Steven L. Beshear
Governor

Kentucky Real Estate Appraisers Board

December 21, 2010

Board of Governors
Federal Reserve System
Attn: Chairman Ben Bernanke
Washington, D.C. 20551

Comments Relating to 12 CFR Part 226, Regulation Z, DOCKET # R-1394, RIN AD-7100-56

Dear Chairman Bernanke:

The following comments are not representative of the Kentucky Real Estate Appraisers Board members. However, they are based upon my personal experience as a real property appraiser since 1977, Certified General Real Property Appraiser since 1992, and an appraiser regulatory official since 1996. I hold membership and designations in two national professional appraisal organizations, I am a Kentucky licensed Real Estate Broker, and I am active in the Association of Appraiser Regulatory Officials as a member of the Board of Directors, having served as President of the group in 2005.

Issue - Page 66558, Comment 42(b)(3)-2 "The Board solicits comment on the exclusion of automated valuation models from the definition of value."

My Comment - Any person, including an appraiser, who develops and reports an opinion of value is responsible for all parts of the process. Therefore, I see no problem with excluding an automated valuation model from the above language. The model is simply a tool, similar to a calculator or a computer generated spreadsheet, used by the appraiser to assist in developing a value opinion.

Issue - "Under this interim final rule, 226.42(c)(1) does not apply in connection with the development or use of an automated model or system that estimates value. (The definition of "valuation" does not include an estimate of value produced exclusively using such an automated system. See 226.42(b)(3).) The Board requests comment, however, on whether creditors or other persons exercise or attempt to exercise improper influence over persons that develop an automated model or system for estimating the value of the consumer's principal dwelling."

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Comment – There must be a prohibition of anyone and any group from exercising or attempting to have improper influence over any person that is engaged to develop and report an opinion of value intended for use in a real estate sales transaction, not only for the value opinion of a consumer's principal dwelling, including the use of an automated model.

There must never be any door left open for any action that impedes independence, impartiality, or objectivity of a person developing and reporting a value opinion.

Issue - Page 66561, "(Covered persons may request that a person that prepares a valuation take certain actions, including correct errors in the valuation, however, see 226.42(C)(3)) "The Board solicits comment, however, on whether there are specific types of alterations that other persons may make that do not affect the value assigned to the consumer's dwelling and therefore should not be deemed material for purposes of 226.42(c)(2)(ii)."

Comment – There is no question that persons responsible for certifying that all loan documents, including reports of value opinions, must verify that the information contained within the documents are void of factual errors. Therefore, those persons should be free to make alterations or changes to information that is factually incorrect. However, the changes must never include items within the scope of work and must never include any information that might alter the value opinion or other assignment results developed by the appraiser. Only the person that developed and reported the value opinion should be given the authority for making changes to any part of the report that will materially impact the value opinion.

Issue – Page 66571, "226.42(f) Customary and Reasonable Compensation Section 226.42(f) implements TILA Section 129E(i), which requires creditors and their agents to compensate fee appraisers (appraisers who are not their employees) at a rate that is "customary and reasonable for appraisal services in the market area of the property being appraised."

"The Board requests comment on whether the final rule should define "agent" to exclude fee appraisers or any other parties."

Comment – There is no compelling valid reason to exempt any person or group from the requirement for either paying or receiving a reasonable and customary fee.

Issue – Page 66571, "The Board requests comment on whether the Board should specify particular types of contractual obligations that, if breached, would warrant holding compensation without violating 226.42(f)."

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Comment – The only contractual obligation that should be included are 1) failure to provide a report after a reasonable time period, 2) violating state or federal appraisal laws in performing the appraisal, and 3) failure to comply with minimum USPAP requirements of development and reporting a value opinion.

Issue - Page 66571, "The Board requests comment on whether further guidance is needed concerning the permissibility of volume-based discounts under 226.42(f)(1)."

Comment – I fail to find any good reason to insert language that will permit a volume discount fee for appraisal assignments ordered by a company. If that act is permitted, there is sure to also be a future loophole that directs the volume discount to be based on another act, i.e. loan closing, report being submitted within a certain time period, etc.

The reason a customary and reasonable fee is being discussed is because of the constant abuses of some groups trying to drive the fee received by the appraiser lower so that a supplier of the appraisal services can keep a larger share of the fee that is charged a lender. Therefore, the volume discount fee, if permitted, will not benefit the loan applicant or the lender, but it will directly benefit the third party that secures the appraisal services, most often at the expense of the appraiser.

Issue - Page 66573, "The Board requests comment on whether the final rule should expressly prohibit basing an appraiser's membership or lack of membership in particular appraisal organization."

