

Office of the Comptroller of the Currency, Treasury
Board of Governors of the Federal Reserve System
Federal Deposit Insurance Corporation
National Credit Union Administration
Bureau of Consumer Financial Protection
Federal Housing Finance Agency

Re: **Minimum Requirements for Appraisal Management Companies**

Docket ID OCC-2014-0002

(12 CFR Part 1222)

Via the Federal eRulemaking Portal: <http://www.regulations.gov>

We are grateful for the opportunity to comment on the multi-agency *Minimum Requirements for Appraisal Management Companies* (AMCs), published for comment on April 9 (the “Rules”). a la mode, inc. owns and operates the Mercury Network, a Software as a Service (SaaS) vendor management platform, providing communications infrastructure, data, and other tools. Lenders, AMCs and appraisers nationwide use Mercury Network to conduct more than 20,000 residential mortgage-related transactions a day.

Since the enactment of the Dodd-Frank Wall Street Reform and Consumer Protection Act¹ (DFA) required states to regulate AMCs with similar levels of oversight as states’ appraisers, Mercury Network and other technology companies like it have come to be known as “portals” (hereinafter, “Portals”) in order to clearly differentiate their software products and features from the services of AMCs. This is an apt descriptor, in that these software platforms provide the infrastructure through which lenders and AMCs, on one side, and appraisers, on the other, connect and conduct business with one another.

We are concerned that under the proposed definitions of AMC and “appraisal management services,” states may conclude that they should regulate so-called Portals with the same manner of oversight and scrutiny as they give AMCs. Rigorous oversight and scrutiny of the activities of AMCs is appropriate, insofar as AMCs hire, pay, and fire appraisers – giving AMCs the kind of leverage over appraisers that could potentially be used to improperly influence appraisal reports.

Regulating Portals as though they were AMCs – requiring registration, bonding, background checks of principals, customary and reasonable fees for appraisal reports, process for removal from fee panels, and so on – would not be appropriate. Portals, which normally *receive* a small (compared to the typical fee for an appraisal report) transaction fee, rather than paying anybody, have no potential influence over appraisers and their work product. Further, since Portals neither hire, pay, nor fire appraisers, as AMCs do, there are certain AMC regulations at the state level with which Portals simply cannot comply. For example, as a Portal, Mercury Network does not pay appraisers and thus cannot pay appraisers

¹ Pub. L. 111-203, July 21, 2010, 124 Stat. 1376.

customary and reasonable fees. As a Portal, Mercury Network does not assemble fee panels and thus cannot follow a process for removing an appraiser from a fee panel.

Even more broadly speaking, the language in the Rules suggests that any link in the chain of the valuation process that “provid[es] administrative services” ought to be regulated as an AMC. Quite apart from the roles of Portals and AMCs in the process, this language potentially brings much more under the umbrella of state regulation than was ever intended.

These comments discuss the potential cost of confusion over whether Portals should be regulated as AMCs and illustrate those costs with the real world example of a dismissed lawsuit against a la mode, inc. and Mercury Network. We also provide examples of how other states have correctly found that Portals are not AMCs and discuss in detail how Portals like Mercury Network operate and contrast them with the operations of AMCs. Finally, we respectfully propose a more accurate definition of “AMC” and “appraisal management services” for inclusion in the Rules that will remove any confusion at the state level over the status of Portals without compromising the impact of the Rules on true AMCs.

The Potentially Enormous Cost of Confusion Over the Definition of an AMC is Illustrated By a 2012 State-level Lawsuit.

In 2012, the Kentucky Real Estate Appraisers Board (KREAB) sued a la mode, inc. in Kentucky state court, alleging, among other things, that a la mode was operating its Portal, the Mercury Network, in the state without having registered Mercury Network as an AMC. After costly litigation, the suit was dismissed with prejudice in favor of a la mode, inc. As part of the settlement of the case, KREAB acknowledged that Mercury Network is not an AMC. But this acknowledgement, cost both a la mode, inc. and the Commonwealth of Kentucky tens of thousands of dollars.

Importantly, the definition of “appraisal management company” under the Kentucky law, which led to confusion, litigation and the expenditure of tens of thousands of dollars, included some of the same language included in the Rules. In Kentucky, an AMC was

a person who performs the actions necessary to administer a network of state-licensed appraisers to fulfill requests for appraisal management services on behalf of a client, whether directly or through the use of software products or online, including but not limited to any of the following actions:

...

*Managing the process of having an appraisal performed, including providing related administrative and clerical duties.*²

² KRS 324A.150.

