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Via electronic submission

Chief Counsel's Office
Office of the Comptroller of the Currency
400 7th Street SW
Suite 3E–218
Washington, DC 20219
Docket No. OCC-2023-0002
RIN 1557-AD87

Melane Conyers-Ausbrooks, Secretary
National Credit Union Administration
1775 Duke Street
Alexandria, VA 22314RIN 3133-AE23
Docket No. NCUA-2023-0019

Ann Misback, Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue NW
Washington, DC 20551
Docket No. R-1807
RIN 7100-AG60

Comment Intake
Consumer Financial Protection Bureau
1700 G Street, NW
Washington, DC 20552
Docket No. CFPB-2023-0025
RIN 3170-AA57

James P. Sheesley
Assistant Executive Secretary
Federal Deposit Insurance Corporation
550 17th Street NW
Washington, DC 20429
Attention: RIN 3064-AE68

Clinton Jones, General Counsel
Federal Housing Finance Agency
Fourth Floor
400 Seventh Street SW
Washington, DC 20219
RIN 2590-AA62

To whom it may concern:

The American Bankers Association[1] appreciates the opportunity to comment on the notice of proposed rulemaking[2] for automated valuation models (AVMs) under section 3354 of the Financial Institutions Reform, Recovery and Enforcement Act (FIRREA).[3] The Dodd-Frank Act added a new section 3354 to FIRREA relating to the use of AVMs in valuing real estate collateral securing mortgage loans for credit and securitization determinations. Section 3354 requires the agencies to issue rules for AVM quality control (QC) standards designed to (1) ensure a high level of confidence in the estimates produced by AVMs; (2) protect against the manipulation of data; (3) seek to avoid conflicts of interest; (4) require random sample testing

[1] *The American Bankers Association is the voice of the nation's $23.7 trillion banking industry, which is composed of small, regional and large banks that together employ more than 2.1 million people, safeguard $18.7 trillion in deposits and extend $12.2 trillion in loans.*
[2] The proposed rule was issued by the Consumer Financial Protection Bureau, the Federal Reserve Board, the Federal Housing Finance Agency, the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation, and the National Credit Union Administration. 88 Fed. Reg. 40,638 (June 21, 2023).
[3] Pub. L. 101–73, title XI, §1125, as added Pub. L. 111–203, title XIV, §1473(q), July 21, 2010, 124 Stat. 2198. 12 USC 3354.

and reviews; and (5) account for any other such factor that the agencies determine to be appropriate.

The proposal "would require mortgage originators and secondary market issuers to adopt policies, practices, procedures and control systems to ensure that AVMs used in certain credit decisions or covered securitization determinations adhere to quality control standards designed to meet specific quality control factors." The proposed factors include the four factors listed in section 3354 and a fifth addressing fair lending compliance.

I. Summary of the Comment

ABA's paramount concern is that the proposal likely will over-burden – and therefore discourage – AVM use in mortgage origination. AVMs can provide an estimated property value in minutes and at a fraction of the cost of an appraisal, benefiting both mortgage originators and consumers. While we appreciate that the proposal extends flexibility to mortgage originators to decide how to incorporate the QC factors into AVM use, the rule will impose additional layers of compliance burden. This added burden is unnecessary and inappropriate for banks in that they have long been subject to prudential regulators' model risk guidance and are regularly examined for compliance.

ABA has additional concerns with other aspects of the proposal, most notably with the proposed fifth QC factor for fair lending. Banks support fair lending laws and are regularly examined for compliance with them. We understand the agencies' concern that AVMs could "produce property estimates that reflect discriminatory bias, such as by replicating systemic inaccuracies and historical patterns of discrimination."[4] However, the addition of the fifth factor is unnecessary here – as the agencies acknowledge, long-standing fair lending laws have and will continue to apply to mortgage transactions. Moreover, it is impractical for most banks to test AVMs for fair lending concerns for reasons discussed below.

