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August 25, 2010

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VIA HAND DELIVERY

Chairman Ben S. Bernanke
Board of Governors of the Federal Reserve
System
20th Street and C Street, NW
Washington, DC 20551

Re: Interim Final Regulations Implementing Section 129E of the Truth in Lending Act

Dear Chairman Bernanke:

K&L Gates LLP is counsel to the Coalition to Facilitate Appraisal Integrity Reform ("FAIR" or "Coalition"), which is a coalition of several of the nation's largest appraisal management companies. As the Board of Governors of the Federal Reserve System ("Board") is charged by Title XIV of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act" or "Act") with promulgating interim final regulations by October 20, 2010 to implement certain statutory requirements regarding appraisals, the Coalition has prepared a detailed letter to provide the Board with basic information regarding appraisal management companies and to address a particular provision of Title XIV that requires lenders and their agents to compensate fee appraisers at a "customary and reasonable" rate for appraisal services.

More specifically, based on the requirements of the Administrative Procedures Act and the language of the Dodd-Frank Act, the Coalition believes the Board is not mandated by the Act to prescribe standards governing "customary and reasonable" appraisal rates as part of its interim final regulations. Moreover, as the scope and general understanding of "customary and reasonable" has various meanings among participants in the appraisal industry, including appraisal management companies, the Coalition believes the establishment of standards to guide mortgage lenders and their agents in the compensation of fee appraisers would greatly benefit from notice and comment rulemaking to allow the public to provide input on the meaning of "customary and reasonable." Accordingly, enclosed please find a letter signed by the five members of the Coalition, which discusses these issues in more detail.

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After reviewing the enclosed letter, if you have any questions regarding this information, or if the Coalition can be of further assistance as the Board reviews these issues, one or more members of the Coalition would be happy to meet with you or a member of your staff. Please call me at (202) 778-9027 if you would like to schedule a meeting or if the Coalition can provide the Board with additional information.

Thank you for your kind consideration.

Sincerely,

Phillip L. Schulman

Phillip L. Schulman, Esq.

Coalition to
Facilitate Appraisal Integrity Reform

August 25, 2010

<u>**VIA HAND DELIVERY**</u>

Chairman Ben S. Bernanke
Board of Governors of the Federal Reserve
System
20th Street and Constitution Avenue, NW
Washington, DC 20551

Re: Interim Final Regulations Implementing Section 129E of the Truth in Lending Act

Dear Chairman Bernanke:

This letter is written on behalf of the Coalition to Facilitate Appraisal Integrity Reform ("FAIR" or "Coalition"), which is a coalition of five of the nation's largest appraisal management companies.[1] As the Board of Governors of the Federal Reserve System ("FRB" or "Board") is charged by Title XIV of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act" or "Act") with promulgating interim final regulations by October 20, 2010 to implement certain statutory requirements regarding appraisals, the Coalition seeks to provide the Board with basic information regarding appraisal management companies ("AMC") and the role of AMCs in the process of valuating residential real property.

We also write this letter to address a particular provision of Title XIV, which requires lenders and their agents to compensate fee appraisers at a "customary and reasonable" rate for appraisal services performed in the market area where the property is located. This is a requirement that was never discussed on the House and Senate floors, and based on requirements of the Administrative Procedures Act and the language of the Dodd-Frank Act, the Coalition believes the Board is not mandated by the Act to prescribe standards governing "customary and reasonable" rates as part of its interim final regulations.

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[1] These five appraisal management companies include: (1) LSI, a division of Lender Processing Services, Inc.; (2) ServiceLink Valuation Solutions, LLC, a Fidelity National Financial, Inc. company; (3) Valuation Information Technology, LLC d/b/a Rels Valuation.; (4) CoreLogic, Inc.; and (5) PCV/Murcor.

Moreover, the scope and general understanding of "customary and reasonable" has various meanings among participants in the appraisal industry, including AMCs, which are responsible for nearly 70% of all appraisals ordered and produced nationwide. Thus, the establishment of standards to guide mortgage lenders and their agents in the compensation of fee appraisers would greatly benefit from a deliberate notice and comment rulemaking to allow the public to provide input on the meaning of "customary and reasonable" appraisal rates. This is particularly the case when the Dodd-Frank Act is intended to protect consumers from certain abuses, but the "customary and reasonable" rate requirement is written to guarantee higher compensation for individual appraisers, which will increase the price of appraisals for consumers. For the many reasons discussed herein, the Coalition believes the Board should lawfully delay rulemaking activities related to the "customary and reasonable" provision of the new Section 129E of the Truth in Lending Act ("TILA").

Below we provide general information about the role of AMCs in the valuation industry and the valuable services provided by AMCs in the course of a residential real estate appraisal. We also discuss in detail the reasons the Board's interim final regulations to implement Section 129E of TILA should not yet address "customary and reasonable" rates paid to fee appraisers.

I. EXECUTIVE SUMMARY

AMCs operate networks of individual appraisers for the completion of appraisal reports. In addition to pre-qualifying these appraisers and receiving appraisal orders from lenders and other clients, AMCs facilitate and manage the entire appraisal delivery process, including tracking the progress of the order, managing all communication between the lender and the appraiser, reviewing specific elements of appraisal reports for quality and compliance with applicable laws, ensuring prompt delivery of completed appraisals, and collecting and paying the appraisers' fees for their services. By acting as the sole point of contact between the lender and appraiser, AMCs also insulate the individual appraiser from any influence or coercion by the lender, which has allowed many lenders to comply with recent regulatory appraisal independence requirements. AMCs, therefore, serve an important role in the appraisal industry and have a direct interest in the appraisal reform provisions contained in the Dodd-Frank Act.

As AMCs are responsible for collecting appraisal fees from lenders or borrowers and compensating appraisers for their services, the Act's new requirements regarding "customary and reasonable" rates paid to fee appraisers impact an AMC's ability to continue producing high quality appraisals in a cost effective manner. Moreover, the regulation of compensation amounts paid to individual appraisers will significantly impact the ultimate prices paid by consumers. Thus, as the Board is charged by the Dodd-Frank Act with prescribing interim final regulations by October 20, 2010 to implement the "appraisal independence" standards of Section 129E, the Coalition is concerned that a quick promulgation of standards to govern the payment of "customary and reasonable" rates will not adequately consider the impact on consumers and will create significant implementation concerns.

Interim Final Regulations on "Customary and Reasonable" Rates are Not Required Within 90 Days. Based on the provisions of the Administrative Procedures Act and the language of the Dodd-Frank Act, the Coalition believes the Board is not required to issue interim final regulations within 90 days of the Act's enactment governing "customary and reasonable" rates. As the Board's mandate to issue interim final regulations is contrary to the structure and purpose of the Administrative Procedures Act, it is not clear if the FRB's mandate in the Act extends to Section 129E(i) regarding "customary and reasonable" rates, and there is no other applicable "good cause" exemption to the standard notice and comment rulemaking procedure, the Coalition believes that Congress did not expressly supersede the requirement for notice and comment rulemaking to prescribe "customary and reasonable" appraisal rates. The Coalition, therefore, urges the Board to delay deliberations regarding these appraisal compensation requirements until the public can provide input through a notice and comment rulemaking.

