

Federal Financial Institutions Examination Council
Legal Advisory Group



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June 11, 2002

Mr. Jesse G. Snyder, Chairman
Appraisal Subcommittee Federal Financial Institutions Examination Council
2000 K Street, N.W. - Suite 310
Washington, D.C. 20006

Dear Mr. Snyder:

The Legal Advisory Group (“LAG”) of the Federal Financial Institutions Examination Council (“FFIEC”) has been requested to provide a legal opinion regarding: (1) the scope of authority of the Appraisal Foundation’s Appraiser Qualification Board (“AQB”) to adopt education-related standards for certified real estate appraisers; (2) the scope of the responsibility of the Appraisal Subcommittee of the FFIEC (“ASC”) to monitor the AQB; and (3) the ASC’s authority to oversee state appraiser regulatory agency implementation of those AQB standards, pursuant to Title XI of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (“FIRREA”), as amended (“Title XI”).¹ The LAG consists of the General Counsel of the Federal Deposit Insurance Corporation, the General Counsel of the Board of Governors of the Federal Reserve System, the Chief Counsel of the Office of the Comptroller of the Currency, the Chief Counsel of the Office of Thrift Supervision and the General Counsel of the National Credit Union Administration, the constituent agencies of the FFIEC.

Because of challenges by an appraisal education provider, we were asked for a legal opinion on these specific issues:

- Does Title XI authorize the AQB to adopt minimum education requirements for certified real estate appraisers, including those relating to continuing education and distance education?
- Is the ASC’s interpretation of its duties to monitor and review AQB activities appropriate and consistent with Title XI and other applicable law?
- Was the ASC acting improperly or in any manner inconsistent with Title XI or other law when it instructed States to rescind their approvals of continuing education courses for certified real property appraisers that did not conform to AQB criteria?

¹ Pub. L. No. 101-73, 103 Stat. 183 (1989) (codified as amended at 12 U.S.C. §§ 3331-3352).

Regulatory Framework

The certification of real estate appraisers is subject to a unique regulatory framework created by Title XI. The appraisal regulatory structure includes State or U.S. territory appraiser certifying and licensing agencies (“state agencies”), a private corporation, and federal agencies. Under Title XI, the states, through the state agencies, are responsible for certifying and licensing real estate appraisers to participate in federally related transactions and for supervising their appraisal-related activities.² Under Title XI, the state agencies must adopt criteria for real estate appraiser certification that currently meet the minimum criteria established by the AQB of the Appraisal Foundation, a private non-profit organization.³ Title XI charges the ASC with oversight of the real estate appraiser regulatory framework through monitoring (i) the requirements of the states for certifying and licensing appraisers and (ii) the activities and operations of the Appraisal Foundation, including the AQB.⁴

Issues and Discussion

Issue 1: Does Title XI authorize the AQB to adopt minimum education requirements for certified real estate appraisers, including those relating to continuing education and distance education?

Section 1116(a) of Title XI defines a “State certified real estate appraiser” as an “individual who has satisfied the requirements for State certification in a State or territory whose criteria for certification currently meets the minimum criteria for certification issued by the [AQB].”⁵ The statute requires states to adopt criteria for appraiser certification that are at least as stringent as the AQB’s minimum certification criteria. The states, of course, can adopt appraiser certification requirements that are stricter than those of the AQB.⁶ Accordingly, to qualify as a state certified real estate appraiser under Title XI, an individual must at least satisfy the minimum criteria for

² Title XI defines the term “federally related transaction” as “any real estate-related financial transaction which-- (A) a federal financial institutions regulatory agency or the Resolution Trust Corporation engages in, contracts for, or regulates; and (B) requires the services of an appraiser.” 12 U.S.C. § 3350(4). The federal financial institutions regulatory agencies have issued regulations identifying which transactions require the services of a certified or licensed appraiser. *See, e.g.*, 12 C.F.R. § 323.3.

³ *See* 12 U.S.C. § 3345(a). FIRREA does not provide minimum requirements for the licensing of real estate appraisers by state agencies. *See* 12 U.S.C. § 3345(c).

