



Austin Chapter
Central Texas Chapter
Houston Chapter
North Texas Chapter
Rio Grande Chapter
South Texas Chapter
Texas Plains Chapter

June 26, 2020

Ms. Virginia Hoelscher
Chair, Opinion Committee
Office of the Attorney General
P.O. Box 12548
Austin, Texas 78711-2548

Via Email to: Opinion.committee@oag.texas.gov

Re: Opinion Request No. RQ-0355-KP

Dear Ms. Hoelscher

The Texas chapters of Appraisal Institute (AI) appreciate the opportunity to provide input to the Attorney General's Opinion Committee regarding Attorney General Opinion Request No. RQ-0355-KP, concerning the authority of the Texas Appraiser Licensing and Certification Board (hereinafter, "TALCB" or "Board") to exempt licensed or certified appraisers from the statutory requirement to comply with the Uniform Standards of Professional Appraisal Practice (USPAP) when performing a property evaluation allowed under federal law and the Interagency Appraisal and Evaluation Guidelines (hereinafter "IAEG" or "Guidelines" and attached hereto as "Exhibit A").

The AI is a global professional association of real estate appraisers, with over 17,000 professionals in almost 50 countries throughout the world. Its mission is to advance professionalism and ethics, global standards, methodologies, and practices through the professional development of property economics. Most AI professionals are practicing real estate appraisers and property analysts who provide valuation-related services to such clients as mortgage lenders, financial institutions, government agencies, attorneys, and financial planners as well as homeowners and other individual consumers. The AI has 1,480 Designated Members, Candidates for Designation and Affiliates in Texas organized into 7 chapters located across the state – Austin, Central Texas, Houston, North Texas, Rio Grande, South Texas, and Texas Plains.

It is our position that the TALCB is charged with ensuring that appraisals are performed in accordance with professional standards by appropriately qualified appraisers. Federal statutes, regulations, and policies have established that individuals who hold a state-issued license or certification to appraise real property may also provide evaluations of real property to federally regulated financial institutions. As such, appraisers are authorized by federal banking law to provide evaluations for purposes of Section 1103.004 of the Texas Appraiser Licensing and Certification (TALC) Act.

Therefore, appraisers should not be required to comply with the TALC Act when providing evaluations to federally regulated financial institutions in accordance with the IAEG. We do not believe that any specific regulatory exemption need be adopted by the TALCB to allow state-licensed and state-certified appraisers to perform evaluations as both federal law and policy, and the TALC Act, already contain adequate provisions to allow appraisers to perform these services. What is needed, however, is an official statement from the TALCB and/or the Attorney General clarifying the applicability of federal law and Section 1103.004 of the TALC Act to appraisers when providing evaluations. Such written clarification would provide appraisers with much-needed assurances that they may legally provide evaluations to federally regulated financial institutions and will not be subject to administrative action by the Board.

Background

The Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (hereinafter, "FIRREA") (Pub. L. 101--73, 103 Stat. 183) was enacted in the wake of the savings and loan crisis of the 1980s.¹

The stated purpose of Title XI of FIRREA (codified at 12 U.S.C. § 3331, et seq.) (hereinafter, "Title XI") is to "provide that Federal financial and public policy interests in real estate transactions will be protected by requiring that real estate appraisals utilized in connection with federally related transactions are performed in writing, in accordance with uniform standards, by individuals whose competency has been demonstrated and whose professional conduct will be subject to effective supervision."²

Pursuant to Title XI³ and federal regulations adopted pursuant thereto⁴, a financial institution regulated by a federal financial institutions regulatory agency (hereinafter, the "Agencies") is required to obtain a written appraisal that is compliant with the Uniform Standards of Professional Appraisal Practice (USPAP), and is performed by a state licensed or certified appraiser, for certain real estate related financial transactions. A real estate related financial transaction engaged in by a federally regulated financial institution that requires the services of an appraiser is a "federally related transaction."⁵

Title XI created a unique, complementary relationship between the States and the Federal government. Title XI recognized that the States were in the best administrative position to certify and license real estate appraisers and to supervise appraisal-related activities in relation to federally related transactions. Pursuant to this delegated authority, the

¹ Available at <https://www.govinfo.gov/content/pkg/STATUTE-103/pdf/STATUTE-103-Pg183.pdf>

² 12 USCS § 3331. "Purpose"

³ 12 USCS § 3342, "Transactions requiring the services of a State certified appraiser" and 12 USCS § 3343 "Transactions requiring the services of a State licensed appraiser"

⁴ 12 C.F.R. § 34.43, 12 C.F.R. § 225.63, 12 C.F.R. § 323.3, 12 C.F.R. § 722.3 all "Appraisals Required"

⁵ The terms "federally related transaction" "real estate related financial transaction" "federal financial institutions regulatory agency" "financial institution" and "written appraisal" are defined at 12 USCS § 3350 (4), (5), (6), (7), and (10) respectively.

