



January 12, 2009

Office of the Comptroller of the Currency, Treasury (OCC)

Docket ID OCC-2008-0021

regs.comments@occ.treas.gov.

250 E Street, S.W., Mail Stop 1-5, Washington, DC 20219.

Board of Governors of the Federal Reserve System (FRB);

Docket No. OP-1338

regs.comments@federalreserve.gov

Jennifer J. Johnson, Secretary

Board of Governors of the Federal Reserve System

20th Street and Constitution Avenue, NW., Washington, DC 20551

Federal Deposit Insurance Corporation (FDIC)

Comments@FDIC.gov.

Robert E. Feldman, Executive Secretary, Attention: Comments

Federal Deposit Insurance Corporation

550 17th Street, NW., Washington, DC 20429.

Office of Thrift Supervision, Treasury (OTS);

ID OTS-2008-0012

Chief Counsel's Office, Office of Thrift Supervision

1700 G Street, NW., Washington, DC 20552

National Credit Union Administration (NCUA).

"Durkin Comments on Proposed Interagency Appraisal and Evaluation Guidelines,"

regcomments@ncua.gov

Mary F. Rupp, Secretary of the Board

National Credit Union Administration

1775 Duke Street, Alexandria, Virginia 22314-3428.

Please consider the following recommendations. The window of opportunity is open to enable your agencies to create and enforce a clear concise remediation to the decades of mismanaged collateral valuation.

I have included a statement of qualifications at the end of these comments. My experience includes appraising real estate and other assets for over 35 years.

1. **Adopt USPAP for All Asset-Based Lending.** Recognize USPAP as the generally accepted appraisal standards for machinery, equipment, inventory, all asset appraisals, including its common application to real estate as required by state licensing. Adopt USPAP without interagency agency interpretations, e.g. *‘scope of work rule, the word ‘estimate’ was dropped in 2002, purpose was dropped in 2006, departure rule dropped in 2006, etc.’* Some of the words in the ‘new’ guidelines are no longer applicable, e.g. ‘estimate’. Remove otherwise ambiguous guidelines from the new proposed guidelines. USPAP is amended every two years. It would be an undue burden on the federal financial regulatory agencies to rewrite and upgrade the guidelines every two years. In addition to the overall problem of rewriting guidelines, there is a tendency by scriveners to interpret USPAP wording. The great majority of appraisers, including machinery, equipment, and inventory appraisers, are required by their associations to remain current with USPAP. In the proposed guidelines
 - a. Save extensive rewrites by adopting or otherwise copying the IRS application of USPAP. In October 2008, the IRS completed its guideline update of defining a *qualified appraisal* and *qualified appraiser*. §1.170A-17.
 - i. **Qualified Appraisal.** *An appraisal document that is prepared by a qualified appraiser in accordance with generally accepted appraisal standards. Generally accepted appraisal standards are defined in the proposed regulations as the substance and principles of the Uniform Standards of Professional Appraisal Practice (USPAP), as developed by the Appraisal Standards Board of the Appraisal Foundation*
 - ii. **Qualified Appraiser.** In August 2008, the IRS amended Notice 2006-96 and adopted USPAP as the generally accepted appraisal standards for ALL property types. In addition, the IRS defined a qualified appraiser as “*an individual with verifiable education and experience in valuing the relevant type of property for which the appraisal is performed.*” The IRS removed the presumed qualification of an appraiser designation in favor of the designation being evidence of education and experience.
 - b. USPAP is vitally applicable to all *asset based lending*. Without generally accepted appraisal standards, the risk management function of financial institutions is open to arbitrary valuation of a significant asset group. Ambiguity in appraisal standards leads to uncertainty. Uncertainty in the interpretation of the standards leads to an *anything-goes-rule*.
 - c. “*Independent and reliable collateral valuations are core to a regulated institution's [replace real estate with collateral] credit decisions. Therefore, the proposed Guidelines are intended to re-enforce the importance of sound collateral valuation practices that the Agencies' appraisal regulations mandate*” [Page 10 of Proposed Guidelines].

