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Appraisal Subcommittee

Federal Financial Institutions Examination Council

VIA Certified Mail

May 5, 2005

Mr. Rodger Fitzwater, Executive Director
Missouri Real Estate Appraiser Commission
3605 Missouri Boulevard
Jefferson City, MO 65102-1335

Dear Mr. Fitzwater:

Thank you for your February 10, 2005 letter responding to our November 18, 2004 field review letter. As stated in our letter, our recent field review identified several serious weaknesses in Missouri's appraiser regulatory program ("Program"), including weaknesses that have persisted over the last several years. As a result, the ASC informally concluded that the Program was not in substantial compliance with Title XI of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, as amended ("Title XI").

We are pleased that the Missouri Real Estate Appraiser Commission ("MREAC") and the Department of Commerce and Economic Development's Division of Professional Registration ("Division") have made efforts to address a number of our concerns. We, however, remain troubled by other aspects of your response, as discussed below.

- **Missouri does not investigate and resolve complaints promptly.**

In our November 18th letter, we concluded that Missouri's complaint investigation and resolution program did not comply with ASC Policy Statement 10 regarding the processing of complaints on a timely basis. We noted that we had notified Missouri of this weakness in our December 19, 2001 letter following our 2001 field review. We further noted that the situation had deteriorated since our 2001 review.

To address this concern, we identified three actions that the Division and MREAC needed to take:

1. Develop and implement a plan to obtain the necessary resources to investigate and resolve complaints in a timely manner, as provided in ASC Policy Statement 10. We requested a copy of the plan within 90 days of receipt of the November 18th letter;
2. Work with the Attorney General's Office to identify policies and procedures that would reduce the time it takes that office to process appraiser complaint cases. We recommended that this include a prioritization of appraiser cases referred to the Attorney General's Office, based on the seriousness of the identified violations. We requested a copy of these policies and procedures within the same time period; and
3. Provide the ASC with quarterly complaint logs identifying each open complaint, the date it was received, and its current status.

To our knowledge, the Division and MREAC have not taken any of these actions, nor have the Division and MREAC indicated that they have taken any actions to address our concerns regarding this issue.

In your February 10th letter, you discussed the State's complaint processing statutes and complaint litigation process. You stated that, upon referral to the Attorney General's Office, MREAC no longer has any material control over the time within which the matter is resolved until after the Administrative Hearing Commission issues its decision and certifies its record to the MREAC, other than to offer increasingly lower settlement terms or to withdraw the referral.

Because of MREAC's limited control over referrals to the Attorney General's Office, you requested that we treat each of these referrals as a "special documented circumstance" under ASC Policy Statement 10. Paragraph E of that Policy Statement, in pertinent part, states that, "State agencies need to process complaints of appraiser misconduct or wrongdoing on a timely basis. Absent special documented circumstances, final State agency administrative decisions regarding complaints should occur within one year of the complaint filing date."

We understand that some of the cases referred to the Attorney General's Office were part of the 50 cases that were more than one year old at the time of our 2004 field review. For this reason, the second step in the corrective action plan detailed in our November 18th letter involved the Division and MREAC working with the Attorney General's Office to mitigate the delays being experienced once a case is referred to that office. Based on your response, it does not appear that the Division or MREAC attempted such communications.

Additionally, of the 50 cases outstanding for more than one year, 23 had been outstanding more than two years, and three for more than three years. Even with referrals to the Attorney General's Office, it should be extremely unusual when complaint resolution requires more than two or three years.

As a Title XI jurisdiction, Missouri's responsibilities regarding appraiser-related supervision are unlike any others within State government. These responsibilities are subject to direct Federal regulation and oversight. All responsible State entities, *e.g.*, the Division, MREAC, and the Attorney General's Office, must perform their appraiser regulatory functions in compliance with Federal law, *i.e.*, Title XI, for the State to retain its authority to issue appraiser credentials that convey authority to perform appraisals in connection with federally related transactions.