⁴ *See* 12 U.S.C. §§ 3332(a), 3347.

⁵ 12 U.S.C. § 3345(a).

⁶ The statute also requires the individual to pass a suitable examination administered by the state that is consistent with and equivalent to the Uniform State Certification Examination issued or endorsed by the AQB. 12 U.S.C. § 3345(b).

certification issued by the AQB.⁷ Therefore, the terms of Title XI clearly authorize the AQB to establish minimum criteria for state certification of real estate appraisers.

Although Title XI does not specifically address “education” or “continuing education” as criteria for appraiser certification, the structure, purpose, and legislative history of the statute indicate that education requirements for appraisers are within the scope of minimum certification criteria that Congress authorized the AQB to establish. By not limiting the scope of the criteria, the statute appears to vest the AQB with broad discretion in determining what minimum criteria are appropriate for appraiser certification. Including education requirements among the minimum criteria is a reasonable measure to help ensure that certified appraisers perform their duties properly as Congress intended. Such requirements are consistent with the statutory mandate that appraisers must pass an examination that is consistent with and equivalent to the Uniform State Certification Examination issued or endorsed by the AQB, as both measures are calculated to result in a uniform body of knowledge possessed by certified appraisers nationwide.⁸ In addition, the education requirements complement the AQB’s minimum experience criteria for appraiser certification.

The legislative history indicates that Congress intended Title XI to help solve the appraisal-related problems that had contributed to the widespread insolvency of financial institutions and deposit fund losses by, in part, creating appraisal certification standards that were consistent nationwide.¹⁰ Rather than dictating particular criteria in the statute, Congress looked to the Appraisal Foundation and its AQB as the source of the minimum appraiser certification criteria. The Conference Committee Report on FIRREA provides that “State certified appraisers must meet the requirements for certification issued by the Appraisal Foundation, including a passing grade on a uniform examination.”¹¹

At the time of the passage of Title XI, the AQB had established both education and continuing education requirements. The AQB’s appraiser certification criteria in existence at the time of these Congressional reports included a requirement that an appraiser successfully complete a specified number of classroom hours of AQB-approved courses in subjects related to real estate

⁷ See id.

⁸ Id.

⁹ Section 1116(e) states that the ASC “shall not set qualifications or experience requirements for the states *in licensing* real estate appraisers, including a de minimus standard.” 12 U.S.C. § 3345(e) (emphasis added). This provision clarifies that, although Congress intended the AQB to establish the minimum requirements for the certification of appraisers, Congress intended the authority to establish the minimum requirements for the licensing of appraisers to remain with the states, and did not intend to ASC to set those standards. Title XI and the implementing regulations make distinctions between appraisers that are certified and those that are only licensed. This provision also indicates that Congress considered requirements other than experience to be suitable criteria for appraisers.

¹⁰ H. Rep. No. 101-54, 101st Cong., 1st Sess., pt.1, at 481 (1989).

¹¹ H.R. Conf. Rep. No. 101-222, 101st Cong., 1st Sess., at 455 (1989).

appraisal from a nationally recognized appraisal organization, college, or university. The AQB's criteria also included a limit on the term of certification (*i.e.*, two to four years) and continuing education requirements as part of the criteria for certification renewals. The AQB's continuing education requirements included a specified number of hours of instruction in courses or seminars approved by the AQB.

The legislative history confirms that Congress was aware of the AQB's education and continuing education requirements for appraisers at the time of passage and intended the AQB to maintain and expand on its minimum criteria after the statute's enactment, including its education and continuing education requirements. In its report on FIRREA, the House Committee on Banking, Finance and Urban Affairs ("House Committee") stated, "[t]he Committee has knowledge of and approves the qualification standards established by the Appraisal Foundation for those individuals who seek to become certified appraisers."¹² The following statements from the Senate Committee's report on FIRREA also confirm that Congress knew of the Appraisal Foundation's certification qualifications, including its education-related requirements, and approved them:

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.