No Customary or Standard Price Exists for Appraisals. Moreover, given current pricing practices for appraisals in the industry, there are a number of issues and concerns that the Board should comprehensively consider before prescribing standards for "customary and reasonable" appraisal rates. First, as no standard or uniform price for appraisals currently exists, the Board should take the time to consider the many variances in appraisal products and appraisal markets that result in price adjustments. Generally, the prices for appraisal services are market driven and reflect variations in the scope of work performed by appraisers, the nuances of individual transactions, the costs associated with producing appraisals in different markets, and the appraiser's internal pricing factors. If the Board were to prescribe standards for "customary and reasonable" rates without regard to these factors, the Coalition believes that consumers will ultimately pay higher prices for appraisals. We, therefore, believe these concerns should be fully considered as part of a notice and comment rulemaking.

<u>Higher Appraisal Fees Do Not Correspond to Higher Quality Appraisals</u>. <u>Second</u>, before the Board establishes "customary and reasonable" rates, we believe it is important for the FRB to fully explore the position prevalent in the appraisal industry that higher appraisal fees will necessarily yield higher quality appraisals. Prior to recent regulatory reforms, higher appraisal fees were the custom for many appraisers who, in partnership with overzealous mortgage brokers and lenders, produced appraisal reports with inflated values, which, by definition, are not "high quality" appraisals. But, the AMC appraisal model is a prime example of why a link between higher fees and higher quality appraisals is not a realistic representation of the market. Notably, because of the services and many cost-reducing efficiencies provided by AMCs on behalf of individual appraisers, appraisers are willing to set their appraisal prices at a lower rate for orders accepted from AMCs. Moreover, AMCs go to great lengths to ensure that only the most qualified appraisers are members of their networks and that each appraisal report goes through extensive quality control before it is delivered to a lender or other client. Accordingly, while appraisers may set their prices lower, AMCs produce the highest quality appraisals. The Coalition believes that a collaborative public rulemaking process is necessary to ensure "customary and reasonable" rates are not predicated on misinformation common in the appraisal industry.

<u>Clarity on Requirements is Needed Before the Board Can Establish Rates</u>. <u>Finally</u>, as no reliable fee studies are currently available to lenders and AMCs regarding "customary and reasonable" rates, the industry is concerned that any standards incorporated in the interim final regulations would be arbitrary. Additionally, there are significant practical questions about how lenders and their agents can comply with the Dodd-Frank Act. In addition to the fact that the industry needs time to commission reliable and objective fee studies, the industry also needs guidance from the Board on how these studies should be structured, how often they must be updated, whether a range of fees will be deemed to satisfy the "customary and reasonable" standards, whether an appraiser can discount the "customary and reasonable" rate, the kinds of other acceptable evidence for "customary and reasonable" rates, and the ultimate regulatory authority responsible for enforcing these provisions. These are not the kinds of questions we believe can be thoroughly considered and addressed by October 20, 2010, and the Coalition, again, urges the Board to address these issues through a notice and comment rulemaking.

II. BACKGROUND

A. <u>The Credit Crisis, Inflated Property Values, and the Need for Appraisal Reform</u>

During the recent housing boom, homeownership was an attainable goal for many Americans, particularly given the creative mortgage products offered by mortgage lenders. Yet, as the market started to unravel, those practices that contributed to overextended borrowers in risky mortgages took center stage. In particular, housing prices escalated to all-time highs, and when the credit crisis provided a much-needed market reset, borrowers were left with overvalued properties and inflated appraisals. Overzealous mortgage brokers and lenders were partly to blame for these property values, as they used the promise of future business in a booming market and higher appraisal prices to influence the ultimate valuation conclusions made by licensed and certified appraisers. The result of this undue pressure and coercion in the midst of an economic downfall was a series of regulatory reforms specifically targeting the appraisal practices of mortgage lenders and brokers and designed to insulate individual appraisers and their valuation conclusions.

Most notable is the Home Valuation Code of Conduct ("HVCC"), which resulted from a March 2008 settlement between FHFA, the New York Attorney General, and Fannie Mae and Freddie Mac. The HVCC, which took effect May 1, 2009, applies to all conventional mortgage loans sold to Fannie Mae and Freddie Mac, and prohibits mortgage lenders and their agents from influencing the independent judgment of appraisers through collusion, coercion and bribery. The HVCC was followed by the Board's own regulations prescribing appraisal independence standards to prevent unfair and deceptive practices by creditors, mortgage brokers and their affiliates in connection with residential mortgage loans secured by the consumer's principal dwelling. Individual states also enacted new legislation containing prohibitions on the undue influence of appraisers, and the U.S. Department of Housing and Urban Development ("HUD") amended its appraisal guidelines for Federal Housing Administration ("FHA")-insured loans to incorporate appraisal independence standards similar to those of the HVCC. It, therefore, was no surprise that the Dodd-Frank Act sought to make appraisal independence standards permanent by amending the TILA statutes.

The HVCC also first introduced prohibitions on a lender's reliance on appraisers selected, retained, or compensated by mortgage brokers, real estate agents or other third parties. HUD similarly extended its existing ban on appraisals ordered by real estate brokers to mortgage brokers and other loan originators compensated on a commission basis. In response to these requirements, lenders sought to order appraisals through intermediaries to ensure a layer of insulation between those responsible for loan production and the independent appraisers. Although AMCs existed long before the HVCC, because, in part, AMCs serve an honest broker function and were not considered a part of the inflated valuation problem, they became the preferred intermediary for mortgage lenders to distance themselves from individual appraisers and to ensure compliance with new appraisal independence standards. In fact, HUD acknowledged in its 2009 appraisal guidance that many lenders use AMCs to help ensure appraiser independence.[2] AMCs, therefore, have been important part of appraisal reform. Any appraisers that experienced pressure and coercion to produce appraisal reports with inflated property values did so at the hands of mortgage brokers and lenders, not AMCs. Accordingly, please allow us to describe AMCs in more detail and explain how AMCs improve the appraisal process.

B. The Value of AMCs in the Appraisal Market

AMCs act as a centralized appraisal source for mortgage lenders that operate on a wide geographic basis. Rather than contacting individual appraisers in each state or jurisdiction, a lender may obtain appraisals directly through an AMC. A local appraiser under contract with the AMC then performs the physical inspection of the property and issues an appraisal report containing an estimated property valuation. AMCs also have invested substantial sums in automating the appraisal delivery process. Lenders submit orders for appraisals electronically, the appraiser selection process is automated and designed to ensure the unbiased selection of qualified vendors, and completed appraisals are transmitted electronically back to lenders. Moreover, the automated systems rate individual appraisers for quality, turnaround time, and responsiveness, and the appraiser is able to focus his or her attention on the exercise of the appropriate professional skill and judgment. The introduction of such technologies to the appraisal process has produced tangible benefits; namely, high quality appraisals can be obtained in a matter of days (rather than weeks) at reasonable prices.