One of the central purposes of Title XI is to ensure that appraisers who perform appraisals in connection with federally related transactions are competent, that their work conforms to the Uniform Standards of Professional Appraisal Practice ("USPAP"), and that their professional conduct is effectively supervised. That purpose must be met. Missouri must have an effective enforcement program, because enforcement is essential to fulfilling Title XI's purposes. Missouri's continued, long-term failure to resolve this concern brings into question Missouri's overall ability to supervise its appraisers as contemplated by Title XI.

The ASC adopted Paragraph E of ASC Policy Statement 10 to help ensure that States have effective enforcement programs. While the Policy Statement does not require that each complaint must be finally processed administratively within one year of its filing date, the Policy Statement makes clear that each State needs to ensure that its *entire* system for processing and

investigating complaints and sanctioning appraisers is administered in an effective manner. Timeliness in resolving complaints is a central aspect of that effectiveness.

Title XI compliance is a State-wide responsibility. If more than one component of State government performs Title XI-related regulatory tasks, each of those components must perform those tasks in a manner consistent with Title XI. If challenges arise, the various State components must work together to find solutions to ensure Title XI compliance.

We recognize that Title XI compliance can be complicated by administrative and State law structural difficulties. Nevertheless, Missouri (and any other State facing such difficulties) needs to find creative ways to ensure compliance. Indeed, because of the direct Federal interest in Missouri's Program, special case processing procedures might need to be implemented – without weakening disciplinary sanctions on licensed or certified appraisers that violate Federal and State law.

Therefore, we again reiterate that MREAC and the Division need to:

1. Develop and implement a plan to obtain the necessary resources to investigate and resolve complaints in a timely manner, as provided in ASC Policy Statement 10. Provide us with a copy of the plan within 60 days of receiving this letter;
2. Work with the Attorney General's Office to identify policies and procedures that would reduce the time it takes that office to process appraiser complaint cases. This should include a prioritization of appraiser cases referred to the Attorney General's Office, based on the seriousness of the identified violations. Provide us with a copy of these policies and procedures to the ASC within 60 days of receiving this letter; and
3. Provide the ASC with quarterly complaint logs identifying each open complaint, the date it was received, and its current status.

- **Missouri accepts examinations that do not conform to AQB criteria.**

In our November 18th letter, we noted that Missouri issues certified appraiser credentials based on examinations that fail to conform to AQB criteria. An Interpretation of the Criteria states that examination results are valid for not more than two years. Section 339.515(3) of Missouri's appraiser regulatory statute ("Statute") provides that appraiser examination results are valid for three years. We brought this concern to your attention in our 2001 field review letter.

To address this concern, we directed MREAC and the Division to:

1. Review their records regarding individuals issued certified credentials since July 1, 2000;
2. Within 30 days of receipt of November 18th letter, determine whether the examination used to support the certified credential was passed more than 24 months prior to issuance of the credential;
3. Require all certified appraisers whose examinations failed to meet AQB criteria to successfully complete the appropriate examination within 90 days from the MREAC's and Division's receipt of the November 18th letter;
4. Take the necessary steps to downgrade to the licensed level any certified appraiser who fails to successfully complete the appropriate examination within the 90-day period;

5. Initiate necessary amendments to State statutes, regulations, and/or MREAC policies and implement the necessary procedures to ensure compliance with AQB criteria regarding examination validity; and
6. Refrain from issuing appraiser certifications that fail to conform to AQB criteria and Title XI.

As discussed below in detail, MREAC and the Division refuse to downgrade affected certified appraisers and to refrain from issuing appraiser certifications that fail to conform to AQB criteria and Title XI.

In your February 10th letter, you stated that you performed a full review of your records and identified 57 appraisers who were certified based on examination results more than two years old. In recent telephone conversations with you, we were informed about the current status of these 57 certified appraisers. You told us that, on January 8, 2005, the Division sent letters to these appraisers, informing them of their situation and offering them the option to retake the appropriate certification examination. The Division then held a free examination preparation course on February 22nd and 23rd. Examinations were provided on February 24th and March 14th. Forty-nine of the 57 appraisers chose to take the examination. One appraiser failed the examination, but likely will retake the examination in the near future. Eight appraisers did not take the examination.