Moreover, for both the statutory QC factors and the fifth factor, it is grossly inefficient to require thousands of mortgage originators to each perform similar testing on the limited number of commonly used AVMs. We suggest the agencies consider directly exerting authority over AVM vendors as service providers to mortgage originators to address concerns with AVMs, including potential biases. In addition, the agencies should consider whether a public-private standard setting organization could more efficiently ensure that AVMs meet quality and fair lending standards.

II. We generally support the scope of the proposed rule but urge the agencies to exclude business-purpose transactions and loan modifications.

The proposed rule will apply to "mortgage originators" making "credit decisions" involving a consumer's "principal dwelling." The agencies propose to use Federal Reserve Regulation Z's existing definitions for "mortgage originators" and "principal dwelling." ABA generally supports reliance on existing regulatory definitions, as this helps reduce confusion and regulatory burdens.

[4] 88 Fed. Reg. at 40,647.

However, ABA has two concerns with the definitions and scope of the proposed rule. First, the agencies should clarify in the final regulation that it applies to consumers' principal dwellings, which means it only applies to consumer-purpose credit. Although the agencies state that FIRREA is generally not limited to consumer-purpose credit,[5] we believe Congress intended a narrower scope for section 3354, which refers to a "consumer's principal dwelling." Applying the rule to consumer credit would be consistent with the CFPB's plan to codify its version of the final rule in Regulation Z, which applies only to consumer-purpose credit.

Second, the agencies should reconsider the definition of a "credit decision." The proposal defines a credit decision as a decision whether and under what terms to originate, modify, terminate or make other changes to a mortgage, including whether to extend new or additional credit or change a credit limit. ABA appreciates that this definition would exclude certain actions, including mortgage originators' use of AVMs for portfolio reviews, and reviews of completed evaluations. Also excluded is the use of AVMs by appraisers to develop opinions on value. These exclusions are appropriate as the excluded activities do not involve credit decision-making and excluding them will reduce some burden and costs that may otherwise be passed on to borrowers.

However, we do not support extending the rule to loan modifications. A modification may or may not involve a credit determination. Even when it does, the rule's burden will discourage banks from using AVMs to evaluate borrowers for loan modifications and drive them to use full appraisals, which are more costly and time-consuming. Especially in consideration of consumers in distress, the agencies should strike the balance of cost and efficiency to exclude loan modifications from application of the final rule.

III. ABA supports the proposal to require the GSEs, not mortgage originators, to apply the QC factors to the GSEs' AVMs.

ABA also supports the agencies' recognition in the preamble that Fannie Mae and Freddie Mac are responsible for applying the rule to their AVMs when making a "securitization determination," including an appraisal waiver.[6] However, the proposed regulation itself is ambiguous on this point, and we urge the agencies to clarify this in the final rule. It would be impossible for a mortgage originator to perform quality control on the GSEs' AVMs.

The agencies should also clarify that the rule will apply to similar activities by secondary market entities other than the GSEs, for entities that structure and market residential mortgage-backed securities, e.g., private-label securitization.

IV. ABA supports the proposed flexible approach, but we question the efficiency and effectiveness of requiring individual mortgage originators to apply QC factors to third party AVM vendors.

The proposal "would require adoption of policies, practices, procedures and control systems to ensure that AVMs used in certain credit decisions or covered securitization determinations

[5] Id. at 40,645.
[6] Id. at 40,643.

adhere to quality control standards designed to ensure a high level of confidence in the estimates produced; protect against the manipulation of data; seek to avoid conflicts of interest; and require random sample testing and reviews."[7]

ABA does not oppose imposition of these statutory standards, although we question the agencies' paraphrasing the statute. Specifically, the statute refers to the third factor as "avoid conflicts of interest," whereas the agencies phrased this factor as "seek to avoid conflicts of interest." The proposal expands the third factor without any discussion or justification. We recommend that the agencies revert to statutory language for the third factor.