- d. The credit culture should require USPAP for UCC Article 9 Collateral as well as for real estate collateral.

2. Adopt a Form of Enforcement to Insure Compliance. Create an interagency enforcement by the use of fines, penalties, or removal of the appraiser from employment consideration. This would enforce compliance with USPAP for all property appraisal types. Without enforcement, there is passive compliance.

- a. At present, there is literally no USPAP compliance enforcement.
 - i. State real estate appraisal licensing boards are staffed by a mixture of one licensed real estate appraiser, one certified residential real estate appraiser, one certified general appraiser, one banker, one broker and one lay person. The majority of the board lack USPAP competence to professionally Review or critique appraisals. There is no requirement to have a USPAP Appraisal Foundation Certified Instructor on any board.
 - ii. The various appraisal association Peer Review Committees similarly lack competence in USPAP. Where they exist, the peer review is fraternal in the approach to performance remediation.
 - iii. Only the IRS has in place fines, penalties, and disbarment. The IRS has for over 20 years had fines and penalties for appraisers who negligently or intentionally provide faulty appraisals. This past year the IRS increased the penalties.
- b. The federal financial regulatory agencies, by adopting a form of enforcement, can significantly improve the quality of appraisal in both real estate and other asset based lending.
- c. Federally chartered banks are subject to periodic audit by the Office of the Comptroller of the Currency (OCC). These examinations once included a review of trust account compliance with valuation guidelines to ensure the proper, periodic valuation of trust assets. The periodic audit of underlying appraisals supporting asset based lending would help insure better quality of risk management.
- d. The perception of enforcement would by itself threat improve appraisals.

3. Encourage or Mandate Financial Institution Risk Managers to Become USPAP Competent and Appraisal Review Competent for All Asset-Based Lending.

- a. An appraisal is a professionally researched opinion about the economic exchange value of the rights inherent in the ownership of property. An appraisal is an argument where the credibility and competence of the messenger is as important as the logic of the message.
- b. Train in-house appraisal reviewers for asset based lending and/or subcontract to independent competent USPAP Reviewers. [USPAP Standard Rule 3].
- c. The material is available by either subcontracting USPAP review and course work or employing USPAP Certified instructors sponsored by local banking

associations, by the bank itself, or through groups like Risk Management Associates. In addition, the American Society of Appraisers (ASA) has an extensive series of courses in *appraisal review and management*. ASA awards an *appraisal review* designation to people completing the requirements. Under the impetus of Basal II, this ASA material is currently being taught in Russia, Australia, Mexico, and the U.S.

- d. And if that availability is not sufficient, there are many USPAP Appraisal Foundation Certified Instructors all over the U.S. available to provide the training.

The passage of FIRREA Title XI in 1989 [Pub. L. 101-73, 103 Stat. 183 (1989)] was intended to improve and protect financial institutions by providing educated, tested, and licensed independent appraisers. It mandated state licensing of real estate appraisal and required all appraisals to be performed in accordance with USPAP. FIRREA created the Appraisal Subcommittee to oversee state licensing and the Appraisal Foundation.

Twenty years have passed since FIRREA and Title XI. Why is the subject of improved regulation of appraisal and banks a continuing problem? There are many reasons. Leaving aside the easy credit and ephemeral securitization issues, there is (1) the advent of unregulated mortgage broker-salespeople parading as bankers and then bankers owning mortgage broker subsidiaries, (2) overt pressure on underpaid URAR/Fannie Mae/Freddie Mac form appraisers, (3) Mortgage brokers selling easy credit Ninja loans (i.e. no income, no job, no asset loans), (4) Drive by appraisals, (5) Low fee Uniform Residential Appraisal Report (URAR) form filling that require little analysis and that include disclaimer on environmental issues, unsupported adjustments, ten minute inspections, automatic clauses, no study of the deed, a fee split on an average \$350 gross, and a push to get 10 to 20 form appraisals done in a week.