Comment – The following language in "Comment 42(f)(2)(i)(D)-2 clarifies that permitting a creditor to consider an appraiser's qualifications does not override state or federal laws prohibiting the exclusion of an appraiser from consideration for an assignment solely by virtue of membership or lack of membership in any particular appraisal organization. For this reason, federal banking agency regulations prohibit excluding a state-licensed or state-certified appraiser from consideration of an assignment for a federally related transaction solely by virtue of membership or lack of membership in any particular appraisal organization."

Given the above language, there is apparently a recognized need to prohibit designation or membership within an organization to be the "sole" basis of appraiser selection. Although I am a designated member of two of the nationally recognized professional organizations, I agree that membership or designation alone should not be the deciding factor for selection. However, depending upon the assignment, that might be a valid consideration within the aggregate of the decision for selecting the best qualified appraiser.

I believe the primary criteria for establishing an appraiser's qualifications should always be the accumulation of education, examination, and experience that at minimum comply with the Appraiser Qualifications Board requirements for state certification.

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However, certification alone will often not suffice as the only consideration. It is essential to also consider appraiser familiarity with the property type being appraised, knowledge of the market area in which the property is located, the advanced education and training for the type of property being appraised, and the number of years experience in appraising the type of property being appraised.

Therefore, I believe that instead of recognizing or considering membership and designation in a professional organization or a state appraiser credential as the sole basis of a selection or a fee, the above items should be considered as the most significant when entering into a contract with an appraiser. The final decision should always be based upon the scope of work, property type and the appraiser's knowledge and expertise.

Given the above, it must also be recognized that a state appraiser credential must be the predominant selection criteria because Title XI requires that when appraisals are required for Federally Related Transactions and real estate related transactions, they must be completed by a licensed or certified appraiser.

Issue - Page 66573, "The Board solicits comment on whether the factors in 226.42(f)(2)(i)-(F) are appropriate and whether other factors should be included."

Comment – In my opinion, the six factors included within the language are appropriate. I have no other suggestions for making them more meaningful or beneficial.

Issue – Page 66574, "The Board requests comment on whether additional guidance is needed regarding anticompetitive acts that would disqualify a creditor or its agent from the presumption of compliance under 226.42(f)(2)."

Comment – The current language prohibits conspiracy, monopolization, and restraint of trade. There are specific examples given with clarification. Therefore, in my opinion, the guidance is reasonable and I have no other examples or guidance to recommend being added.

Issue - Page 66574, "In preparing this interim final rule, the Board did not identify appraisal fee schedules, surveys or studies that would be appropriate to designate as a "safe harbor" for creditors and their agents to comply with 226.42(f)(1). The Board solicits comment on whether and on what basis the final rule should give creditors or their agents a safe harbor for relying on a fee study or similar source of compiled appraisal fee information. The Board also requests comments on what additional guidance may be needed regarding this third-party rate information on which a creditor and its agents may appropriately rely to qualify for the presumption of compliance."

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Comment – The interim final rules language advises that schedules or fee surveys completed and set by appraisal management companies will not be acceptable. Without this prohibition, there is little doubt that many fee schedules would be developed by various and sundry companies with the argument the fees comply with reasonable and customary expectations for specific market areas.

I strongly believe that "one" specific fee schedule must be included within the rules and recognized as the authoritative source, similar to the one used issued by the U.S. Department of Veterans Affairs and specific for each region of the United States. Frankly, it would be reasonable to identify that schedule in the final rule because it already exists, is widely accepted, it has been codified and is currently recognized by a federal agency, and it would provide a very legitimate and reasonable "safe harbor."

If the final rule language includes a requirement to pay what is reasonable and customary without also identifying a fee schedule, the result will be chaos. It will present significant problems for appraiser enforcement agencies, and there will be no hope of a solution to the dillima.

Issue – Page 66575, "The interim final rule therefore does not limit the meaning of "appraisal management company" to entities with an appraiser panel of a particular size. The Board requests comment on whether the interim final rule's definition of "appraisal management company" is appropriate for the final rule."

Comment – In my opinion, the definition of "appraisal management company" contained within Section 226.42(f)(4(iii) is sufficient.

Some individuals and companies will maintain a specific number is needed for identifying an "appraisal management company." However, it should also be understood there will be a great deal of confusion for the appraiser regulatory agencies to implement effective regulation if a tiered system of employee numbers is required for identifying an "appraisal management company."

Issue – Page 66576, "The Board solicits comment on whether reporting should be required only if a material failure to comply causes the value assigned to the consumer's principal dwelling to differ from the value that would have been assigned had the material failure to comply not occurred by more than a certain tolerance, for example, by 10 percent or more."

Comment - I fail to understand how a margin of error for the value opinion, whatever that might be, can be a reasonable factor for determining sufficient reason for whether or not to report obvious USPAP deficiencies.

If it is decided to use some factor, I ask who and what method will be used to set the measure for percentage difference? Also, who or what agency will become the final authority for determining serious violations?