In a telephone conversation between you and Marc Weinberg, ASC General Counsel, you stated that MREAC and the Division would not be taking any action against these eight appraisers or the one appraiser who failed the examination (should she choose not to retake the examination). In your February 10th letter, you stated your belief that the certifications of these appraisers “have been and are being issued in compliance with [S]tate and [F]ederal law.” On that basis, MREAC refused to downgrade to the licensed level any certified appraiser who fails to complete successfully the appropriate examination. MREAC also refused to refrain from issuing appraiser certifications that fail to conform to AQB criteria and Title XI.

You further supported your refusals based on the difficulty MREAC would have convincing the Administrative Hearing Commission and State courts that State law conflicted with Federal law and was preempted in this instance. You also cited MREAC’s possible exposure to legal costs involved in expensive and futile lawsuits.

Finally, you supported your refusals based on the argument that the AQB’s Interpretations are not part of the AQB’s criteria and, therefore, are not binding. You noted that the ASC “never has promulgated any rules defining the word, ‘criteria.’” You based your position on *Chevron U.S.A., Inc. v. Natural Resources Defense Council, et al.* 467 U.S. 837 (1984), which “authorizes administrative agencies to ‘[formulate] policy and [make] rules to fill any gap left, implicitly or explicitly, by Congress.’” Because the ASC has not defined “criteria,” you believe it is an open question whether an AQB Interpretation should be treated as equal to the AQB criteria.

Your argument based on *Chevron* does not apply in these circumstances. While it is true that the ASC, as the Federal agency tasked with enforcing the AQB’s minimum criteria for certified appraisers, has not defined “criteria,” the ASC has no rulemaking authority regarding the creation, interpretation, or application of the AQB’s criteria. That authority rests with the AQB under Title XI. The AQB is a private entity – part of a private, non-profit educational

organization - and is not a U.S. Government agency. Therefore, the AQB is not subject to *Chevron* and other tenets of Federal administrative law, including 5 U.S.C. § 552. In any event, the AQB always has held that the Interpretations are binding regarding the certification classifications and are inherent parts of the criteria. Indeed, without the Interpretations, many of the “criteria” would become too general to apply in a real world setting. This binding effect of the Interpretations is clearly evidenced in many written AQB communications. In sum, because the AQB considers and treats the Interpretations to the certification criteria as binding and an essential, substantive part of the criteria, then, for Federal law purposes, they are binding, and the ASC is duty-bound by Title XI to ensure that States comply with them.

The ASC cannot allow Missouri or any other State to issue certified credentials that, on their face, authorize appraisers holding those credentials to perform appraisals in federally related transactions when those appraisers have not technically passed the appropriate certification examination. To allow them to continue performing appraisals in federally related transactions would misrepresent their authority to federally insured financial institutions and other users of appraisal services.

We agree that the affected appraisers’ certifications were issued in compliance with State law. This fact creates a possible option for appraisers who chose not to re-take the appropriate certification examination. States have the authority under Title XI and State law to issue appraiser credentials other than federally-recognized “certified” and “licensed” credentials. A few States issue such credentials. These appraiser credentials are valid for State purposes, but not Federal purposes. Therefore, holders of these credentials are authorized to perform appraisals only in non-federally related transactions. Missouri could choose to issue such credentials to the certified appraisers who do not to re-take the appropriate certification examination. Issuance of such a credential would eliminate the need to downgrade a certified appraiser to the licensed level.

ASC Policy Statement 8 requires that any State agency issuing these kinds of credentials “must ensure that any potential user of that appraiser’s services is aware that the appraiser’s certificate or license is limited to performing appraisals in connection with non-federally related transactions. The State agency must place a conspicuous notice directly on the face of any evidence of the appraiser’s authority to appraise stating, ‘Not Eligible To Appraise Federally Related Transactions.’” Appraisers holding these credentials cannot be included in the National Registry.