Residential appraisers, regardless of the number of USPAP courses, were performing and continue to perform like the rest of their peers; quick turn-around, self-deception, and simplification. All of which led to routine negligence and group-think incompetence. Encouraged by the Fannie Mae market there was little oversight. The residential appraiser mantra continues to be “everyone does it that way.” Commercial appraisal reports too have fault. The reports are generally a rambling elongated jumble of disjointed unsupported statements and assertions, filled with boilerplate appraisal jargon, idiomatic expressions, and professional society dogma, all wrapped in a weighty package. It is common humor among commercial real estate appraisers that a gorged report is sold by the pound. Benign negligence, their adherence to traditional appraisal dogma, an inability to present an argument with sufficient evidence to support the valuation assertion continues.

Mandating USPAP for all asset-based lending combined with objective professional USPAP review and the threat of penalties for non conformance will significantly improve the risk associated with institution’s loan collateral.

The federal financial regulatory agencies that oversee the process of collateral appraisal are in a unique position to improve this condition.

Bank management is ultimately responsible for the valuation quality of collateral appraisals. Bank management would be well served by breaking with the old way of relying on *designated real estate appraisers* and insisting on USPAP compliant appraisals and competent appraisers for all asset based lending will. The new emphasis is on Risk Management. Basal II, IFRS, IVS, and change require a fresh look at the three Cs of know your borrower's character, know your borrower's capacity to repay, and know your collateral. Reduce the collateral risk by insisting on USPAP compliant appraisals. Mimic the IRS Rules where possible. Include USPAP training for bank risk managers

Sincerely,

A handwritten signature in black ink, appearing to read 'R. Durkin', with a long horizontal flourish extending to the right.

Roger P. Durkin, Esq.

Statement of Qualifications Roger Durkin J.D., M.S., ASA

Specific Experience Relative to Real Estate. Practice primarily involves litigation related valuations. Divorce, IRS related decedent estate, charitable donation, gift tax issues, and general litigation. Durkin was the Review Appraiser for the Massachusetts Office of Inspector General and Mass Bay Transportation Authority (MBTA) during Boston Big Dig Construction. General practice types of property appraised included; eminent domain issues for commercial and residential property, litigation involving undisclosed easements, value of temporary easements, value of conservation land, wetland, 200 acres of contaminated land of the Fore-River Quincy Massachusetts Shipyard facility as expert for the U.S. Maritime Administration. The diminution valuation of an 8,000 square foot Victorian residence in Weston, Massachusetts for the diminution in value caused by contamination by Chlordane. The diminution and stigma affect on value of a crematorium build in a cemetery in Wakefield, Massachusetts. The value addressing the stigma attached to James Bulger real property for the U.S. Attorney.

Specific Experience Relative to Business Valuation

Durkin is a former investment banker and personally a Member of the Philadelphia-Baltimore-Washington Stock Exchange. He was a Registered Principal of the National Association Securities Dealers (NASD). The investment banking firm underwrote SEC public offerings, made markets in over-the-counter stocks, and Synercap Corporation, a subsidiary, provided venture capital and management consulting services. Durkin taught the course for NASD stockbroker licensing. He has over 30 years experience appraising business enterprises involving decedent estates, gift tax, charitable donation, ESOPs, shareholder litigation, family limited partnerships, divorce, and buy-sell agreements. Among the projects was the appraisal of the former Soviet Pharmaceutical facility in Riga Latvia for the Republic of Latvia for use in privatizing the industry. He was lead appraiser on the Fore-River Quincy Shipyard enterprise value for the plaintiff U.S. Maritime Administration. Valued a diversity of restaurants, including Marc Anthony's of Onset, Salerno's Resort in Onset, Senator Motel Augusta Me, Asian Grill of Waltham, Lanai Island of Wakefield, Sonny's Place in Southbridge, Thai Dish, Ming of Nashua, Porthole in Lynn. He valued the FBI Fugitive James Bulger's Liquor business for the U.S. Attorney. And Durkin is the contract professional practice appraiser for the Massachusetts Eye and Ear Infirmary, New England Medical Center, Brigham and Women's, Caritas Hospital, Central Vermont Hospital and North Country Hospital.