TALCB has the responsibility of ensuring that appraisals for federally related transactions are performed in compliance with USPAP by an appropriately state-licensed or state-certified appraiser. The functions of the TALCB as it relates to federally related transactions are overseen by a federal agency – the Appraisal Subcommittee.^{6 7}

While many real estate related financial transactions engaged in by federally regulated financial institutions require a written appraisal performed by an appraiser, Title XI also authorizes each federal financial institutions regulatory agency to “establish a threshold level at or below which a certified or licensed appraiser is not required to perform appraisals in connection with federally related transactions”⁸.

Pursuant to this authority, the Agencies have adopted regulations which exempt several categories of real estate related financial transactions from the requirements to obtain a written, USPAP-compliant appraisal. Collectively, these 15 categories of transactions that do not require an appraisal are often referred to as the “appraisal exemptions”⁹.

For 5 out of the 15 categories of appraisal exemptions a federally regulated financial institution is required to obtain an “evaluation” of the real property collateral, instead of an appraisal.¹⁰ Estimates are that 80-90% of all real estate related financial transactions engaged in by federally regulated financial institutions do not require a USPAP-compliant appraisal performed by an appraiser, and instead may utilize an “evaluation” that is not USPAP-compliant and is not required to be performed by an appraiser.

The Agencies’ have published the Interagency Appraisal and Evaluation Guidelines¹¹ to provide additional guidance to federally regulated financial institutions regarding their valuation responsibilities. In addition to the 5 categories of “appraisal exemptions”, the IAEG also references several post-transactional situations in which it may be appropriate for a financial institution to obtain an evaluation, including monitoring collateral values, measuring portfolio collateral risk, and modifications/workouts of existing credits¹². It is estimated that the valuation needs of financial institutions require 4 times as many evaluations performed by non-appraisers as appraisals performed by appraisers.

What is an “Evaluation”?

Pursuant to the IAEG, an evaluation is “A valuation permitted by the Agencies' appraisal regulations for transactions that qualify for the appraisal threshold exemption, business loan exemption, or subsequent transaction exemption.”¹³ An evaluation is required to

⁶ 12 USCS § 3346, ““Establishment of State appraiser certifying and licensing agencies””

⁷ The term “Appraisal Subcommittee” is defined at 12 USCS § 3350 (2)

⁸ 12 USCS § 3341(b)

⁹ 12 C.F.R. § 34.43 (a), 12 C.F.R. § 225.63 (a), 12 C.F.R. § 323.3 (a), 12 C.F.R. § 722.3 (c)

¹⁰ 12 C.F.R. § 34.43 (b), 12 C.F.R. § 225.63 (b), 12 C.F.R. § 323.3 (b), 12 C.F.R. § 722.3 (d)

¹¹ Available at <https://www.fdic.gov/news/news/financial/2010/fil10082.html>

¹² “IAEG” at XVII, (A), (B) and (C)

¹³ IAEG at “Appendix D”

provide “a reliable **estimate** [emphasis added] of the collateral’s market value as of a stated effective date”¹⁴. Evaluations are used in lieu of appraisals for real estate related financial transactions that qualify for one of the appraisal exemptions.

Likewise, an “appraisal” is defined as “a written statement independently and impartially prepared by a qualified appraiser (state licensed or certified) setting forth an **opinion** [emphasis added] as to the market value of an adequately described property as of a specific date(s), supported by the presentation and analysis of relevant market information.”¹⁵

Pursuant to Title XI and the IAEG, an appraisal is required to comply with USPAP and must be performed by a state-licensed or state-certified appraiser. On the other hand, an evaluation may be performed by a person who “possess[es] the appropriate appraisal or collateral valuation education, expertise, and experience relevant to the type of property being valued”¹⁶. Importantly, the IAEG do not limit appraisers to only providing appraisals and specify that a person who is a state-licensed or state-certified appraiser may also perform an evaluation.¹⁷

Under both federal and state law an “evaluation” is not an appraisal. Appraisals and evaluations are separate and distinct real estate valuation products provided to federally regulated financial institutions for use in different types of federally regulated real estate related financial transactions. One is an opinion of value performed by a person, the other an estimate of value that may be at least partially performed using technology. Both are federally regulated – with the one difference that federal law has delegated to the states the responsibility to ensure that appraisals for federally related transactions comply with Title XI. The TALCB has no similar responsibility as it relates to evaluations. Evaluations do not exist outside of the federally regulated banking space. And the term “evaluation” is not defined anywhere in Texas law. Evaluations are exclusively a creature of federal banking law.