* * *

[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.¹³

The recognition in section 1116(a) of Title XI that a state's standards for appraiser certification must "currently" meet the AQB's minimum criteria for certification indicates that Congress expected that the AQB periodically would revise its criteria.¹⁴ Section 1116(a) represents a marked departure from the approach found in precursor legislation to FIRREA, including the Real Estate Appraisal Reform Act of 1988.¹⁵ This bill provided for the formation of an Interagency Appraisal Committee, in part, to prescribe permanent appraiser certification requirements that conformed to the Appraisal Foundation's appraiser certification criteria.¹⁶ Given the decision by Congress to eschew

¹² H.R. Rep. No. 101-54, pt.1, at 481.

¹³ S. Rep. No. 19, 101st Cong., 1st Sess., at 35-36 (1989).

¹⁴ 12 U.S.C. § 3345(a).

¹⁵ H.R. 3675, 100th Cong. (1988).

¹⁶ *See id.* at §§ 500-01; H. Rep. No. 100-1001, 100th Cong., 2nd Sess., pt.1, at 33, 42 (1989).

“permanent” certification requirements for state agencies in favor of requirements that “currently” meet the AQB’s minimum criteria, it appears that Congress foresaw that the AQB’s minimum criteria would change over time and planned for such change accordingly. The decision to define a “State certified real estate appraiser” as an individual certified by a state with certification requirements that “currently” meet the AQB’s minimum criteria, therefore, indicates that Congress intended to provide for the on-going development and refinement of the AQB’s criteria, which were less than one year old at the time of FIRREA’s enactment.

The AQB’s authority to establish minimum education criteria for appraiser certification reasonably encompasses the methods of appraiser education, including “distance education.” At the time FIRREA was enacted, the AQB’s minimum education criteria contemplated only classroom education. Since the passage of FIRREA, the AQB has amended its minimum criteria to address the needs of appraisers for alternative methods to meet their education requirements. In 1991, the AQB recognized that correspondence courses could be a valid method for certified appraisers to meet their continuing education requirements, but concluded that additional criteria were needed to ensure that the quality of the courses would be consistent with the traditional classroom education criteria and consistent nationwide. The AQB further amended its criteria in 1997 to expand the concept of correspondent education to include computer-based education courses. It included “distance education” as a valid method for appraisers to meet their education and continuing education requirements. The AQB defined “distance education” to include “any educational process based on geographical separation between instructor and learner (e.g., CD-ROM, on-line learning, correspondence courses, video teleconferencing, etc.)” As earlier with the authorization of correspondence courses, the AQB promulgated additional criteria for distance education courses to ensure that the quality of the distance courses would be on par with the classroom courses and consistent nationwide.

Therefore, the terms, structure, and legislative history of Title XI all support the conclusion that Title XI authorizes the AQB to adopt minimum education requirements for certified real estate appraisers, including those relating to continuing education and distance education.

Issue 2: Is the ASC ‘s interpretation of its duties to monitor and review A QB activities appropriate and consistent with Title XI and other applicable laws?

Section 1103(b) of Title XI expressly requires the ASC to “monitor and review the practices, procedures, activities, and organizational structure of the Appraisal Foundation.”¹⁷ Title XI does not specify how the ASC is to perform this oversight or prescribe limits on its oversight function. Therefore, the statute appears to vest the ASC with broad discretion in determining how to monitor and review the Appraisal Foundation, including the AQB. Under the ASC’s interpretation of its oversight responsibilities, it monitors and reviews the AQB ‘ s activities in the following manner: (1) ASC staff attends AQB and other Appraisal Foundation meetings and work sessions; (2) the ASC

¹⁷ 12 U.S.C. § 3332(b).

staff and sometimes the ASC, as a body, review and comment on AQB proposals; (3) through the grant process, the ASC reviews prospective and existing AQB projects and reimburses the Appraisal Foundation for expenses relating to the AQB's Title XI-related activities;¹⁸ (4) the ASC retains a certified public accounting firm to review the Appraisal Foundation's financial operations annually; and (5) ASC staff maintains regular, informal professional communications with AQB members and Appraisal Foundation staff

Consistent with this interpretation, the ASC generally reviews and comments on the AQB's proposals related to minimum criteria for appraiser certification and informally discusses the proposals with the AQB. In light of the AQB's broad authority to establish minimum appraiser certification criteria, discussed above, the ASC generally monitors whether the AQB's proposals are reasonable, not arbitrary or capricious, and otherwise consistent with law. The ASC reviewed the AQB's proposals related to minimum education and continuing education criteria, including distance education requirements, and determined that the AQB was not acting in a manner that was unreasonable, arbitrary, or capricious, or otherwise inconsistent with law.