Specific Experience Relative to Personal Property.

Durkin valued the extensive art collection contained in the 11-story US Trust headquarters in Boston; the entire art and antique collection at Aetna's Hartford headquarters; Phoenix Insurance Art Collection in Albany, Greenfield, and Hartford. Alexander Graham Bell artifacts of the then New England Telephone in Boston; the contents of the DAR Museum in Martha's Vineyard; the Sir Isaac Newton collection at Babson College; the artifacts for the U.S.S. Constitution Ship holdings. Durkin is the contract appraiser for the U.S. Customs Service relative to seizures of art, coins, jewelry, artifacts, and rugs in Port of Boston, Baltimore, Hartford, and Buffalo. And for the Postal Inspection Service, FBI, IRS, U.S. Attorney, and Secret Service in Boston relating to seized property. Durkin is the contract medical equipment appraiser for Massachusetts Eye & Ear Infirmary, Central Vermont Hospital, New England Medical Center, Brigham & Women's, and North Country Hospital in the valuation of equipment and practices. He was lead appraiser in the valuation of the heavy equipment, machinery, of the Quincy Shipyard for the U.S. Maritime Administration, the appraisal of the former Soviet Pharmaceutical facility in Riga Latvia, the Bridgeport and New Haven Connecticut Container Terminals, all equipment in 200,000 square foot facility of Concurrent Computer Corporation, Moore Precision Machine Company of Bridgeport, the tangible assets of the former Soviet Academy of Sciences Pharmaceutical Facility in Riga Latvia, all tangible personal property, equipment, machinery owned by Babson College.

Formal Education and Advanced Study

BA, Merrimack College, Andover, Massachusetts. Master of Science in Valuation, Lindenwood College, St. Charles, MO., Juris Doctorate, Massachusetts School of Law, Andover, Massachusetts. Specialized appraisal education the Appraisal Institute including Eminent Domain, American Society

of Appraisers 30-hour courses; PP 201, M&E 201, RP201, RP202, BV 201, 202, 203, and BV205 (Professional practices). ASA Conference Seminars since the early 1980's.

Professional Associations

- American Society of Appraisers, Senior Member, five designations two in Real Property and two in Personal Property, one in Review. Past president Boston Chapter. Former Member International Ethics (Peer Review) Committee six years. Former Member Examining and Real Property Committees. Past ASA New England Regional Governor and Past International Governor-At-Large. Currently Member of the By-law and Constitution Committee, and Appraisal Review & Management (ARM) Committee course developer of review courses.
- National Association of Professional Appraisers, Senior Professional Member, current chair.
- American Arbitration Association, Panel of Arbitrators.
- Massachusetts *Board of Bar Overseers*, Six years as a Hearing Officer, Suffolk County
- Massachusetts Licensed Attorney
- Massachusetts Bar Association and American Bar Association
- Licensed General Certified Real Estate Appraiser Massachusetts #1433.
- Philadelphia, Baltimore, Washington Stock Exchange, Former Member.

Published.

A series of professional articles including *Logic and the Appraisal Process*, in ASA's Real Property Journal. *Standards of Appraisal* for ASA's Review & Management Journal. *The Expert Witness* ASA's Personal Property Journal; Wrote 7-hour and 15-hour courses and accompanying textbooks for; *Personal Property Appraisal, Standards, Theory and Methods*, *Narrative Appraisal Report Writing*, *The Legal Environment of Appraisal*, and *Marketing Appraisal Services*. *Property Law for Appraisers*, and *The Appraiser as Expert Witness*, ASA ALL302.