AMCs typically offer significant services on a regional and national basis and, thus, operate from large regional or national processing centers. They not only manage networks of independent, third-party service providers, but they manage all

[2] See HUD Mortgagee Letter 2009-28 (Sept. 18, 2009).

of the ordering, tracking, and delivery tasks associated with the vendors' offerings. Specifically, in return for a management fee, AMCs, among other things:

- Recruit and qualify vendors for the networks, as well as verify their licensure and/or certification, check references and audit work samples;

- Negotiate service level expectations with individual vendors;

- Assume loan-level administrative duties for the large numbers of transactions in their pipelines, including (i) order entry and assignment, (ii) tracking order status, (iii) updating clients on delays, (iv) performing both pre- and post-delivery quality control, (v) transmitting preliminary and final hard copies of appraisal reports to clients, (vi) handling accounts payable and receivable, (vii) engaging in dispute resolution between lenders and appraisers, (viii) providing and administering warranties and E&O Insurance, and (ix) ensuring proper record retention;

- provide a single point of contact for lenders and uniformity across jurisdictions;

- offer technology interfacing that permits auto assigning, tracking, and reviewing and the electronic delivery of reports; and

- warrant the quality of the final appraisal product.

In essence, a lender client hires an AMC to act on its behalf to engage a real estate appraiser and perform the administrative functions involved in the appraisal ordering, tracking, and delivery process. AMCs understand the perspective of each interested party in the transaction and have experience meeting each party's needs while preserving the integrity of the appraisal process. For example, they meet the lender's need to manage a multi-state business in a professional and cost-effective manner by providing, among other things, electronic portal connections, expertise in multi-state laws and regulations governing the products and services they manage, and a single point of contact. They meet appraisers' needs by marketing the appraisers' services, generating work, managing client relations, collecting fees from lenders, offering continuing education, and acting as a buffer between the lender and appraiser so as to reduce the risk of undue pressure. Finally, and most importantly, AMCs meet consumers' needs by reducing the time required for appraisals and improving their quality while keeping costs down.

AMCs, therefore, have become an integral part of the appraisal process and, over the past year, have been responsible for nearly 70% of all residential appraisals ordered and produced nationwide. As a result, in addition to existing banking regulatory standards imposed on AMCs as the agents of federally-regulated banks and lenders, AMCs are the subject of new regulatory requirements, including new minimum standards and a national registry applicable to AMCs under the Dodd-Frank Act, as well as registration requirements and other standards of conduct under state laws. However, because mortgage lenders are the AMCs' clients, any appraisal reforms targeted at lenders also have a direct effect on the operations of an AMC.

As noted above, AMCs collect fees from lenders or borrowers and ensure that network appraisers are paid for their appraisal services. Those reforms in the Dodd-Frank Act that impact a lender's payment of an appraiser for appraisal services also must be followed by AMCs. Thus, when the Act mandates that lenders and their agents pay appraisers at a rate that is "customary and reasonable" for appraisal services, AMCs are also bound by this requirement, which ultimately impacts the prices paid by consumers. And, determining "customary and reasonable" is no easy task given the range of services provided by appraisers and the different markets and uses for appraisal reports. Accordingly, the Coalition offers our knowledge and expertise in the appraisal industry as a resource to the Board as you explore these issues. We hope the Board will consider the information we provide herein and pursue a collaborative process for the creation of regulatory standards to guide lenders and AMCs in paying "customary and reasonable" rates for appraisal services.

III. DISCUSSION - "CUSTOMARY AND REASONABLE RATES"

As you know, Title XIV of the Dodd-Frank Act adds a new Section 129E to TILA, a subsection of which requires **"lenders and their agents [to] compensate fee appraisers at a rate that is customary and reasonable for appraisal services performed in the market area of the property being appraised."[3] The Act also provides that "evidence for such fees may be established by objective third-party information, such as government agency fee schedules, academic studies, and independent private sector surveys." Fee studies, however, are required to "exclude assignments ordered by known appraisal management companies."**

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[3] See Section 129E(i)(1) of TILA.

In addition, the Board is tasked with prescribing interim final regulations within 90 days of the Dodd-Frank Act's enactment "defining with specificity acts or practices that violate appraisal independence" and "defining any terms in this section or such regulations."[4] Upon the Board's promulgation of an interim final rule on "appraisal independence," the HVCC will sunset.[5] Further, the Board, along with other federal agencies, is authorized to issue joint rules, interpretative guidelines and general policies related generally "to acts or practices that violate appraisal independence" within the meaning of the various subsections of Section 129E.[6] Based on these provisions, we believe it is relevant that Congress did not express that the interim final rules would cover all subsections of Section 129E, as it did regarding the more general rulemaking authority. Moreover, the Board cannot ignore that the meaning of "customary and reasonable" rates has various understandings in the current appraisal industry depending on the particular services provided by appraisers, the type of transaction, the complexity of the assignment, and the source of the appraisal order. Thus, for the reasons discussed in detail below, the Coalition believes the Board is not required to establish standards governing the payment of "customary and reasonable" rates by October 20, 2010. Rather, these standards should be determined as part of a collaborative public rulemaking process.

A. The Dodd-Frank Act Does Not Require the Board to Issue Interim Final Rules Governing "Customary and Reasonable" Rates for Appraisal Services.

Section 129E(g) of TILA provides the Board, as well as certain other agencies,[7] with authority to issue joint rules, interpretative guidelines, and general statements of policy with regard to subsections (a), (b), (c), (d), (e), (f), (h) and (i) of Section 129E. Notwithstanding that general authority, the Board is also tasked with issuing interim final regulations within 90 days of the Dodd-Frank Act's enactment "defining with specificity acts or practices that violate appraisal independence" and

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[4] See Section 129E(g)(2) of TILA.

[5] See Section 129E(j) of TILA.

[6] See Section 129E(g)(1) of TILA.

[7] Specifically, the Comptroller of the Currency, the Federal Deposit Insurance Corporation, the National Credit Union Administration, the Federal Housing Finance Agency and the Bureau of Consumer Financial Protection.

"defining any terms in this section or such regulations." Unfortunately, Section 129E(g) does not specify those sections of 129E that require interim final regulations within 90 days. The Board is certainly not required to address all sections of 129E, as one subsection only permits, and does not require, implementing regulations.

Moreover, it is not clear that Section 129E(i), the appraiser compensation provision, is an "appraisal independence" provision requiring interim final rules within the 90 day timeframe. Given the expedited timeframe, it is unlikely that the Board will follow standard notice and comment rulemaking procedures required by the Administrative Procedures Act ("APA"). An agency's reliance on exceptions to the standard rulemaking procedures must be "narrowly construed and only reluctantly countenanced" in order to assure that "an agency's decisions will be informed and responsive."[8] Since the Board's direction to issue interim final regulations addressing "appraiser compensation" in Section 129E(i) is not expressly clear, and there is no other applicable "good cause" exemption to the standard notice and comment rulemaking procedure, the Coalition strongly urges the Board to delay their deliberations concerning Section 129E(i) until the Board and the other agencies can undertake standard rulemaking.

