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Appraisal Subcommittee

Federal Financial Institutions Examination Council

May 16, 2005

Mr. James Pfeffer, Chairman
Kansas Real Estate Appraisal Board
1100 SW Wanamaker Road, Ste. 104
Topeka, KS 66604

Dear Mr. Pfeffer:

Thank you for the Kansas Real Estate Appraisal Board's ("Board") cooperation and assistance in the March 17-18, 2005 Appraisal Subcommittee ("ASC") review of Kansas' real estate appraiser regulatory program ("Program"). As discussed below, Kansas needs to take several actions to bring the Program into full compliance with Title XI of the Financial Institutions, Reform, Recovery, and Enforcement Act of 1989, as amended, ("Title XI").

Our foremost concern is that Kansas issued certified credentials based on outdated examinations that failed to conform to Appraiser Qualifications Board ("AQB") criteria. We also discuss two other areas needing corrective action.

- **Kansas issued certified appraiser credentials supported by examination results that were more than two years old, which is inconsistent with AQB criteria.**

Section 58-4109(f) of Kansas' appraiser regulatory statute ("Statute") provides that appraiser examination results are valid for five years. In April 2000, the AQB issued an Interpretation to its criteria specifying that examination results were not valid for more than two years. The AQB made this Interpretation effective July 1, 2000. Both the AQB and the ASC sent letters to all States in 2000 to make them aware of the Interpretation and the need for States to conform their operations to the Interpretation. Kansas failed to do so.

Board staff reviewed its records to determine whether Kansas had issued any credentials supported by examination results more than two-years old. Board staff determined that three certified appraisers fell into this category. (Fifty-two State licensed appraisers also were issued credentials supported by outdated examination results. Title XI, however, does not require States to conform to AQB criteria regarding licensed appraisers.) While on-site, we reviewed Kansas' files and confirmed the Board staff determinations.

We also identified two pending applications for certification that were supported by outdated examination results. Board staff planned to send a letter to these applicants, notifying them of the situation and giving them the opportunity to retake the examination.

A statutory amendment to conform the Statute to the AQB Interpretation is in the legislative process. We understand that Senate Bill Number 276 was introduced in February 2005. The bill has been approved by committee and by the full Senate, and was referred to the State House of Representatives on March 23rd. On March 25th, at the Board's request, ASC staff faxed a letter to the legislature explaining the need for the statutory amendment and supporting its prompt adoption. Barring unforeseen circumstances, the Board expects this bill to become

law this summer. The Board then will have to adopt implementing regulations.

To address this concern, the Board needs to:

1. Notify the three certified appraisers whose credentials failed to conform to AQB criteria that they must take and pass the appropriate examination within 90 days from the Board's receipt of this letter to maintain their certified credentials with authority to perform appraisals in connection with federally related transactions;
 2. Take the necessary steps to downgrade to the licensed level any certified appraiser who fails to take or pass the appropriate examination within the 90-day period. Alternatively, the Board could recall an existing certification and overstamp it with wording similar to "Not Eligible to Appraise Federally Related Transactions." In this case, the appraiser's record on the National Registry would be deleted;
 3. Notify the two applicants for certification of these circumstances and give them the same options as discussed in steps 1 and 2 above;
 4. Refrain from issuing appraiser certifications that fail to conform to the AQB Interpretation; and
 5. Advise the ASC monthly on the status of the statutory amendment and any implementing regulations.
- **Board regulations provide appraiser members of the Board credit for up to 14 hours of continuing education per year for Board participation.**

Section 117-6-1(c)(3) of Kansas' rules and regulations provides that Board members who actively serve on the Board may receive 14 hours of appraiser continuing education annually. In response to an ASC letter, the AQB, in an August 4, 2004 letter, stated that it is permissible for a State to award continuing education credit to appraisers who attend a State board meeting under the following circumstances:

- The State board meeting must be at least two-hours long (this is consistent with the requirement that continuing education courses must be a minimum two-hours in length);
- A credentialed appraiser may not receive continuing education credit for attending a State board meeting more than once per continuing education cycle (this is consistent with the requirement that continuing education is designed to maintain and advance an appraiser's skills, knowledge and competency, and should not be repetitive or redundant); and
- The State board must verify the identification of any credentialed appraiser wishing to receive credit for attending a State board meeting, and must have adequate procedures in place to ensure the credentialed appraiser attends the meeting for the required period of time.

To address this concern, the Board needs to amend its regulations to conform to the direction provided by the AQB in its August 4, 2004 letter regarding this issue and ensure that certified credentials renewed after the June 30, 2005 renewal cycle conform to these provisions. We have enclosed a copy of the AQB's August 2004 letter for your convenience.