Appraisal Instructor

Durkin is an Appraisal Foundation Nationally Certified Instructor for, *Uniform Standards of Professional Appraisal Practice* (USPAP). He has taught USPAP since 1992 throughout the U.S. Also teaches *Narrative Appraisal Report Writing*, *Legal Environment of Appraisal*, *Capitalization Magic and Myth*, *Valuation Theory*, *The Appraiser as an Expert Witness*, *Marketing Appraisal Services*, *ASA's Real Property 201 and 202*. A ten-day course in *Business Valuation* at Kaunas University in Lithuania. Taught ASA Real Property Appraisal courses in Mexico City, Monterrey, and Guadalajara Mexico. Taught USPAP in Lithuanian and Mexico.

Expert Witness Experience. Middlesex & Suffolk County Superior Cts, Suffolk, Middlesex, Plymouth, Norfolk, Barnstable Probate Cts, Massachusetts Land Ct, Lowell, Wrentham District Cts, Rockingham County (NH) Superior Ct, U.S. Bankruptcy Ct. 2/96 Plymouth Probate Moneghan v Moneghan Bus Val, 10/96, AAA Nelson v Riccio expert dental practice valuation. 4/97, Berson v Berson, Expert art, Suffolk Superior, Judge Gould, 10/97 U.S. Bankruptcy Ct, Judge C. J. Kenner, Expert Witness, Business Val. 12/97, Suffolk Superior Atty. Barbeau, Swoong v Kwong, #SC96-1906, Expert testimony Chinese Art. Judge Scandurra, Barnstable Probate, Expert Bus Val. 5//98 Brockton Probate Ct Business Val. Traychek v Traychek. Expert testimony, M&E, Causal Damage legal Malpractice, Zachera, Judge M. Lopez, Suffolk Superior. 7/98 Depo 7 hr Atty. S. D. Ellis, Springfield, Vt. Benedict v Booska Bailment Issue. 7/00 Expert for equip, land, enterprise, U.S. Maritime Administration v. MHI, Inc., Judge W. Hillman, U.S. Bankruptcy Ct, Boston. 8/02 Stockbridge v. Stockbridge, expert book-of-business, and real property, Plymouth Probate. 8/02, Wise v. Wise, law practice assets, Brockton Probate. 12/02, Mail Boxes Etc., Inc. v. Armstrong, San Diego, AAA. 02/03, Krasavat v. Jesse Bands, Inc., AAA NYC, bus val. testimony. 3/03 Johnston v. Durkin Law, PC ♦234 Lewis Wharf, Boston, MA 02110♦ 1-800-698-9833

Johnston, Rockingham Superior Ct. specialized medical practice. 7/03, Suffolk Probate, Guendouz v. Guendouz, Bus. Val. Judge Smoot. 10/04, Federal District, Levin v. Dalva Brothers, provenance; 12//04 Norfolk Superior, Livingstone v. Shepard, Malpractice, Standards. 2/05, Caruso v. Caruso, Middlesex Probate, Real Property. 12/07 U.S. v. Kim, Atlanta Federal Court, Copyright infringement. 05 Michaels et al v. Lakeside Cemetery Corp. Mass Land Court Misc. No. 282161. 4/06 David K. Bliss, et al v. Linda Keil Wakely, et al, Bristol Superior Court C.A. No. A03-916, Value diminution stigma to real property.

Work Experience: Attorney and Appraiser. Durkin Valuation Consultants in real, personal, and intangible property. 1966 to 1973. President of R. P. Durkin & Company, Inc., investment banking firm, Member of the Philadelphia-Baltimore-Washington Stock Exchange; Associate Member Boston, Montreal, Pittsburgh and Cincinnati Exchanges. Underwriting new issues, Syndicate participation, Securities market maker in the NASDAQ, O-T-C market, providing a full range of financial services and president of venture capital company Synercap Corporation 1969-1979.

Durkin Valuation Consultants has eight staff appraisers involved in a diversity of appraisal work. Their credentials include a Ph.D., two J.D.s, a Master of Science, a Master of Arts, an M.B.A., and two Senior Members of the American Society of Appraisers.