The Rules include the overbroad catch-all “managing the process of having an appraisal performed” as well, as we discuss in more detail below.

The Rules’ Definitions of AMC and “Appraisal Management Services” May Cause Confusion at the State Level Whereby a State Might Seek to Regulate Portals Under Its AMC Laws and Regulations.

The Rules define an AMC thusly:

(c)(1) Appraisal management company (AMC) means a person that:

(i) Provides appraisal management services ...

...

(iii) Within a given year, oversees an appraiser panel of more than 15 State-certified or State-licensed appraisers in two or more States ...

(d) Appraisal management services means one or more of the following:

...

(3) Managing the process of having an appraisal performed, including providing administrative services such as receiving appraisal orders and appraisal reports, submitting completed appraisal reports to creditors and secondary market participants, collecting fees from creditors and secondary market participants for services provided, and paying appraisers for services performed; and

(4) Reviewing and verifying the work of appraisers.³

In the broadest possible sense, Portals exist to help others “manage the process of having an appraisal performed.” But the “management of the process” is NOT performed by the Portal itself, but by the AMCs and lenders who use the Portals. For example, part of the “process of having an appraisal performed” is selecting an appraiser from a fee panel to receive an assignment. An AMC user of Mercury Network can call up the roster of a fee panel the AMC user created using the Mercury Network tool, see helpful information such as counties or states the appraiser practices in, which state(s) an appraiser is licensed in, the appraiser’s average turnaround time for assignments, his published fees, and so on. The AMC employee or contractor is the one who decides which appraiser from the fee panel she created gets the assignment – taking into account, if she so chooses, the information provided by the Portal. The Portal itself makes no decision, does not hire, pay or fire appraisers, but it is possible to erroneously consider this provision of tools for decision-making “managing the process of having an appraisal performed.”

³ Rules, § 34.211(c) - (d).

Additionally, AMCs keep a roster of appraisers they prequalify to do their appraisal work, such roster being considered an “appraiser panel”⁴ or “fee panel.” An employee or contractor of an AMC sets fee panel guidelines, vets appraisers, selects appraisers for inclusion, and removes appraisers from the panel. A Portal cannot and does not do any of those things. Mercury Network and similar software packages provide tools whereby the AMC users can organize the fee panels they create using the process the Rules are designed to regulate. Yet we are concerned that the Rules’ language regarding “oversee[ing] an appraiser panel” is overly broad and might lead a State to erroneously conclude that Portals are AMCs. Portals, as discussed above, display and organize the software presentation of the members of a fee panel for use by a human employee or contractor of an AMC.

Further, the language in (d)(3) reproduced above including within the definition of “appraisal management services” the extremely broad “providing administrative services” opens up numerous non-appraisal management services to state scrutiny and regulation – not just Portals. An admin working for an appraiser vendor clearly “provides administrative services” in the course of “having an appraisal performed.” Under the Rules as drafted, he would be an AMC. A temp agency which fills the role of receptionist at an AMC clearly “provides administrative services” in the course of “having an appraisal performed.” Under the Rules as drafted, the temp agency would be an AMC.

It is this potential confusion that these comments urge you to avoid, by recognizing that AMCs ought to be subject to regulation because, and to the extent that, they hire, pay and fire appraisers.

Portals Provide a Communications Infrastructure, Data and Information, and Tools; an AMC Hires, Pays, and Fires Appraisers.

A Portal may provide any or all of the following: (i) a communications infrastructure, enabling lenders and AMCs to contract with appraisers for specific appraisal assignments and enabling appraisers to provide completed reports to their clients; (ii) data and information provided by a lender or AMC that such lender or AMC might use in calculating a customary and reasonable fee for the market, or selecting an appraiser for its fee panel, or selecting from among the appraisers on its panel to perform a particular appraisal assignment; and (iii) tools to aid lenders or AMCs in their quality checking of completed appraisal reports.

In contrast, AMCs are in the business of selecting appraisers for a fee panel or for a particular assignment, negotiating and paying an appraisal fee, and removing an appraiser from a fee panel – in other words, hiring, paying and firing. A Portal does not – and cannot – do any of those things. The DFA makes the appraisal process more independent, requiring keen oversight of the entities which do hire, pay and fire. The DFA did not intend that communications infrastructure, data and information, or tools be regulated by state appraisal boards.

⁴ Rules, § 34.211(e).

Consider some analogies to more familiar situations, to better understand the role so-called Portals play in the appraisal process.