In fact, as discussed in more detail later in this letter, given the ambiguities presented by the appraiser compensation provision, the Coalition believes it is important for the Board to solicit information from the public explaining appraiser compensation before developing rules to implement Section 129E(i). This is a procedure that the Board has already followed in its formation of "appraisal independence" rules through prior rulemaking.[9] Notice-and-comment rulemaking ensures that affected stakeholders are given the opportunity to address the practical effects of a proposed rule on those most affected by its promulgation, and allows for revisions to minimize its unintended and/or unnecessary negative consequences. Since this appraiser compensation issue has never been the subject of public discussion, the public would be adversely affected if notice and comment procedures are abrogated. We discuss these issues in more detail below.

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[8] New Jersey v. EPA, 626 F.2d 1038, 1045 (D.C. Cir. 1980).

[9] See Final Rule to amend Regulation Z, 73 Fed. Reg. 44522 (July 30, 2008); see also Proposed Rule, 73 Fed. Reg. 1672 (Jan. 9, 2008).

1. The Board's Mandate to Issue Interim Final Rules on Appraisal Compensation Must Be Construed Narrowly

The scope of the Board's authority to issue interim final rules is construed narrowly.[10] Section 553(b) of the APA generally requires public notice before promulgation of regulations.[11] The notice requirements of Section 553 "are designed (1) to ensure that agency regulations are tested via exposure to diverse public comment, (2) to ensure fairness to affected parties, and (3) to give affected parties an opportunity to develop evidence in the record to support their objections to the rule and thereby enhance the quality of judicial review."[12]

Applying Section 559 of the APA, which allows Congress to supersede or modify the requirements of section 553,[13] the Supreme Court has held that the presumption for standard rulemaking is strong, since deviations from notice and comment procedures must be express.[14] The D.C. Circuit also has stated that Congress' intent to deviate from notice and comment rulemaking must be clear.[15] Since the Board's mandate to issue interim final regulations is antithetical to the structure and purpose of the APA and it is not clear if the Board's mandate extends

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[10] New Jersey v. EPA, 626 F.2d 1038, 1045 (D.C. Cir. 1980) (stating "it should be clear beyond contradiction or cavil that Congress expected, and the courts have held, that the various exceptions to the notice-and-comment provisions of section 553 will be narrowly construed and only reluctantly countenanced").

[11] Section 553(b) of the APA requires that federal agencies, prior to the promulgation of any regulation, publish in the Federal Register a general notice of proposed rulemaking that includes: (1) a statement of the time, place, and nature of public rulemaking proceedings; (2) reference to the legal authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved. 5 U.S.C. § 553(b).

[12] Int'l Union, United Mine Workers of Am. v. Mine Safety & Health Admin., 407 F.3d 1250, 1259 (D.C. Cir. 2005).

[13] 5 U.S.C. § 559 (stating "[s]ubsequent statute may not be held to supersede or modify [§ 553] . . . except to the extent that it does so expressly").

[14] Marcello v. Bonds, 349 U.S. 302, 310, (1955)(stating: "exemptions from the terms of the Administrative Procedure Act are not lightly to be presumed in view of the statement in [Section 559] that modifications must be express").

[15] Ass'n of Data Processing Serv. Orgs., Inc. v. Bd. of Governors, 745 F.2d 677, 686 (D.C. Cir. 1986)(stating "the import of the § 559 instruction is that Congress's intent to make a substantive change be clear.").

to the subsection on appraiser compensation, the Coalition believes that Congress did not expressly supersede the notice and comment procedures for the appraisal compensation provisions.

2. Appraiser Compensation is Distinct From Appraisal Independence

Since interim final rules to be issued by October 20, 2010 will not provide opportunity for notice and comment, the mandate to issue these rules must be construed narrowly. A broad reading of the Board's mandate would require the Board to issue interim final regulations on every subsection of 129E within 90 days of the Act's enactment, which is inconsistent with Section 129E(h). That section provides that the Board and the other agencies "may" jointly issue regulations that address the issue of appraisal report portability. Thus, a broad reading of the Board's mandate not only is contrary to the structure of the APA but also inconsistent with Section 129E(h).

It is, also, worthwhile to note that subsection (h), along with subsection (i), were inserted into Section 129E during the Conference Committee hearings. Subsections (h) and (i) were never discussed on the House and Senate floors, which may help explain why these two subsections, compared to the rest, are outliers and distinct from the appraisal independence provisions set forth in Section 129E.

The term "appraisal independence" is not defined in the Dodd-Frank Act, but reflects the standard understood in the industry – that appraisers should be free from any improper, coercive influences of loan transaction insiders.[16] Although Section 129E is titled "appraisal independence," Section 129E(i), which addresses appraiser compensation, in no way relates to "unfair" conduct that promotes an appraiser's false reporting of value. In fact, "customary and reasonable fees" paid to appraisers are not mentioned in any prior guidance on "appraisal independence" as discussed in the HVCC, Regulation Z, or the Interagency Guidance -"Independent Appraisal and Evaluation Functions."

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[16] For example, the Board, OCC, FDIC, OTS, and NCUA, issued guidance on "Independent Appraisal and Evaluation Functions" describing procedures that regulated institutions should implement to enable appraisers to exercise independent judgment when valuing a property. Further, under the newly amended section 226.36(b) of Regulation Z, the Board targets "unfair" behavior that violates this standard by prohibiting appraisal coercion. See 12 CFR 226.36(b).

The Board's interim rulemaking mandate more clearly applies to subsections of Section 129E that target appraisal coercion. Section 129E(a) provides a general prohibition that a person in connection with a consumer credit transaction may not engage in "any act or practice that violates appraisal independence as described in or pursuant to regulations." Subsection (b) follows, requiring that the implementing regulations describing "acts or practices that violate appraisal independence" must include certain statutorily prescribed conduct, all of which prohibit coercive behavior that attempts to influence the independent judgment of an appraiser.[17] Subsection (c) provides a list of specifically allowable conduct, and subsections (d),(e) and (f) also address appraisal independence, as previously described in the Board's amendment to Regulation Z and the Interagency Appraisal and Evaluation Guidelines.[18] The Coalition believes that the Board's task to define "with specificity acts and practices that violate appraisal independence" in its interim final rules should be limited to dictating prohibited conduct aimed at pressuring appraisers to misstate the value of property, and furthering "appraisal independence" standards as outlined in subsections (a) through (f).

3. Other Exceptions Under the APA Do Not Apply to Section 129E(i)

The APA generally requires that rules be published not less than 30 days before their effective date.[19] It, however, appears that Congress intended for the

[17] According to Section 129E(b), the following actions must be included in any regulation describing acts or practices that violate appraisal independence: (1) . . . compensat[ing], coerc[ing], extort[ing], collud[ing], instruct[ing], induc[ing], brib[ing], or intimidat[ing] a person, appraisal management company, firm or other entity conducting or involved in an appraisal, or attempt[ing], to compensate, coerce, extort, collude, instruct, induce, bribe, or intimidate such a person, for the purpose of causing the appraised value assigned, under the appraisal, to the property to be based on any factor other than the independent judgment of the appraiser; (2) mischaracterizing or suborning a mischaracterization of the appraisal value of the securing property; (3) seeking to influence the appraiser or otherwise to encourage a targeted value to facilitate the making or pricing of the transaction; and (4) withholding or threatening to withhold timely payment for an appraisal report or for appraisal services rendered.