The agencies provide flexibility for originators, stating that "the proposed rule would not set specific requirements for how institutions are to structure their policies, practices, procedures and control systems. This approach would give institutions the flexibility to set quality controls for AVMs as appropriate based on the size of the institution and the risk and complexity of transactions for which they will use AVMs covered by this proposed rule. As modeling technology continues to evolve, this flexible approach would allow institutions to refine their policies, practices, procedures, and control systems as appropriate."[8]

ABA supports a flexible approach to quality control. The agencies appropriately recognize that banks adhere to supervisory guidance on model risk management, appraisals, and third-party risk management, making prescriptive regulation unnecessary. Furthermore, the agencies should not set AVM-specific standards, as a one-size-fits-all approach would not work well given the variety of mortgage originators and their business models. Such standards also would impede technological innovations. It would be helpful, however, for the agencies to include in the official commentary for the rule, an outline of the types of issues they have identified with AVMs, potential remedies with narratives, analytical/quantitative examples, and case studies, to inform stakeholders of practical remedies for any issues identified.

However, our overarching comment, as discussed below, is that it is inefficient and likely ineffective to require each mortgage originator to separately apply QC factors to third-party AVM vendors. Smaller banks in particular may be unable to apply QC factors to a vendor's AVM, lacking the capacity in-house and the resources to engage other vendors to do so. Such a requirement would discourage community banks from using AVMs, raising the cost for mortgage customers and, in many cases, force them to wait weeks for appraisal reports. We suggest some alternatives in section V.2 below.

II. We support fair lending laws but question the need for the fifth factor related to fair lending compliance.

1. *The agencies have not justified the addition of a fifth factor.*

The agencies state that although the fair lending laws[9] apply to AVM use, adding a fifth factor will "heighten awareness" of the applicability of fair lending laws to AVMs and create an

[7] Id. at 40,646.
[8] Id. at 40,641.
[9] The Equal Credit Opportunity Act, 15 USC 1691, and the Fair Housing Act, 42 USC 3601.

independent requirement to have policies, procedures, and controls to address fair lending risks in AVM use.[10] The agencies state that "as with models more generally, there are increasing concerns about the potential for AVMs to produce property estimates that reflect discriminatory bias, such as by replicating systemic inaccuracies and historical patterns of discrimination."[11] The agencies further state that bias could occur in AVMS because of the data used to develop the model, among other causes.

ABA's members universally oppose discrimination. Banks support fair lending laws, dedicate considerable resources to comply with them, and are regularly examined for compliance. However, the agencies' justification for a fifth factor is not sufficient. Regulators can "heighten awareness" of fair lending risks without regulation. Bulletins and policy guidance are more suitable if the goal is simply to make mortgage originators aware of fair lending risk.

Moreover, codifying the AVM rule in Regulation Z, as the CFPB proposes, could result in plaintiffs challenging originators with the private right of action and statutory damages set forth in the Truth in Lending Act (TILA). Litigation risk increases the cost of compliance, and that cost will be passed on to customers. Congress clearly did not intend such a result, as it inserted the QC requirements in FIRREA, not TILA.

The agencies state that the fifth factor will create an independent requirement to have policies, procedures and controls to address fair lending risk in AVM use. We find this reason unconvincing. The agencies regularly assess banks' compliance management systems and can ensure through those examinations that policies, procedures and controls are in place to address fair lending risk in AVM use. The rule creates an unnecessary requirement, and one that could be used by plaintiffs as discussed above, for little benefit to consumers.

> 2. *The agencies should use other tools to address their concerns, and avoid burdening banks, particularly community banks, that are not able to test models for disparate impact.*

ABA is concerned about the ability of banks to apply QC for fair lending to AVM models. Most community banks lack the in-house expertise needed to test for disparate impact and will lack the volume to yield the number of observations for testing. Even many larger institutions lack sufficient mortgage lending activity to engage in testing, and to justify the cost of disparate impact testing. The CFPB recognized this issue in its Initial Regulatory Flexibility Analysis (IRFA) and suggested that small entities could take other steps to meet the fifth factor, including having policies, procedures and controls in place "to ensure that human interactions and decision-making comply with applicable nondiscrimination laws . . . ."[12] The Bureau also stated that small entities could research how AVM providers assess and account for discrimination in their AVMs and opt for providers who have taken such factors into consideration."[13]

[10] 88 Fed. Reg. at 40,647.
[11] Id.
[12] Id. at 40,668.
[13] Id.