Finally, in your February 10th letter, you request exemptions for affected appraisers who fall into several specific circumstances. A statement of each exemption request and our related determination follows:

- We have five (5) people who took their certified examination in January, March or May 1998, before the interpretation went into effect on July 1, 2000. Considering the dates these people passed their certified examinations, they were compliant with our State law of thirty-six (36) months but would find it impossible to meet the twenty-four (24) month exam requirement as that time period has already expired by the July 1, 2000 date. These people were certified prior to the 2001 field review of the MREAC but were not identified as a problem at that time.

- ❖ We concur with MREAC's rationale regarding this situation and approve the associated waiver request. We understand that two of the remaining eight certified appraisers who chose not to re-take the examination fall into this category. These two certified appraisers do not need to re-take the examination.
- There are an additional twenty-four (24) out of the fifty-seven (57) people who took their certified examinations from July 1998 through May 2000, before the interpretation went into effect in July 1, 2000.
 - ❖ We do not approve this waiver request. MREAC was informed of the Interpretation and its impending effective date, and could have withheld certification issuance. We understand that four of the remaining eight certified appraisers fall into this group.
- We have one person who got all his information into the Commission in December 2001 to be considered for his certification. Due to circumstances beyond the applicant's control (Commission had a backlog of applicants), he was placed on the next available agenda in late January to be reviewed by the License Committee. The License Committee made the recommendation for approval, the Commission met the next day and letters were sent after the meeting. He returned his fee and Commission issued his certification on February 14, 2002. This caused him to miss certification within twenty-four (24) months by 20 days.
 - ❖ We concur with MREAC's rationale regarding this situation and approve the associated waiver request. MREAC, as the decision-maker, had taken final administrative action within the 24-month period, and only the ministerial act of issuing the credential had to be completed. We understand that this appraiser is one of the eight certified appraisers who chose not to re-take the examination. This appraiser does not need to re-take the examination.
- We have one (1) person who was approved after an April Commission meeting and was sent a letter of approval. He chose to send his fee and activate his certificate after July 1st (beginning of a new license cycle). This caused him to be certified more than twenty-four (24) months after his exam, the anniversary of which was in May.
 - ❖ We do not approve this waiver request. This certified appraiser made a voluntary choice to delay the beginning of his credentialing period. MREAC knew about the impending effective date of the Interpretation and should have informed the appraiser about the possible risks of postponing the effective date of the credential. We understand that this appraiser is one of the eight certified appraisers who chose not to re-take the examination.

As a result of the two approved waivers and the appraisers who have re-taken and passed the examination, only six appraisers remain affected by this issue - five appraisers who chose not to re-take the examination, and one appraiser who failed the examination. Should any of these six appraisers take and pass the appropriate certification examination, they will have satisfied all of the AQB's minimum qualifications criteria for certification, and no longer would fall within the class of affected persons.

To address this concern, the Division and MREAC must:

1. Take the necessary steps to downgrade expeditiously to the licensed level any of these six certified appraisers who failed to take or to pass the appropriate examination. In the alternative, MREAC can choose to recall all physical certificates (and pocket cards or similar documents) from the appraisers and issue replacement credentials with the wording “Not Eligible to Appraise Federally Related Transactions” clearly and conspicuously over stamped on the credentials;
2. Within 30 days of receiving this letter, notify the ASC in writing of the choice to be exercised by each of the six appraisers (*i.e.*, re-take the examination, be downgraded to the licensed classification, or be issued a replacement certified credentials restricted to non-Federally related transactions);
3. Notify the ASC in writing of the time frames within which each appraiser’s action will be completed; and
4. Inform us in writing when these actions have been completed.

You have reported to us that the Governor has indicated that you now can initiate the necessary amendments to your State statute to bring it into compliance with the Interpretation. In that regard, the Department and MREAC must:

1. Take immediate action to ensure that the appropriate curative statutory language is introduced in the State legislature as soon as possible;
2. Propose and adopt on an expedited basis, if possible, any regulations and/or policies and procedures necessary to implement the curative legislation; and
3. Keep us informed about the status of the curative legislation and any implementing regulations and/or policies and practices.

Finally, Missouri must refrain from issuing appraiser certifications that fail to conform to AQB criteria and Title XI. Further issuance of such certificates risks the ASC initiating a non-recognition proceeding under § 1118 of Title XI (12 U.S.C. 3347).

