’s charge to the AQB is to establish “minimum criteria for certification” for real

---

<sup>13</sup> The memorandum enclosed a recent newsletter of the Association of Professional Appraisers, which contained the language quoted above. This Association apparently has been created by Lee & Grant and is made up of purchasers of Lee & Grant products. Association membership benefits include product discounts.

<sup>14</sup> Copies of this letter were sent to U.S. Senators Cleland, Miller, and Sarbanes; U.S. Representatives McKinney, Max Collins, John Linder, and Michael Oxley; Staff of the Senate and House Committees, respectively, on Banking, Housing, and Urban Affairs, and Financial Services; the Congressional Budget Office; the Inspector’s Generals’ offices at U.S. Department of Justice, U.S. Department of Treasury, Federal Reserve Board, Federal Deposit Insurance Corporation, and National Credit Union Administration; head-of-agency offices at the U.S. Department of Justice, U.S. Department of Treasury, and the Federal Reserve Board; FFIEC members; the Federal Trade Commission; State appraiser regulatory agencies; and the offices of the Mayor and Corporation Counsel of the District of Columbia. A representative of the Federal Reserve Board’s Inspector General’s office already has contacted ASC staff, and, on November 29<sup>th</sup>, spoke at length with Ben Henson, ASC Executive Director, about the issues discussed in this request. House of Representatives staffers also have contacted us. Chairman Watson, Executive Director Ben Henson, and General Counsel Marc Weinberg met with House Financial Services Committee staffers on December 5<sup>th</sup>.

estate appraisers. Title XI does specifically limit the areas that the AQB can determine are appropriate for certification. The AQB canvassed other professions for the standards imposed on practitioners of the professions. Uniformly, the AQB found that experience, education, and examination were the keystones of professional standards. We believe that criteria in these areas pass the reasonableness and arbitrary and capricious tests. Also, although Title XI does not specifically address “education” or “distance education,” Title XI’s legislative history clearly shows that Congress was aware of the AQB’s criteria in the education area and intended the AQB to establish mandatory minimum education criteria for certification, including continuing education.

Additional research has lent further support to our view that Congress not only knew of the AQB’s then-existing certification criteria, but also specifically approved them, including the AQB’s minimum education and continuing education requirements. In its May 16, 1989 report on FIRREA, the Senate’s Committee on Banking, Housing, and Urban Affairs stated, “[t]he Committee has knowledge of and approved the qualification standards established by the Appraisal Foundation.”<sup>15</sup>

And, while Congress knew of and approved the AQB’s specific qualification criteria for State certified real estate appraisers, we believe that the AQB’s authority to adopt those criteria is not limited only to the specific words contained in the criteria as they existed in 1989, as we understand Georgia verbally contends. Congress certainly intended that the AQB ensure, through its adoption of reasonable and appropriate minimum qualification requirements suited to ever-changing technology and an evolving real estate marketplace, that only qualified and competent persons perform real estate appraisals in connection with federally related transactions (and other real estate transactions where the services of State certified real estate appraisers are required).

Second, the ASC believes that it properly performed its monitoring and review function respecting the AQB’s questioned actions, consistent with the language, spirit, and intent of Title XI.

Finally, the ASC believes that it properly performed its State agency oversight responsibilities when it instructed States to rescind their approval of continuing education courses for certified appraisers that were not approved by the AQB under its criteria.

---

<sup>15</sup> H.R. Rep. No.54, 101<sup>st</sup> Congress, 1<sup>st</sup> Sess., pt. 1 (1989), at 481.