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Appraisal Subcommittee

Federal Financial Institutions Examination Council

November 7, 2005

Mark Recktenwald, Director
Department of Commerce and Consumer Affairs
335 Merchant Street, Room 310
Honolulu, HI 96809

Dear Mr. Recktenwald:

Thank you for your September 15, 2005 letter responding to our July 18, 2005 field review letter. Our field review letter identified the need for the Department of Commerce and Consumer Affairs (“Department”) to amend its appraiser regulations to: (1) reflect 2003 changes in Appraiser Qualifications Board (“AQB”) criteria; and (2) adequately reference the Uniform Standards of Professional Appraisal Practice (“USPAP”).

We understand that you are in the final stages of drafting implementing regulations to address both the 2003 and 2008 AQB criteria changes. Based on the draft regulations we reviewed while on site, we agree that the draft revisions, among other things, should cure the deficiencies noted in our July 18th letter. In your letter, you noted that your rulemaking process is lengthy. Because incorporation of the 2003 AQB changes is long overdue, we expect that the Department will expedite the rulemaking process. Please provide us with a copy of the final draft rules for our review and comment, and keep us informed about their status.

In your September 15th letter, you provided a detailed explanation of why the Department does not believe the manner in which Hawaii incorporates by regulation and implements USPAP exposes the State’s enforcement program to potentially successful legal challenge.

While we appreciate your explanation, we stand by our concerns as stated in our July 18th letter:

Section 466K-4(a) of Hawaii’s revised statutes for real estate appraisers . . . states that all State credentialed appraisers “shall comply with the current uniform standards of professional appraisal practice approved by the director when performing appraisals in connection with a federally or non-federally related transaction.” Section 16-114-88(a) of Hawaii’s Administrative Rules [“HAR”] attempts to implement this provision for federally related transactions by stating that those standards are “the minimum appraisal standards of the appropriate federal financial institutions regulatory agency.” Under § 16-114-106(4) of the Rules, an appraiser who fails to comply with the agencies’ regulations may have his or her credential revoked, suspended, not renewed, or denied.

We have no concerns with Section 466K-4(a) of your statute. It appropriately requires your licensed and certified appraisers, in effect, to comply with the current version of the uniform standards of professional appraisal practice, as approved by the director, when performing

appraisals in federally and non-federally related transactions. The section is perfectly consistent with Title XI of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, as amended (“Title XI”). The difficulties arise in the way that Hawaii has chosen to implement § 466K-4(a). This is important because Hawaii’s appraiser regulatory statute, Chapter 466K, only spells out the broad parameters of that program. Almost all aspects of your appraiser regulatory program must be fleshed out and implemented through rulemaking.

In our view, those implementing regulations, do not adequately implement § 466K-4(a) in several ways. First, § 466K-4(a) requires the director to approve the current version of the uniform standards of professional appraisal practice. The director has done so by approving the definition of USPAP in § 16-114-2 HAR as “the uniform appraisal standards including ethics and competency provisions established by the Appraisal Standards Board as adopted and as it may subsequently be amended by the Appraisal Foundation.” That definitional section clearly and appropriately incorporates by reference the current USPAP. But, that section merely defines USPAP; it does not *apply* USPAP to licensed or certified appraisers when they perform appraisals in connection with federally and non-federally related transactions.

Next, we turn to your regulations to see if USPAP is applied to the appraisal activities of your licensed and certified appraisers. Nowhere in your regulations did we find the USPAP definition from § 16-114-2 HAR directly applied to those activities. The closest that your regulations come to that result is in §§ 16-114-88(a) and 106(4) HAR. Those two sections require your appraisers to comply with “the minimum appraisal standards of the appropriate federal financial institutions regulatory agency.”

This reference is problematical for several reasons. First, you should understand that the Federal financial institutions regulatory agencies’ (“agencies”) regulations are intended for regulating financial institutions and not real estate appraisers. Different considerations go into regulating differing groups, very often resulting in different regulatory conclusions and requirements.

Second, by referencing the agencies’ regulations, your regulations fail to state with clarity that USPAP is *the* appraisal performance standard for your real estate appraisers. The appraisal performance standards in the agencies’ rules are identified as the “generally accepted appraisal standards *as evidenced by* the Uniform Standards of Professional Appraisal Practice [USPAP] promulgated by the Appraisal Standards Board of the Appraisal Foundation.” *Emphasis added.* The use of the words, “evidenced by,” injects some latitude in how the agencies may apply their respective appraisal standards.

Third, the agencies may change that language in the future, causing Hawaii’s standards to shift, perhaps in a manner that is unacceptable to Hawaii. All of these concerns could be avoided by directly referencing directly USPAP, which is already a defined term in your regulations.

Next, we need to examine how your regulations apply appraisal standards to federally and non-federally related transactions. Section 16-114-88a only applies the “minimum appraisal standards of the appropriate federal financial institutions regulatory agency” to appraisals performed by licensed and certified appraisers in federally related transactions. (We expressed our concerns regarding this reference in the preceding paragraphs.) We, however, could not find any specific regulatory provision that spells out the minimum appraisal performance standards

for your licensed or certified appraisers when performing appraisals in non-federally related transactions. For that reason, it appears that you have not adequately implemented § 466K-4(a) HRS that specifically requires the director of the Department to approve “the current uniform standards of professional appraisal practice . . . when performing appraisals in connection with a . . . non-federally related transaction.”

In summary, we agree that your statute and regulations, together, define USPAP adequately and properly incorporate by reference future changes in USPAP. Our concern is that it appears that your regulations fail to refer directly to the USPAP definition cited in your regulations and do not implement that standard in connection with your certified and licensed appraisers’ performance of appraisals in connection with both federally and non-federally related transactions.

Please contact us if you have any questions.

Sincerely,

Ben Henson
Executive Director

cc: Alan Taniguchi, Executive Officer