The communications infrastructure provided by a portal can be understood to be like the services of **FedEx** as a courier, or **Sprint** as a phone and data service. A lender or AMC on one end and an appraiser on the other might use either of those companies to communicate and exchange documents, but that does not make FedEx or Sprint a participant in the process. This is true even though one or the other party will pay FedEx a one-time fee to ship a package of documents, or Sprint on a monthly basis to keep their phone working.

There are other useful ways to understand what Portals provide for lenders, AMCs and appraisers.

The data and information Portals make available to lender and AMC clients of appraisers are like statistics to a **baseball manager**. A baseball manager might decide during a game to replace his pitcher with another one, from his bullpen. In deciding whether to do so, he might consult data accumulated in and accessed through **statistical databases**, respecting the historical performance of his pitchers and the opposing team's batters. Though he may take certain statistics into account in his decision-making process, the decision whether to replace a pitcher, and with whom, is understood to be entirely the manager's. In this scenario, Portals are like repositories of statistics, providing data a lender or AMC (the baseball manager) might use to make decisions as to which appraisers (bullpen pitchers) from their fee panel to use, and which appraisers to put or keep on their fee panels in the first place.

The tools Portals provide for purposes of a lender's or AMC's quality check of an appraisal report can be understood with reference to income tax return preparation. **Taxpayers** are familiar with IRS Form 1040A, which once completed is the taxpayer's federal "tax return." The bottom of page two of Form 1040A, labelled "Paid preparer use only," requires a paid tax preparer to identify herself as having prepared the form. If the taxpayer uses **tax preparation software**, like Intuit's TurboTax, the taxpayer may not (and must not) identify TurboTax as a "paid preparer." Even though the taxpayer has paid for the use of the software, the IRS still considers the return "self-prepared." The taxpayer him- or herself is responsible for ensuring the 1040A form is complete and accurate before the taxpayer submits it to the IRS under his or her name and Social Security number. Like tax preparation software, portals provide tools to help organize and present data, for which either appraisers or lenders/AMCs are ultimately responsible, and help ensure that forms are complete and filled out correctly. However, Portals do not provide substantive content or analysis; that is the appraiser's responsibility.

DFA's Purposes Are Served Best When Entities Who Hire, Pay and Fire Appraisers are Regulated.

The mandate that the residential mortgage appraisal process be separated from the residential mortgage loan production process has foreseeably led to a greater prevalence of AMCs. Anticipating a greater role for AMCs, DFA requires that states register and bring AMCs under the supervision of each

state's appraiser certifying and licensing agency.⁵ The Rules are intended to establish minimum standards for AMCs, including that AMCs must verify that only licensed or certified appraisers are used for federally related transactions, ensure appraisals conform to the Uniform Standards of Professional Appraisal Practice (USPAP), and ensure that appraisals "are conducted independently and free from inappropriate influence and coercion."⁶

The only means to coerce appraisers in the residential mortgage process is the promise of future work and fees, or the threat of withholding the same. In order to have such leverage, a person or entity must have the actual or perceived power to influence future appraisal assignments.

Portals have no such power, real or imagined. Instead, only the entity hiring the appraiser, or its agent charged with assigning appraisals, has that power. It helps achieve the DFA's goals to have states regulate and oversee those persons or entities which manage **who is on and who is off a fee panel**, whom to engage in **future appraisal work**, and who **pays for completed appraisal work product**.

By requiring that entities with such leverage – AMCs – be outside the loan production process, DFA helps ensure that the residential appraisal process is independent, and results in accurate reports. That is why DFA mandates state-level regulation of the entities which hire, pay and fire appraisers. Regulating Portals as though they had the ability to hire, pay and fire appraisers – which they do not – will not advance those goals.

Some of the Largest States Emphasize Contractual and Payor/Payee Relationships in Determining Which Entities are AMCs.

It is with this in mind that Illinois, for example, acknowledges that the defining characteristic of AMCs in terms of how and why they should be regulated is the contractual relationship with the appraiser. In 2009, the nation's fifth most populous state's Real Estate Appraisal Board made a finding, representing the Board's interpretation of USPAP and Illinois law, that an AMC which engages an appraiser is the appraiser's "client." This was a departure from other states, but is a logical conclusion from the language of USPAP and Illinois law. AMCs usually are "the party or parties who engage an appraiser (by employment or by contract) in a specific assignment"⁷ – and as such have the power to hire, pay and fire.

Illinois' AMC law likewise recognizes the need to oversee entities which have the power to hire, pay and fire. An AMC under Illinois law is an entity which

- (1) administers networks of independent contractors or employee appraisers to perform real estate appraisal assignments for clients;
- (2) receives requests for real estate appraisal services

⁵ 12 U.S.C. 3353.