- **The Board needs to update its regulations to reflect changes in AQB criteria.**

The Board needs to amend its regulations to reflect two changes in AQB criteria. Effective January 1, 1998, the AQB eliminated acceptance of teaching from the list of activities acceptable as qualifying experience. And, effective April 1, 2004, the AQB removed ACE Credit from its authorized distance education approval process and added the International Distance Education Certification Center. In practice, Kansas has not accepted teaching as experience or accepted ACE Credit-approved distance education courses. Nevertheless, the Board needs to adopt these housekeeping amendments to its regulations.

- **Board Counsel must allow ASC staff to observe executive sessions of the Board.**

During the Board meeting attended by ASC staff, the Board entered into executive session. Prior to convening the executive session, Assistant Attorney General Nohe instructed all observers to leave. She included ASC Policy Managers, the Board's prosecuting attorney, and Board staff. We advised the Board and Ms. Nohe of our authority to observe the proceedings as part of our State oversight responsibilities under Title XI. After Ms. Nohe instructed ASC staff to leave the meeting, our staff noted their protest and left the meeting.

Title XI clearly requires the ASC to monitor State appraiser certifying and licensing agencies for the purpose of determining whether a State agency's policies, practices, and procedures are consistent with this title. The ASC, and all agencies, instrumentalities, and federally recognized entities under Title XI, shall not recognize appraiser certifications and licenses from States whose appraisal policies, practices, or procedures are found by the ASC to be inconsistent with Title XI. The ASC may issue a written finding ordering the non-recognition of appraiser certifications and licenses for one or more of the following reasons:

- (1) The State agency fails to recognize and enforce the standards, requirements, and procedures prescribed pursuant to Title XI;
- (2) The State agency is not granted authority by the State which is adequate to permit the agency to carry out its functions under Title XI; 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 Title XI.

While Title XI has authorized the ASC to monitor State agencies, to make determinations regarding their compliance with Title XI, and to take action against non-complying States, Title XI is silent regarding how the ASC is to accomplish these tasks. In *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the Supreme Court laid out an analytical framework for the review of an agency's construction of a statute it administers. In those cases where "Congress has [not] directly spoken to the precise question at issue," *Chevron*, 467 U.S. at 842, ruled that the question is "whether the agency's [action] is based on a permissible construction of the statute." *Id.* at 843. 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 policy to elucidate the statute. *Id.* at 844. So long as the action comports with the statutory objectives and is not arbitrary or capricious, the administering agency's reasonable policy choices are entitled to deference. *Id.* At 844-845, 864-866.

The ASC, as the agency administering Title XI, made a reasonable policy decision many years ago to establish an on-site field review program as a key component in its State agency monitoring system. The efficacy of the ASC's field review program clearly rests on the ASC's ability to obtain reliable information about *all* areas of the State's appraiser regulatory program. The ASC must have access to all aspects of the regulated entity's operations and decision making processes. No area reasonably related to the State's compliance with Title XI can be off limits to Federal oversight.

It is essential that the ASC have access to State agency executive sessions. Over the years, the ASC has learned of significant Title XI compliance issues by attending executive sessions. Without attending those sessions, those issues never would have been discovered or would have been discovered at a point where curative actions would have been much more difficult. Of course, the ASC will respect the privacy of all individuals and confidential matters discussed during executive session. Indeed, the ASC is obligated to protect the privacy of individuals and other confidential matters under Federal law.

That is not to say that ASC staff during a field review will attend every executive session. After being briefed by State officials regarding the matters to be discussed at such a session, the ASC staff on site, after consulting with the ASC Executive Director, ASC General Counsel, or both, may choose to forego attendance. While that consultation is taking place, the ASC expects State agencies to delay the executive session. If a decision to attend results, then the ASC expects State agencies to honor that decision when the executive session commences.

In conclusion, in the future, the Board must allow ASC staff performing an on-site field review to attend all Title XI-related functions conducted by a State, including attending executive sessions of the Board. If the Board disagrees with this position, please submit a letter to us detailing the legal reasoning for restricting our attendance of executive sessions.

Unless otherwise noted above, please respond to our findings and recommendations within 60 days following the receipt of this letter. Until the expiration of that period or the receipt of your response, we consider this field review to be an open matter. After receiving your response or the expiration of the 60-day response period, whichever is earlier, this letter, your response and any other correspondence between you and the ASC regarding this field review become releasable to the public under the Freedom of Information Act and will be made available on our Web site.

Please contact us if you have further questions.

Sincerely,

Virginia M. Gibbs
Chairman

Enclosure