[18] 12 CFR 226.36(b)(addressing a prohibition on the extension of credit if a violation of appraisal independence is known, as found in section 129E(f)); see also Interagency Appraisal and Evaluation Guidelines (Oct. 27, 1994) (issued jointly by the OCC, FRB, FDIC, and OTS)(addressing reporting obligations of USPAP violations and prohibiting conflicts of interest, as found in section 129E(d) and (e)).

[19] 5 U.S.C. § 553(d).

interim final regulations to become effective immediately to supersede the HVCC, which does not govern appraiser compensation.

The APA allows an agency to justify its departure from standard notice and comment rulemaking and effective date requirements if the agency finds "good cause" that the requirements are impracticable, unnecessary, or contrary to the public interest.[20] According to the Senate Committee responsible for drafting the APA, "the exemption of situations of emergency or necessity is not an 'escape clause' in the sense that any agency has discretion to disregard its terms or the facts. A true and supportable finding of necessity or emergency must be made and published."[21] The purported good cause must be "real and demonstrable."[22] Further, the D.C. Circuit notes that "statutory language imposing strict deadlines, standing alone, does not constitute sufficient good cause under section 553 or an express modification pursuant to section 559 justifying departure from standard notice and comment."[23]

Many agencies rely on the "good cause" exception when the agency issues regulations to avoid regulatory confusion, or to provide regulatory guidance regarding a statute already in effect. These justifications, however, do not apply to appraiser compensation in Section 129E(i). In fact, rather than being contrary to the public interest, the public would benefit from notice and comment rulemaking, and the opportunity to provide input as to what constitutes "customary and reasonable" rates for appraisal services. There is no "real and demonstrable" rationale in this case for immediately requiring that lenders and their agents pay "customary and reasonable" fees to appraisers when the "objective third-party information" evidencing the fees may not yet be available. Since the Board's direction to issue interim final regulations addressing "customary and reasonable" fees is not expressly clear, and there is no other applicable "good cause" exemption to the standard notice and comment rulemaking procedure, the Board should delay their deliberations concerning appraiser compensation until notice and comment rulemaking can be provided.

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[20] 5 U.S.C. § 553(b).

[21] S. Doc. No. 79-248, at 200 (1946).

[22] Id. at 217.

[23] Asiana Airlines v. FAA, 134 F.3d 393, 397 (D.C. Cir. 1998).

B. "Customary and Reasonable" Rates Do Not Have an Established Meaning in the Appraisal Industry. As a Result, Interim Final Rules Would Raise Substantial Concerns about Implementation and the Prices Paid by Consumers.

In addition to the fact that the Dodd-Frank Act's mandate for interim final rulemaking does not encompass Section 129E(i) of the statute, before the Board creates standards to govern "customary and reasonable" appraisal rates, it is important for the Board to understand current practices in the industry and the challenges facing the Board as it relates to a "customary and reasonable" determination. Just as appraisal reports are not one-size-fits-all, a single standard price for appraisals does not exist in the appraisal industry. Despite claims from some individual appraisers that the compensation they receive is unreasonable, the fees are market driven, controlled by the appraisers themselves (and not AMCs or other parties), and reflect appraiser-imposed adjustments based on the services performed by the appraiser, services performed on the appraiser's behalf by other parties (including AMCs), and the appraiser's desired source of appraisal orders. Thus, the Board's determination as to what constitutes "customary and reasonable" appraisal rates should have the benefit of public comment and the collaboration of other federal agencies. Otherwise, interim final standards could create significant implementation obstacles for lenders and their agents and ultimately harm the consumer. We highlight these challenges and concerns below.

1. Any "Customary and Reasonable" Rates Should Account for the Variances in Appraisals and Not Result in Higher Prices Paid by Consumers

While the Coalition believes it may be possible to arrive at a range of "customary and reasonable" appraisal rates to guide the prices paid to appraisers in this country, any such standard must account for the fact that appraisals have multiple uses and multiple markets in today's industry and are priced accordingly. Even if appraisals ordered through AMCs are eliminated from consideration,[24] all remaining appraisals cannot be considered equal.

[24] Despite language in the Dodd-Frank Act excluding AMC appraisal assignments from fee studies that evidence customary and reasonable rates, we question how appraisal prices can be determined without reference to appraisal orders placed with AMCs. As noted above, nearly 70% of all residential real estate appraisals are ordered through AMCs, which arguably makes the prices paid to appraisers in connection with AMC appraisals the most-accurate reflection of market prices.

a. Variations on the Scope of Work and Services Performed by Appraisers

First, the scope of work performed by appraisers varies in every transaction, and the price paid to the appraiser should be adjusted according to the actual services provided. In fact, Congress acknowledges in the Dodd-Frank Act that variances in the scope of work should impact appraisal fees, and the Act creates an exception for complex assignments in Section 129E(i)(3). Thus, there is no question that a "customary and reasonable" rate may take into account the "increased time, difficulty, and scope of the work required" for an appraisal and "include an amount over and above the customary and reasonable fee for non-complex assignments."

But, even a category of "customary and reasonable" fees for "complex" and "non-complex" appraisal assignments may not capture the real variances in an appraisal's work. On any given day, an appraiser is required to adjust the services he or she performs on a property-by-property basis given municipality-specific requirements for appraisals, a lender's requirement for additional photos of the property, additional comparable properties, an additional analysis of required repairs, a request for a rush or priority appraisal, or the types of properties being appraised, including rural properties, urban properties, or a home plus acreage, to name a few. AMCs know appraisal-specific requirements of their lender clients, know whether there is need for a rush service, and track jurisdiction-specific variances. It follows that the appraiser should be paid based on the exact scope of work performed. Being an appraiser is a skilled profession, and it is in no one's best interest to divide appraisals into a pre-defined category of "complex" or "non-complex" appraisals and establish appraisal prices accordingly. The truest measure of a "customary and reasonable" fee is whether an appraiser receives a fee that represents fair market value for the services performed by the appraiser.

This is exactly the approach taken by HUD in connection with appraisals for FHA-insured loans. HUD's current guidelines require FHA lenders to ensure that all parties to the appraisal process – appraisers, AMCs or other third parties – "are compensated at rates that are customary and reasonable and are commensurate with the level of the *respective* service provided."[25] Moreover,

> FHA believes that the marketplace best determines what is reasonable and customary in terms of fees. The fee is

[25] See HUD Mortgagee Letter 2009-28; "Frequently Asked Questions – ML 09-28," available at http://portal.hud.gov/portal/page/portal/HUD/groups/appraisers.