⁶ *Ibid.*

⁷ *Uniform Standards of Professional Appraisal Practice*, 2014-2015, at U-2.

from clients and, for a fee paid by the client, enters into an agreement with one or more independent appraisers to perform [appraisals]; or (3) otherwise serves as a third-party broker of appraisal management services between clients and appraisers.⁸

An entity which does any of those three things truly has leverage over an appraiser, leverage which could potentially be used to coerce a result on an appraisal report favorable to loan production. Therefore, those are the activities the state of Illinois seeks to oversee and regulate.

A Portal like Mercury Network, however, has no such power of coercion. A Portal does not create or administer “networks of independent contractors or employee appraisers” – its AMC and lender users do. A Portal does not receive requests for real estate appraisal services from clients or enter into agreements with appraisers – its AMC and lender users do. And a Portal does not serve as a third party “broker” of appraisal management services between clients and appraisers because it takes no independent actions to “broker” or otherwise facilitate communications – its AMC users do. Software products like Mercury Network give AMCs and lenders tools to perform these functions, but they do not actually perform the functions themselves such that they can coerce appraisers – any more than TurboTax files tax returns or Westlaw researches court cases independently. The fact that a software platform is used by an AMC as a tool to perform certain AMC functions does not make it an AMC.

Similarly, the nation’s second most populous state, Texas, emphasizes an AMC’s ability to hire, pay and fire. The Texas Appraiser Licensing and Certification Board’s “AMC FAQ’s”⁹ include this insight into whether a so-called Portal might have to register as an AMC in the state:

[U]nder our definition, it is an “appraisal management service” if the company directly or indirectly administers a panel of appraisers or recruits, retains or selects an appraiser. Therefore one of the questions we ask to help determine if the Portal is acting as an AMC is whether or not the company selects or qualifies appraisers that the lender clients may use for their assignments. If the company does, then we consider them to be an AMC. Under Texas’ definitions, if the company collects fees from creditors and reimburses appraisers for appraisal services, the company would be considered an AMC. So another question we ask is how the company is compensated for their Portal service? Are they sharing in the fees paid to appraisers (like many AMCs do), or do they simply charge a fixed amount for use of the “technology service”?¹⁰

Several other states have affirmatively found that Portals are not AMCs under their state laws: Alabama¹¹, North Carolina¹², South Dakota¹³ and Tennessee¹⁴ among them. While this encourages a

⁸ 225 ILCS 458/1-10.

⁹ Retrieved from <http://www.talcb.state.tx.us/pdf/forms/AMC-FAQ.pdf> on April 23, 2014.

¹⁰ *Id.* at pg. 5.

¹¹ <http://reab.state.al.us/pdf/AMC%20Forms/Not%20Required%20to%20Register.pdf>. retrieved May 12, 2014.

¹² <http://www.ncappraisaiboard.org/directory/NotAnAMC.pdf>, retrieved May 12, 2014.

¹³ http://dlr.sd.gov/bdcomm/appraiser/appraisal_management_program_not_amcs.aspx, retrieved May 12, 2014.

¹⁴ Unpublished.

belief that states will not attempt to regulate Portals under the umbrella of their AMC laws and regulations, as noted above, it only takes one state going against the grain to cost Portal providers and States themselves tens of thousands of dollars. To avoid this confusion and expense, it ought to be made clear that Portals do not fall under the Rules' definitions of AMC or "appraisal management services."

Fannie Mae, an Intended User of More Than 1.96 Million Appraisal Reports Each Year, Emphasizes the Contractual Relationship Between an Appraiser and AMC.

With the advent of its Uniform Mortgage Data Program, an effort undertaken jointly by Fannie Mae and Freddie Mac to enhance appraisal data quality and standardization, Fannie Mae newly requires appraisers to identify the AMC which commissioned the appraisal in the "Lender/Client" field of the Appraiser Certification section of the Uniform Residential Appraisal Report.

This reflects an understanding that it is an AMC which has the power to hire, pay and fire appraisers, and thus has leverage that could potentially be used to influence the results of an appraisal. There are two ways to fill in the requisite field: "the name of the appraisal management company (AMC) ... if the appraisal is ordered through an AMC. If no AMC is involved, 'No AMC' must be entered."¹⁵ In other words, either an AMC **ordered the appraisal**, or **no AMC was involved** in the transaction.