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Based upon my work with the Kentucky Real Estate Appraisers Board as a complaint investigator since 1996, I have yet to find a USPAP violation based solely upon a value opinion being low or high. Also, I have never found a USPAP deficiency based upon any benchmark value opinion developed by the investigator, the review appraiser or any other source.

Therefore, I strongly encourage the Board to not insert any arbitrary percentage for the value opinion difference as "the" determining factor for a decision of whether a report with USPAP allegation(s) should be reported.

Also, I strongly discourage any group or individual from submitting a complaint allegation, if the only basis of deficiency within a report is a value opinion dispute or an allegation that a margin of error was greater than a preconceived percentage or range.

The premise of USPAP, contained within the preamble, is "to promote and maintain a high level of public trust in appraisal practice by establishing requirements for appraisers." The preamble also includes "It is essential that appraisers develop and communicate their analyses, opinions, and conclusions to intended users of their services in a manner that is meaningful and not misleading."

In an effort to comply with the above, rather than setting artificial percentages or value differences, I believe it would be more reasonable to require that "all" suspected deficiencies of Ethics and "any" USPAP deficiencies that give suspicion to a lack of competency in either knowledge or location must be submitted. Doing so will address the following language from the interim final rules.

Page 66575, "Section 226.42(g)(1) requires reporting of a failure to comply with USPAP or of an ethical or professional requirement under applicable state or federal statute or regulation only if the failure to comply is material, that is, likely to significantly affect the value assigned to the consumer's principal dwelling."

"The Board interprets TILA Section 129(E)(e) to apply only to a material failure to comply with USPAP or a codified standard ethical or professional conduct."

Before making a final decision, I advise the Board to be mindful of the ASC Policy Statements, including the following from "Statement 10, Section E, "State agencies must analyze each complaint to determine whether additional violations, especially those relating to USPAP, should be added to the complaint."

Statement 10 Section E also includes, "It is critical that State agencies investigate allegations of USPAP violations, and if, allegations are proven, take appropriate disciplinary remedial action." This language places the burden for reviewing the complaint and finding USPAP violations upon the appraiser regulatory agencies.

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Also, Policy Statement 10, Section E advises that "Dismissal of an alleged USPAP violation due to an "absence of harm to the public" is inconsistent with the Title XI's purpose; the extent of the loss, however, should be a factor in determining the appropriate level of discipline."

The ASC Policy Managers review appraiser regulatory agency case files for the purpose of ensuring that the agencies have investigated all allegations of USPAP violations, not only those alleged. If allegations are proven, the agency must have taken appropriate disciplinary or remedial action. Also, the agency cases are routinely reviewed to verify that the findings and sanctions are consistent for similar findings.

Therefore, if the ASC considers detecting and reporting "all" USPAP requirements to be the minimum expectation of state appraiser agencies, why would the Board even consider a rule that has less expectation upon the groups and individuals identified as being responsible for submitting complaints.

Policy Statement 10, Section E advises that "Persons analyzing complaints for USPAP compliance must be knowledgeable about appraisal, appraisal methodology, and USPAP." That expectation should be no less for the persons who will make a final decision to submit a complaint to a state appraiser enforcement agency.

In order for the complaint process to work in a meaningful way, it will be essential for education (specifically USPAP courses), guidance and assistance to each group and individual(s) that will be responsible for submitting allegations of USPAP deficiency. Otherwise, the state appraiser agencies will be overrun with frivolous complaints.

Absent additional staffing, which most state agencies cannot afford at this time, the complaint increase will no doubt create additional problems for compliance with The Appraisal Subcommittee (ASC) guidance. The agencies are required to pursue compliance with the expectation that absent special circumstances (mass numbers of cases does not qualify) all complaint allegations must be investigated and processed within 12 months of being received in the agency office.

To ensure successful enforcement, there must also be a standardized form developed for purposes of reporting the alleged deficiencies to the state appraiser regulatory agencies. This customized form should include specific topics for alleged violations of USPAP that can be identified easily by the person responsible for submitting the complaint. This will benefit the agencies in sorting the serious and meaningful complaints from those that have no material deficiencies.

In summary, I caution the Board against creating some arbitrary percentage or value opinion to be used as the gauge or factor for determining if the allegation is sufficient for filing a complaint. If not, the process will create confusion and render the majority of complaint allegations meaningless and unenforceable.

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In my opinion, the Dodd-Frank Wall Street Reform and Consumer Protection Act language gave the appraiser regulatory community a chance to revise problems left after the passage of Title XI and FIRREA. Therefore, it is critical the Board seize this opportunity and write the most meaningful rules possible for correcting the problems.

I appreciate this opportunity to provide comment.

Sincerely,

Larry Disney
Executive Director