> [the] result of a business decision, which may or may not be negotiated, between the appraiser and the client. . . . Given that a reasonable and customary fee depends on the complexity of the assignment and the expertise needed to perform and report a credible and accurate appraisal of the property, the fee will vary depending upon the property type, the purpose of the assignment and the scope of work and, therefore, cannot be easily defined as an objective number.[26]

HUD, therefore, has declined to set fees or fee schedules for appraisers, as "the marketplace best determines what is reasonable and customary in terms of fees" based on the services performed. Reliance on competitive market forces and the actual services performed by the appraiser is the only way to properly measure "customary and reasonable" fees.

b. Variations on the "Markets" for Appraisals

Second, when determining a "customary and reasonable" rate for appraisal services performed "in the market area of the property being appraised," the Board should not assume that market area only includes geographical areas. In fact, there is no common understanding of "market" area among AMCs and appraisers. Even if geography is the only measure, AMCs and appraisers consider a geographic market to mean anything from states, Metropolitan Statistical Areas, individual zip codes, or location categorizations (i.e., rural, suburban, or urban). Market also has non-geographic meanings, such as lender-generated appraisal orders, non-lender generated appraisal orders (i.e., consumer orders), appraisal orders in connection with foreclosures, short sales or Real Estate Owned properties, and more generally, appraisal orders for use in originating a loan versus servicing a loan. Again, these variances must be accounted for in price. By defining market area to include specific types of transactions and/or the source of the appraisal order, and then factoring in geography, the industry will be able to arrive at "customary and reasonable" rates that better reflect the appraiser's costs to produce an appraisal, the nuances of individual transactions, and the specific requirements for the appraisal requested by the customer. This type of analysis, however, cannot be

[26] See "Frequently Asked Questions – Reasonable Fees/Time," available at http://portal.hud.gov/portal/page/portal/HUD/groups/appraisers.

performed without comprehensive input from all participants in the appraisal industry.

c. Variations on the Factors Appraisers Use to Establish Their Own Prices

Third, another variation on the price of appraisals that makes it difficult to determine a "customary and reasonable" rate is the voluntary price adjustments and appraisal prices established by individual appraisers on a transaction-by-transaction or a client-by-client basis. For instance, when an appraiser elects to become a member of an AMC's panel of appraisers, the appraiser receives certain benefits and cost savings with AMC appraisal assignments. AMCs market the appraisers' services, generate work and appraisal orders for the appraiser, manage relations between the client and the appraiser, collect and process fees from lenders, provide a technology platform, offer continuing education classes, and often warrant the final appraisal product, to name a few. By contrast, the appraiser that does not participate on an AMC's appraiser panel must perform each of these functions internally and incur the costs associated with these functions. Thus, in exchange for the many costs absorbed by AMCs and the services provided on the appraiser's behalf, individual appraisers charge less for their appraisal services when orders are received from AMCs. Stated differently, the appraiser establishes his fee at an amount representative of the services he performed and the costs he incurred to produce the appraisal.

Appraisers also set their fees based on other factors, including the volume of work they receive from certain sources and the appraiser's own qualifications, which makes it difficult to determine what should be an appraiser's customary rate. The Appraisal Standards Board ("ASB"), which is charged with providing guidance on the Uniform Standards of Professional Appraisal Practice ("USPAP"), acknowledges that there is no single rate for appraisal services and pricing differentials may occur between an appraiser's various clients. Specifically, the ASB's Frequently Asked Questions provide:

> Is it a violation of USPAP to offer reduced appraisal fees for clients that send me a large volume of business? Could I also offer a discount for the method of payment, such as collecting the fee from the borrower at the time of inspection?

In response to these questions, the ASB replies that "an appraiser may establish his or her fees based on a number of factors, including the amount [of] business received, relationships, method [of] payment, and client specific requirements."[27]

Furthermore, many states both license and certify appraisers, which carries with it different qualifications and standards for the individual. Because more is often required of a person to become a certified appraiser as opposed to a licensed appraiser, fully-certified appraisers charge more for their services. Given these practices, the Coalition questions how a single appraisal rate can be established when each price charged by an appraiser is arguably the "customary and reasonable" rate based on the appraiser's own evaluation of his or her business and qualifications.

Ultimately, the prices for appraisal services are market driven and reflect variations in the scope of work performed by appraisers, the nuances of individual transactions, the costs associated with producing appraisals in different markets, including appraisal orders received from AMCs, and the appraiser's internal pricing factors. As there is no single standard or uniform price for appraisals, a determination as to what constitutes a "customary and reasonable" rate for appraisal services is a significant issue that would benefit from a collaborative rulemaking with input from the public. Otherwise, if the Board does not weigh these variables and, instead, excludes appraisal assignments by AMCs, the appraiser's highest price will become the "customary and reasonable" rate that a lender or its agent is required to pay to an appraiser. And, as nearly 70% of all appraisals are ordered through AMCs, once the AMCs add a management and administrative services fee to the appraiser's rate, the cost of an appraisal will increase for a substantial majority of consumers. **While the Coalition supports collaborative efforts to establish "customary and reasonable" rates <u>to be paid by consumers</u> for appraisal services, we do not believe the Board should be responsible for promulgating standards that will guarantee a higher level of income for appraisers and, thus, higher appraisal fees for consumers.**

2. The Price Currently Paid to Appraisers is Unrelated to the Quality of the Appraisal Reports

As noted in the Background section above, appraisal reform exists today because of the actions of overzealous mortgage brokers and lenders that sought to

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[27] <u>See</u> USPAP Frequently Asked Questions, <u>available</u> <u>at</u> http://www.uspap.org/2010USPAP/FAQ_files/faq01_50/faq_31_.htm.

influence the appraised values of real property and drive up housing prices in a booming housing market. These originators allegedly promised future business to appraisers and paid higher prices for the appraisal reports to coerce favorable valuation conclusions from appraisers. Thus, prior to the HVCC and other regulatory requirements regarding appraiser independence standards, higher appraisal fees were the custom for many appraisers. Yet, an appraisal with an inflated value, by definition, is of poor quality. It is important to emphasize that higher fees paid to appraisers do not automatically signal higher-quality appraisals.

Appraisals ordered through AMCs have substantially increased since the HVCC and other appraisal independence standards went into effect. Not only does an AMC insulate appraisers from mortgage lenders, but AMCs are known for returning high quality appraisals as a result of the many services performed by the AMC. Notably, AMCs play a crucial role in ensuring the selection of experienced and qualified appraisers. They ensure that only licensed, insured, experienced and qualified appraisers perform appraisals, and they consider each vendor's qualifications to perform appraisals in particular markets and on various types of property transactions before identifying a particular appraiser for a specific project assignment. AMCs require appraisers to satisfy rigorous qualification criteria and provide business references before admitting them to the networks, and they often offer ongoing continuing education courses that keep appraisers informed of changes in the market and current federal, state, and lender guidelines. If vendors fail to continuously meet these qualifications or are deemed to produce substandard appraisals, AMCs will remove these appraisers from the networks.