- **Missouri’s policy to accept affidavits in support of credential renewal is inconsistent with ASC Policy Statement 10.**

As noted in our November 10th letter, Missouri accepted affidavits attesting to continuing education from certified appraisers to support their credential renewals. ASC Policy Statement 10 provided that States, at a minimum, should have a reliable means of validating both the education and experience credit claimed for certification or licensing. Lack of routine verification procedures is both an invitation to potential fraud and a threat to the integrity of a State’s appraiser regulatory program. Missouri did not have a reliable means of validating affidavits.

To address this concern, we directed the Division and MREAC to:

1. Prepare, within 30 days of receipt of the November 10th letter, a listing of all certified appraisers whose credentials were renewed effective June 30, 2004;
2. Within 90 days of receipt of the November 10th letter, audit the continuing education claims of at least ten percent of the identified appraisers;

3. Identify appraisers who failed to conform to AQB criteria, take appropriate disciplinary actions against those appraisers, including but not limited to a requirement to obtain the necessary education within a specified time period;
4. Downgrade to the licensed level any certified appraiser who fails to obtain the necessary education; and
5. Comply with ASC Policy Statement 10's new part F, beginning January 1, 2005.

On February 10th, MREAC sent an audit letter to a sample of appraisers who renewed June 30, 2004. We learned in a recent telephone conversation with you that you sent this letter to about 18% of the renewing appraisers (318 out of 1792). Certified appraisers made up about 89% of this group (or about 15% of the 1792 renewing appraisers).

All but seven of these 318 appraisers responded to the February 10th audit letter. The letter's response date was February 20, 2005. Only one appraiser did not have the appropriate continuing education. That appraiser took an AQB-approved online USPAP course. Missouri, however, does not accept online USPAP courses for continuing education purposes.

We understand that MREAC will be determining what action to take against these eight appraisers at its meeting on May 18-19, 2005. We also note the Board's decision to eliminate the use of affidavits in the future and to return to requiring all renewing appraisers to submit certificates of completion regarding each continuing education course.

To ensure that the Division and MREAC ensure that all certified appraisers have met the AQB's minimum continuing education requirements, the Division and MREAC need to:

- Within 30 days from receipt of this letter, notify the ASC in writing of the name, license number, and credential level of the eight appraisers who either failed to respond to the audit notice or did not provide acceptable continuing education;
 - If any of these appraisers are certified –
 - a. Either downgrade them expeditiously to the licensed level or, in the alternative, recall existing credentials and re-issue credentials overstamped with “Not Eligible to Appraise Federally Related Transactions,” as discussed earlier in this letter; and
 - b. Inform us in writing when these steps have been completed; and
 - Comply in all respects with ASC Policy Statement 10 F, effective January 1, 2005.
- **The provisions in Missouri's statute for waiving or extending continuing education are not consistent with the AQB criteria.**

We noted in our November 10th letter that § 339.519 of the Statute allows MREAC to waive continuing education requirements for retirees, disabled persons, or for any other cause. Section 339.525(2) of the Statute allows the MREAC to extend a certified appraiser's credential period for up to six months when the appraiser fails to meet renewal requirements “through mistake, misunderstanding, or circumstances beyond the appraiser's control.” Discussions with MREAC and its attorneys also revealed that exemptions are made for military personnel.

AQB criteria currently do not authorize waivers or extensions for any reasons. During previous field reviews, we cautioned MREAC regarding this issue. Division staff assured us that these provisions were never exercised. Also, in our July 19, 2002 letter to Mr. Fitzwater

commenting on draft statutory amendments, we commented on this statutory provision and the fact that AQB criteria did not authorize or recognize waivers or extensions.

In your February 10th letter, you stated that MREAC no longer will grant continuing education waivers or extensions under §§ 339.519 and 339.525(2) of the Statute. We appreciate your decision and recommend that you formalize this policy change in writing.

MREAC, however, will continue to conform to § 41.946 of the Statute, which prohibits persons on active military duty from needing to complete or make up any continuing education regarding their license. While we might share your concerns regarding military personnel, we are bound by Title XI to enforce the AQB's minimum qualifications criteria for certification. As noted above, those criteria currently do not authorize the granting of such extensions or waivers.