The ASC's approach to overseeing the AQB appears to be consistent with the Title XI provisions. Title XI does not authorize the ASC to establish the minimum criteria for state certification of appraisers and, therefore, it should not substitute its judgment for that of the AQB in establishing the criteria. Although Title XI does mandate that the ASC "monitor and review the practices, procedures, activities, and organizational structure of the Appraisal Foundation" and the AQB,¹⁹ Congress did not provide the ASC with the authority or the power to direct or overrule the operations or structure of these private entities. The only enforcement power that Title XI provides to the ASC relates to the state agencies rather than to the Appraisal Foundation or the AQB-i.e., the extreme measure of refusing to recognize any appraiser certifications and licenses issued by a state agency if one of three refusal standards are met.²⁰ Therefore, it appears that, to the extent it considered this point, Congress intended that the ASC informally influence the policies and practices of the Appraisal Foundation and the AQB when necessary to uphold the purposes and provisions of Title XI. As discussed above, the ASC already has established and implemented steps to provide effective informal oversight of the Appraisal Foundation and AQB.

Issue 3: Did the ASC act improperly or in any manner inconsistent with Title XI or other law when it instructed states to rescind their approvals of distance education courses for certified real property appraisers that did not conform to AQB criteria?

¹⁸ Section 1109(b)(4) of Title XI 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." 12 U.S.C. § 3338(b)(4).

¹⁹ 12 U.S.C. § 3332(b).

²⁰ 12 U.S.C. § 3347(b).

Pursuant to section 1103(a) of Title XI, one of the ASC's primary functions is to "monitor the requirements established by States for the certification ... of individuals who are qualified to perform appraisals in connection with federally related transactions."²¹ From time to time the ASC, through effective monitoring of state agencies, has identified state agencies that approved distance courses that did not conform to AQB criteria. The ASC has represented that, in almost all cases, these approvals occurred because the staffs of the state agencies were unaware of the AQB's requirements. The ASC generally has responded to this situation by writing the state agency to instruct it to rescind its approval of the nonconforming distance courses and to remind the state agency that it must comply with AQB course approval criteria. The issue presented is whether the ASC has acted in accordance with Title XI in doing so.²²

As noted above, the AQB's distance education requirements were established in 1997 and incorporated the correspondence course approval criteria already in place. The AQB further conditioned approval of distance education courses on their being: (1) offered by an accredited college or university; (2) accepted for college credit through the American Council on Education's College Credit Recommendation Service (formerly the ACE/PONSI program); or (3) approved through the AQB Course Approval Program ("CAP").²³ The AQB amended its distance education course criteria in 2001 to allow state agencies alternatively to approve the content of distance courses and for the International Distance Education Certification Center to approve course-delivery methodology.

Section 1118 establishes a statutory framework that charges the ASC with the responsibility for ensuring that the state agencies comply with their responsibilities under Title XI, including by complying with the AQB criteria. However, Title XI provides the ASC with only limited enforcement powers. As noted above, the ASC's only enforcement power under Title XI is to refuse to recognize any appraiser certifications and licenses issued by a state agency that the ASC has deemed to have met one of the three refusal standards established in section 1118(b).²⁴ Section

²¹ 12 U.S.C. § 3332(a).

²² Lee & Grant Company ("L&G"), a provider of appraisal education courses, has challenged the ASC's statutory authority to instruct state agencies that they must rescind their approval of distance courses that do not comply with AQB criteria. L&G argues that section 1118 of FIRREA, while providing for ASC oversight of state agencies, does not grant the ASC the authority to provide state agencies with orders or ultimatums to comply with AQB criteria.