Moreover, AMCs are intimately familiar with the complex federal and state laws and regulations that govern appraisals and, thus, are in the best position to ensure appraisers' compliance with them. AMCs provide technologies to their network vendors to facilitate appraisers' workflow and enhance the quality of their work. AMCs also provide ongoing, independent quality control reviews of appraisers to ensure the appraiser's adherence to USPAP and applicable federal and state laws, as well as the provision of independent, unbiased, quality appraisal reports. As part of these quality control reviews, AMCs examine every appraisal report to ensure the integrity of each transaction. To the extent clarifications or other information is required from the appraiser, they ask for this information to support the valuation conclusions reflected in the final appraisal report. The result is that AMCs produce appraisals of the highest quality and integrity that reasonably reflect accurate property values.

Yet, in return for these technology and review services, as well as the other benefits offered by AMCs, many appraisers are willing to accept an appraisal fee that is less than the fee he or she might otherwise charge when the appraiser generates his or her own appraisal orders, which was true well before the HVCC went into effect. In fact, one of the primary reasons that appraisers join panels administered by AMCs is to save the costs otherwise incurred for marketing their own services, generating work, managing client relations, collecting fees from lenders, obtaining necessary continuing education, and maintaining up-to-date technology. *Valuation Review*, a publication devoted entirely to the real estate appraisal industry, cited in a 2008 article that two-thirds of appraisers anticipated marketing to be one of their top three business priorities for 2009.[28] AMCs, however, remove this marketing burden from appraisers. Thus, in exchange for the many costs absorbed by AMCs and the services provided by AMCs on the appraiser's behalf, individual appraisers charge less for their appraisal services when orders are received from AMCs.[29] However, this price in no way reflects the quality of the final appraisal product; in fact, as discussed above, AMCs provide an important oversight function and make it a priority to deliver only the highest quality appraisals.

Accordingly, when certain parties suggest that higher quality appraisals require higher "customary and reasonable" fees, we believe this is not a realistic representation of the current appraisal market. This is particularly true when the source of this complaint is appraisers who historically received higher fees to produce inflated and, by definition, poor quality appraisals. The Coalition, therefore, is concerned that without a collaborative public rulemaking process, any standards promulgated by the Board in connection with "customary and reasonable" rates could be predicated upon misinformation about a link between higher prices paid to appraisers and higher quality appraisals. This position, however, is ultimately designed to produce a higher income stream for appraisers to the detriment of consumers.

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[28] See The Results are In: 2008 Appraiser Marketing Survey, Valuation Review (Nov. 24, 2008).

[29] As described by one appraiser in the Valuation Review article, he opted for "a higher volume of appraisals at a lesser fee, (rather) than spend time collecting money, arguing with Realtors/loan officers/borrowers about value . . . . In the long run, this marketing strategy has worked for us. We spend most of our time doing actual appraisal work and not chasing lost fees or pounding the streets for new clients." The Results are In: 2008 Appraiser Marketing Survey, Valuation Review (Nov. 24, 2008).

3. Current Fee Studies are Unreliable, and Established Standards With Respect to "Customary and Reasonable" Fee Schedules are Necessary

Section 129E(i) provides that lenders and their agents may generally rely on fee studies created by objective third parties to form the basis for "customary and reasonable" rates. Yet, currently available studies are not reliable, do not represent the appraisal industry as a whole, and do not account for the fact that appraisals have multiple uses and multiple markets. If the Board were to issue guidance on "customary and reasonable fees" in its interim final rule, it is likely that the "objective third-party information" called for in the Act may not yet be available, which could subject lenders and their agents to the harsh penalties under new Section 129E of TILA.

a. <u>The Industry Needs Time to Produce Reliable Fee Studies, Which Do Not Currently Exist</u>

Although the Coalition is aware of a few fee studies in the market, the available studies do not represent the appraisal industry as a whole. For example, the Veteran's Administration has compiled appraisal fee schedules, but these prices apply only to appraisals performed in connection with VA transactions, which comprise less than five percent of the market.[30] Appraisals for VA transactions also must be completed according to VA guidelines, and the fee schedule likely accounts for these specific requirements in establishing price. Thus, as the VA's fee schedule applies only in certain transactions, it cannot be considered "customary" in the marketplace.

Another vendor also has produced a fee study that identifies the "median" appraisal price by county in each state. This study, however, only considers appraisal orders contained in the vendor's own system. A "median" price also does not reflect the "customary and reasonable" fee for the services required in each individual appraisal, as it does not differentiate among the complexity level of the assignment or the intended use and intended user, which may affect the price.

[30] According to HMDA data reported by lenders, VA-guaranteed loans represented 4.2% of the total mortgage market in 2008. In 2007, VA loans accounted for only 1.9% of the mortgage market. <u>See</u> The 2008 HMDA Data: The Mortgage Market During a Turbulent Year, <u>Federal Reserve Bulletin</u> (Apr. 28, 2010).

Given the unreliability of currently-available fee studies, we understand that there may be a few lenders and AMCs that are commissioning third-party fee studies to be performed. Others, however, are waiting for standards established by regulators before commissioning or otherwise purchasing fee schedules or other evidence. Thus, in creating these standards, there are a number of questions and concerns the Board should consider as part of notice and comment rulemaking. Notably:

- The Board should interpret the statutory text to resolve issues and ambiguities not directly addressed by the statute, including issues such as how a fee study should be conducted to ensure it is scientifically/statistically accurate and reliable, and how frequently a study must be updated to represent current market rates.

- It is essential that the Board, upon issuing interim or final joint regulations with the other agencies, allow lenders and their agents sufficient time for any necessary operational changes to ensure they are complying with the statutory requirement.

- In addition to requiring customary and reasonable fees, Congress opined that evidence of such fees could be established by objective fee schedules, implicitly creating a presumption that a fee paid to an appraiser in good faith based on a reliable study would meet the statutory requirement. Given the substantial penalties under TILA for noncompliance, the Board should affirm this rebuttable presumption.

- It is also likely that multiple fee surveys will be generated as a result of this new statutory requirement to pay "reasonable and customary" fees, potentially resulting in conflicting rates. The Board, therefore, should provide guidance as to compliance with the law and its regulations when multiple studies are created, and how lenders should reconcile differences among the studies.

- No singular, objective number can represent what is a customary and reasonable fee in a given market, given the variance of appraisal assignments. HUD affirms this conclusion, and with regard to FHA loans, opined that: "given that a reasonable and customary fee [paid to appraisers] depends on the complexity of the assignment and the expertise needed to perform and report a credible and accurate appraisal of the property, the fee will vary depending upon the property type, the purpose of the assignment and the scope of work and, therefore, cannot be easily defined as an objective number."[31] The Board should indicate whether a fee schedule providing a range of fees for a particular market area based on variances will qualify as "customary and reasonable."