States, secondary market participants, and the rest of the residential mortgage industry recognize that the prime function of AMCs is to order and pay for appraisals – to hire an appraiser, and pay her. AMCs also have the power to fire an appraiser – remove her from a fee panel. The value of regulating such entities lies in the leverage they have over appraisals, and therefore the influence they might have over the results of a particular appraisal. Portals have no such leverage.

It is Impossible For So-called Portals to Comply With Many Typical States' Requirements for AMCs.

To further illustrate that only AMCs are meant to be regulated because, and to the extent, they hire, pay and fire appraisers, we can observe some State requirements for AMC licensure¹⁶ with an eye toward how a Portal might comply.

Before making an assignment to an appraiser, an appraisal management company must verify that the appraiser receiving the assignment satisfies	Portals do not make assignments to appraisers, and have no means by which to verify appraiser competency.
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¹⁵ *Uniform Appraisal Dataset Specification, Appendix D: Field-Specific Standardization Requirements*, v.1.6, November 22, 2013.

¹⁶ Examples are from Tex. Occ. Code §1104 and A(rizona).R.S. § 32-3661.

each provision of the competency rule of USPAP for the appraisal being assigned.	
A registrant shall review the work of appraisers performing appraisal services by performing a review in accordance with Standard 3 of the Uniform Standards of Professional Appraisal Practice (USPAP) of: (1) one of the first five appraisals performed for the registrant by each appraiser, prior to making a sixth assignment; and (2) a total of five percent, randomly selected, of the appraisals performed for the AMC for each twelve-month period following the date of the AMC's registration	Portals do not have access to appraisal reports in such a way that review would be possible. Appraisal reports “pass through” portals on their way from the appraiser to the AMC client. Any “quality control” the portal provides is a computerized software check – required boxes being filled, spelling, completed forms, etc. – but not a review of the substance of the appraisal.
Except in cases of breach of contract or substandard performance of services, pay an appraiser for the completion of an appraisal or valuation assignment not later than the 60th day after the date the appraiser provides the completed appraisal or valuation assignment to the company or its assignee	Portals do not compensate appraisers for appraisal services.
Other than during the first 30 days after the date an appraiser is first added to the appraisal panel of an appraisal management company, a company may not remove an appraiser from its panel, or otherwise refuse to assign requests for appraisal services to an appraiser without (specific process)	Portals do not maintain an appraiser panel.
An [AMC] ... may not enter into contracts or agreements with an independent appraiser for the performance of real property appraisal services in this state unless that person is licensed or certified in good standing with the board.	Portals do not contract with appraisers to perform appraisal services.
An [AMC] shall not: 1. Alter, modify, revise or otherwise change a completed appraisal report submitted by an independent appraiser, including removing the signature of the appraiser. 2. Use an appraisal report submitted by an independent appraiser for any purpose other than the intended use stated in the report.	Portals do not have access to reports and therefore cannot alter or modify them, nor use them for any other purpose.

These examples illustrate two things. First, it is clear that the entity being regulated is assumed to have the power to hire, pay and fire appraisers. In addition, it would not be possible for Portals to comply

with some or all of these requirements. Yet they would apply to Portals in kind with AMCs if an overly broad definition of AMC were applied to Portals.

We Propose a More Accurate Definition of AMC and “Appraisal Management Services” That Reflects the Leverage AMCs Have Over Appraisers.

To avoid potentially costly confusion, at minimum, the language in Rules, § 34.211(d)(3) should be revised or deleted because that language specifically describes AMC functions which are sometimes carried out by AMCs *using* software Portals like Mercury Network. We suggest that if that language remains, a section should be added that exempts Portals, so that the definition of “Appraisal Management Services” includes the following:

(d)(5) Notwithstanding the foregoing, manufacturers of software products or Portals used as tools by entities to provide “Appraisal Management Services” are not themselves “Appraisal Management Companies” and are not providing “Appraisal Management Services” as defined in this section.

We also suggest that a more apt definition of AMC replace the one included in the Rules at § 34.211(c).

(c)(1) Appraisal management company (AMC) means a person or entity that provides appraisal management services, including: (i) maintains an appraiser panel of more than 15 appraisers covering at least two States, with the ability to both select appraisers for such appraiser panel and remove appraisers from such appraiser panel in accordance with State regulations, if applicable; (ii) compensates appraisers for appraisal reports performed; and (iii) is or may be identified in the Appraiser Certification section of the Uniform Residential Appraisal Report as “Lender/Client.”

Thank you for the opportunity to comment on the proposed Rules. We hope you agree that as written, the Rules’ definitions of AMC and “appraisal management services” have the potential to cause costly confusion, which is easily avoided by defining AMCs as entities which hire, pay and fire appraisers.