We understand that you have written to the AQB and expressed your concerns. On April 15, 2005, the AQB issued an Exposure Draft that, in part, addresses these issues. The deadline for submitting comments on the Exposure Draft is May 27, 2005. The AQB's new proposed Interpretation states that:

Waivers or deferrals may not be granted to credential holders who have failed to meet the continuing education requirements.

Appraiser regulatory agencies may place a credential holder in an "inactive status" in the event that the state determines that the deficiency in continuing education was due to extenuating circumstances.

The AQB explained in the Exposure Draft that it is proposing the Interpretation "in an effort to make clear that there can be no 'waivers' or 'deferrals' of continuing education requirements. However, state regulatory agencies with the legal authority to place an appraiser in an 'inactive' status may elect to do so if they have a reasonable basis to believe that the continuing education requirements could not be completed due to valid extenuating circumstances. It is, however, imperative to understand that individuals cannot perform appraisals in federally related transactions if they have a credential with an 'inactive' status. Only those appraisers listed with an 'active' status by the Appraisal Subcommittee are eligible to perform appraisals in federally related transactions."

We will hold our action in abeyance until the AQB makes a final decision on this matter.

- **Missouri's approval process for education courses needs to ensure that a course conforms to AQB criteria.**

During our field review, we identified three continuing education courses approved by MREAC that did not conform to AQB criteria. These were distance education courses that did not have the necessary approval for distance education courses. To address this concern, MREAC was instructed to:

1. Determine, within 30 days of receipt of the November 10th letter, whether each of the courses discussed during the field review conform to the distance education provisions in the AQB certification criteria;

2. Immediately revoke approval of any course determined not to conform to those criteria; and
3. Remain aware of those criteria and ensure that non-conforming courses are not approved in the future.

In its February 10th letter, MREAC stated that it will carefully evaluate all courses submitted for approval to see that they meet AQB criteria. MREAC revoked the approval of one course during its February 3-4, 2005 meeting. Another course's approval expired on June 30, 2004, and the last course now has been approved by the AQB through its Course Approval Program until September 25, 2007. Therefore, all currently approved continuing education courses comply with the AQB criteria.

- **Missouri's statutes and regulations do not conform to 2003 AQB criteria changes.**

In our November 10th letter, we noted that Missouri had not amended its Statute or regulations to adopt the January 1, 2003 AQB criteria changes. In practice, however, the Division and MREAC implemented those changes. We encouraged MREAC to initiate amendments to the Statute and/or its regulations to avoid conflicts between law and practice. Further, to avoid similar discrepancies in the future, we reminded MREAC that it should begin to make the necessary statutory and regulatory changes to conform to the January 1, 2008 AQB criteria changes.

In your February 10th response, you stated that the MREAC "is currently working on new regulations to implement the new AQB criteria to be in place by January 1, 2008. These will include the USPAP course requirements and the AQB requirements for distance education." We are pleased that you are working to ensure the prompt proposal, adoption, and implementation of the new 2008 AQB criteria. Missouri, however, still needs to amend its regulations to conform them to the AQB's current certification criteria, as discussed above. Otherwise, the conflicts between regulation and practice could expose your Program to adverse consequences.

Again, thank you for your response and your efforts to address our concerns. Unless otherwise specified above, please respond to this letter within 30 days from its receipt.

Please contact us if you have any questions.

Sincerely,

Ben Henson
Executive Director

cc: Sharon Lowman, Chair
Craig Jacobs, Assistant Attorney General
Alison Craighead, Division Director, Professional Registration
The Honorable Christopher S. "Kit" Bond
The Honorable Jim Talent
The Honorable William Lacy Clay

The Honorable W. Todd Akin
The Honorable Russ Carnahan
The Honorable Ike Skelton
The Honorable Emanuel Cleaver
The Honorable Samuel B. "Sam" Graves, Jr.
The Honorable Roy Blunt
The Honorable JoAnn Emerson
The Honorable Kenny Hulshof