- Finally, as Section 129E(i)(2) recognizes that the standard "customary and reasonable" fee would not apply to "complex" appraisal assignments, the Board should consider other acceptable circumstances in which a lender may deviate from the "customary and reasonable" norm. For example, if an appraiser agrees to accept less than the "customary and reasonable fee" to offer a volume discount to a lender or its agent, will a lender be prohibited from accepting such an offer? Since compensation is driven by fees established and negotiated in the marketplace, the implementing rules should not support economic inefficiencies. At least, the Board should indicate whether there are acceptable tolerances for appraiser fees based on the nuances of particular transactions without subjecting the lender to potential liability.

b. Implementing Rules Should Clarify Enforcement Mechanism and Scope of the Compensation Requirement

In addition to establishing standards for reliable fee studies, of particular importance is how this requirement will be enforced and by which agencies or regulators. Section 129E(k) provides that "the agency referred to in subsection (a) or (c) of section 108 [of TILA]" will assess civil penalties upon a violation of the compensation requirement. As amended by the Dodd-Frank Act, subsection (a) appears to give the Bureau of Consumer Financial Protection either exclusive enforcement authority or primary enforcement authority (upon the Bureau's establishment),[32] and subsection (c) appears to give the Federal Trade Commission (FTC) enforcement authority. Both the Consumer Financial Protection Act ("CFPA") of 2010 and the Federal Trade Commission Act provide certain procedural due process protections prior to these agencies assessing civil penalties. For example, the CFPA states that the Bureau may not assess a civil penalty for a violation of a consumer financial protection law without "notice and an opportunity for a hearing to

[31] See Housing and Urban Development's FAQs: http://www.hud.gov/offices/hsg/sfh/appr/faqs_fees-time.pdf

[32] See Consumer Financial Protection Act of 2010, §§ 1024(c), 1025(c).

the person accused of the violation, or [if] the appropriate court has ordered such assessment and entered judgment in favor of the Bureau."[33] The Coalition believes these due process measures should be affirmed in the regulations implementing Section 129E(i). The implementing regulations should also address which regulator will field complaints, as there undoubtedly will be debate from appraisers who dispute their fees as to what constitutes a "customary and reasonable" rate.

The Coalition also hopes that implementing regulations to Section 129E(i) will address the scope of the "customary and reasonable" requirement and its applicability to fee appraisers. For example, the regulations may limit the requirement to certain appraisals, as it is unlikely that Congress intended to regulate the fees outside of a consumer credit transaction (since TILA does not regularly apply to credit transactions involving extensions of credit primarily for business, commercial or agricultural purposes). Similarly, although Section 129E(i) is not expressly limited to appraisals on real property, it may be implicit, given the "fee appraiser" definition. Moreover, the Coalition hopes that implementing regulations will provide some clarity on those companies that may be considered "fee appraisers." As it is written, Section 129E(i)(2) suggests that a lender will be required to pay an appraisal company a "customary and reasonable fee," but there is no reciprocal requirement for the appraisal company to pay that amount to the individual appraiser who actually performs the on-site appraisal. As the fee schedules will likely be generated on the fees received by individual appraisers, this "loophole" may skew the results.

Lastly, the statutory language allows for evidence other than fee schedules to establish "customary and reasonable" fees, and there is no prohibition on this evidence including assignments by AMCs. The Coalition, therefore, urges the Board to explore other types of evidence that may account for the price of appraisals paid by the consumer when ordered through an AMC. More specifically, Section

[33] Consumer Financial Protection Act of 2010, § 1055(a)(5); see also Federal Trade Commission Act, 15 U.S.C.S. § 45(m)(1)(B), U.S. v. Hopkins Dodge, Inc., 849 F.2d 311, 314 (8th Cir. 1989) (stating: "We must turn then to 15 U.S.C. 45 to determine when and how a civil penalty may be imposed for a violation of the Truth in Lending Act (which by virtue of 15 U.S.C. 1607 (c) is to be treated as if it were a violation of the Federal Trade Commission Act). The first prerequisite required by the Federal Trade Commission Act, 15 U.S.C.S. § 45(m)(1)(B), in order to impose a civil penalty upon a non-party to the proceeding in which an administrative determination by the FTC that the particular practice is unfair or deceptive and hence unlawful under 15 U.S.C.S. § 45(a)(1), was that the FTC. must determine in a proceeding under the Act that any act or practice is unfair or deceptive, and that it must then issue a final cease and desist order with respect to such act or practice.")

129E(i)(1) does not explicitly prohibit a lender or its agent from factoring into its determination of "customary and reasonable" the fees paid on orders processed through AMCs. Rather, this section requires that evidence of such fees "may be established by objective third party information, such as government agency fee schedules, academic studies, and independent private sector surveys." While the statute provides that "fee studies" must not include "assignments ordered by known appraisal management companies," none of the examples in the statute are referred to as fee studies. Accordingly, we ask the Board to consider whether a nationwide lender, or an AMC acting as the lender's agent, that uses its own extensive database of appraisal rates in a particular market is allowed to rely on that empirical evidence as "customary and reasonable" rates.

Ultimately, given the lack of reliable current fee information and the many questions and concerns that must be addressed regarding acceptable evidence of "customary and reasonable" rates, the Coalition believes these issues cannot comprehensively be explored by October 20, 2010. We, therefore, urge the Board to address these issues through notice and comment rulemaking.

IV. CONCLUSION

AMCs are and have been an integral part of the valuation industry for more than 25 years. Given their benefits, the promulgation of standards governing "customary and reasonable" rates paid to fee appraisers will directly affect an AMC's ability to continue delivering quality appraisals in a cost-effective manner. This is particularly the case if a "customary and reasonable" rate is established without regard to the actual services provided by appraisers and other variances affecting appraisals in each transaction.

However, based on the requirements of the APA and certain language in the Dodd-Frank Act, the Coalition believes the Board is not mandated by the Act to prescribe standards governing "customary and reasonable" rates as part of its interim final regulations. Moreover, as no single customary or standard price for appraisals currently exists in the appraisal industry, the Coalition believes the Board would benefit from industry input through a notice and comment rulemaking to identify the issues of most concern to the industry. As an example, a number of factors should be considered before establishing a "customary and reasonable" rate, including the fact that appraisal fees are market driven, controlled by the appraisers themselves, and reflect appraiser-imposed adjustments based on the services performed by the appraiser, services performed on the appraiser's behalf by other parties, and the appraiser's desired source of appraisal orders. The industry also needs guidance on the structure of acceptable fee schedules and the enforcement and implementation issues surrounding this requirement.

The Coalition, therefore, urges the Board to delay rulemaking relating to "customary and reasonable" appraisal rates. Otherwise, the Board's determination as to what constitutes "customary and reasonable" rates without the benefit of public comment and the collaboration of other federal agencies could create significant implementation obstacles and unintended consequences that will ultimately harm the consumer.

The Coalition hopes this letter has provided the Board with useful information regarding AMCs and their role in the appraisal industry and identified, in detail, the reasons why the Board should not promulgate interim final regulations governing "customary and reasonable" rates for appraisal services. If you have any questions regarding this information, or if we can be of any further assistance as the Board reviews these issues, one or more members of the Coalition would be happy to meet with you, or a member of your staff, in person. Please contact FAIR's counsel, Phillip L. Schulman, at (202) 778-9027 if you would like to schedule a meeting or if the Coalition can provide the Board with any additional information.

Thank you for your kind consideration.

Sincerely,

Donald H Blanchard

LSI / Lender Processing Services, Inc.

ServiceLink Valuation Solutions, LLC

Rels Valuation

CoreLogic, Inc.

PCV/Murcor