²³ The ASC has represented that the CAP was established at the request of State agencies and providers of appraisal education. Under this voluntary program, the AQB contracts with education experts to review submitted courses. The first internet-based distance education courses were approved by the AQB under the distance education course criteria in 1998. As previously noted, the AQB's minimum criteria for continuing education at the time of Title XI's passage, included the requirement that the courses or seminars attended by appraisers be approved by the AQB.

²⁴ Section 1118, in relevant part, reads as follows:

(b) Disapproval by Appraisal Subcommittee. The Federal financial institutions, regulatory agencies, the Federal National Mortgage Association, the Federal Home Loan Mortgage Corporation, and the Resolution Trust Corporation shall accept certifications and licenses awarded by a State appraiser certifying the licensing agency unless the Appraisal Subcommittee issues a written finding that - (1) the State agency fails to recognize and enforce the standards,

1118 requires that, before refusing to recognize a state's certifications and licenses, the ASC must provide the state with written notice of its intention not to recognize these certifications and licenses, and an "ample" opportunity to provide rebuttal information and to correct the conditions causing the refusal.²⁵

The legislative history of FIRREA suggests that Congress did not intend to leave the ASC powerless in remedying violations of Title XI that did not meet the standards in section 1118(b). The House Committee, in a discussion of the ASC's role in monitoring state agencies in its report on FIRREA, noted that a goal in providing the ASC with monitoring responsibilities was a "nationwide system of state certified ... appraisers."²⁶ To meet this Congressional expectation of uniformity among the appraisal certification requirements employed by the states, the ASC regularly reviews the policies, practices, and procedures of the state agencies and provides them with written assessments of their compliance with Title XI. In its correspondence with the state agencies, the ASC highlights specific areas where the practices of a state agency do not comply with the requirements of Title XI, and notes the remedial actions the state agency must take to restore its status as Title XI-compliant.

As noted above, when the ASC has found that state certification programs do not conform to the AQB continuing education criteria, the ASC has provided a written notice to the relevant state agency instructing the agency of the need to conform its program to the criteria. Such notice has included, when relevant, instruction to the state agency to rescind its approval of certain distance education courses that do not comply with the AQB's minimum criteria. These instructions are not unlawful, provided they represent a finding that the relevant state's certification or licensing policies, practices, or procedures are not consistent with the requirements of Title XI.²⁷ However, the ASC ultimately may enforce these instructions only by following the procedures established in section 1118 for refusal of state certifications and licenses, which require the ASC to provide the non-compliant state agency with written notice that a refusal standard has been met and an opportunity to provide rebuttal information or to correct the condition.

requirements, and procedures prescribed pursuant to this chapter; (2) the State agency is not granted authority by the State which is adequate to permit the agency to carry out its functions under this chapter; or (3) decisions concerning appraisal standards, appraiser qualifications and supervision of appraiser practices are not made in a manner that carries out the purposes of this chapter. 12 USC § 3347(b).

²⁵ 12 USC § 3347(c); *see* 12 C.F.R. 1102.20-1102.35.

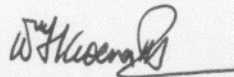
²⁶ H. Rep. No. 101-54, pt.1, at 482.

²⁷ Although the ASC, in some instances, has informed state agencies that it "must" take certain actions without qualifying this instruction with the phrase "in order to comply with Title XI," such a directive by the ASC does not constitute an improper act. The ASC's instruction to the state agencies may constitute threats by the ASC to utilize its enforcement power, but not an attempt by the ASC to utilize powers that were not granted by Congress.

For the foregoing reasons, the ASC's actions with respect to its correspondence with state agencies concerning compliance with Title XI and the AQB's minimum certification criteria appear to be consistent with Title XI and its legislative history.

Sincerely,

Legal Advisory Group
Federal Financial Institutions Examination Council

 for Legal Advisory
Group, FFIEC

By: William F. Kroener, III
Chairman