We appreciate the CPFB's acknowledgment of small bank challenges, but we remain concerned about the rule's burden on them. The CFPB clearly drew on its 2022 engagement with small entities on the AVM rule, as it is the only agency required to go through the Small Business Regulatory Enforcement and Fairness Act (SBREFA) process for rules that will have a significant impact on a substantial number of small entities. Perhaps this is why the CFPB alone stated that it had not certified that the rule would not have a significant impact on a substantial number of small entities. The other agencies all concluded that the rule would not have such an impact, although the Federal Reserve and the FDIC provided IRFAs.

However, the adjustments the CFPB discusses in its IRFA are not reflected in the other agencies' analyses and are not included in the rule text. This suggests that the agencies may implement the rule differently, leading to inconsistent enforcement. Inconsistency flies in the face of issuing identical rules and the level playing field that the Dodd Frank Act envisioned.

Moreover, the IRFAs offered by the Federal Reserve and the FDIC failed to recognize the web of overlapping and duplicative laws and rules that apply to mortgage valuations. In contrast, the CFPB accurately noted that there are numerous other laws that are potentially duplicative and overlapping, including TILA, Equal Credit Opportunity Act (ECOA), "and other title XI" laws related to determining the value of property securing a mortgage loan.[14] The failure to recognize the duplicative nature of the proposal, and the impracticality of testing for smaller banks, indicates that the agencies collectively do not understand how the rule will impact banks' use of AVMs.

Clearly, the rule's overlapping burdens will discourage the use of AVMs. Community banks have informed us that they will not use AVMs if the rule applies to them. For example, small portfolio lenders that were considering using AVMs to streamline home equity lending for loans on their books will not do so if the rule is finalized with the fifth factor. Considering the real probability that the rule will diminish AVM use, consumers stand to lose in this scenario, given the time and greater expense of in-person appraisals.

If the agencies remain concerned about bias in AVMs, the most efficient and effective way to address that concern is for the agencies to assert their supervisory authority over AVM vendors as "service providers." For example, the CFPB recently issued an interpretive rule stating that digital marketing providers are "material service providers" to entities that offer consumer financial products or services and must comply with consumer financial services laws.[15] We note also that the CFPB has recently invoked its Dodd Frank Act authority to supervise nonbank companies that pose risks to consumers.[16] We recommend that the agencies consider these authorities and apply a similar approach to AVM vendors. Requiring thousands of mortgage

[14] Id. at 40,666.
[15] https://www.consumerfinance.gov/about-us/newsroom/cfpb-warns-that-digital-marketing-providers-must-comply-with-federal-consumer-finance-protections/
[16] https://www.consumerfinance.gov/about-us/newsroom/cfpb-invokes-dormant-authority-to-examine-nonbank-companies-posing-risks-to-consumers/

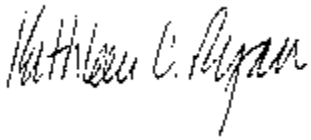
originators, including small banks, to review and apply QC factors to AVMs is inefficient both for the originators and the AVM vendors.

In addition to direct regulation of AVM providers, the agencies should also consider engaging with industry, consumer advocates and other stakeholders to establish standards for AVMs. A collaborative effort would facilitate AVM use to consumers' benefit. ABA is aware that other commenters are suggesting similar efforts, and we would be pleased to participate in a working group or other collaborative body the agencies establish.

III. Conclusion

We appreciate the opportunity to comment on the agencies' proposal and the flexible approach in the final rule. However, we believe the rule will unduly burden and discourage AVM use with little benefit to consumers. ABA urges the agencies to consider our suggestions for different approaches to their concerns about AVM quality and biases. If you have questions about our comment, please contact me at kryan@aba.com.

Sincerely,



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