While appraisals must be performed by licensed or certified appraisers, evaluations are often provided by institution in-house staff. But evaluations are also provided by other real estate lending professionals, financial analysts, real estate brokers and salespeople, architects, accountants, agricultural extension agents, ranch and farm professionals and foresters. None of these parties are, and cannot be, subject to the regulatory jurisdiction of the TALCB when providing evaluations to federally regulated financial institutions.

¹⁴ IAEG at XII “Evaluation Development”

¹⁵ IAEG at “Appendix D”

¹⁶ IAEG at VI “Selection of Appraisers or Persons Who Perform Evaluations”

¹⁷ Id.

The Role of the TALCB

As delegated by FIRREA, the role of the TALCB is to ensure that persons providing appraisals to federally regulated financial institutions for use in federally related transactions are appropriately state-licensed or state-certified, and that the appraisals are performed in accordance with USPAP.¹⁸

FIRREA did not delegate any authority to state appraiser regulatory agencies as it relates to evaluations. However, a real estate related financial transaction engaged in by a federally regulated financial institution that does not require an appraisal is still a transaction that is federally regulated and is subject to all relevant federal banking laws. But these transactions are not, by definition, federally related transactions because they do not require the services of an appraiser.

Since regulation of evaluations being provided to federally regulated financial institutions was not delegated to the TALCB by FIRREA, the TALCB has no role in regulating who may perform those services and how they must be performed. This lack of regulatory authority extends to a person who happens to hold a license or certification as an appraiser when that person is providing a service that does not fall under the federally delegated responsibilities of the Board - including evaluations.

Because who may perform an evaluation, and how an evaluation must be performed, is regulated by federal law, any state-imposed regulations on the providers of evaluations, or dictating of how evaluations must be performed would, if challenged, likely fail on the grounds of federal pre-emption. The same is not true of regulations imposed on appraisers and appraisals because the Board is fulfilling a federally delegated function.

This lack of jurisdiction and pre-emption applies to a person who happens to hold a license or certification as an appraiser when that person is providing an evaluation service. Any separately imposed state requirements that a person who holds a state-issued appraiser license or certification – including requirements to comply with USPAP when performing an evaluation – would have the effect of prohibiting that person from providing that service as authorized by, and in accordance, with federal law and the IAEG.

In effect, a person who holds license as an appraiser is exempt from the Texas Appraiser Licensing and Certification (“TALC”) Act when providing evaluation services to federally regulated financial institutions because the TALCB has no authority to regulate those services regardless of who is providing the service.

Simply put, the role of the TALCB is to regulate appraisers and appraisals. Evaluations are not appraisals when being provided to federally regulated financial institutions. And, the TALCB has no role to play in regulating evaluations and providers of those services.

¹⁸ [12 USCS § 3346](#), “Establishment of State appraiser certifying and licensing agencies”

Evaluations are Specifically Excluded from The TALC Act

Further clarifying that the TALCB does not have authority to regulate evaluations, Section 1103.004 of the TALC Act states that the Act “does not prohibit a person authorized by law from performing an evaluation of real property”. The TALC Act defines an “appraisal” as “an opinion of value or the act or process of developing an opinion of value”. As discussed previously, an evaluation is an estimate of market value. The TALC Act does not include a definition of “evaluation”.

We believe that the enactment of § 1103.004 was an explicit recognition by the legislature and Governor that the authority delegated to the state by FIRREA is limited only to appraisals (i.e., opinions of value), and that the state does not have a role to play in the regulation of evaluations (i.e., estimates of value) being provided to federally regulated financial institutions. An evaluation is not an appraisal under both federal and Texas law.

A person who happens to possess a license or certification to perform appraisal services is specifically allowed by the IAEG to perform evaluations. As such, we believe that, for purposes of the TALC Act, that person is “authorized by law” to perform an evaluation for a federally regulated financial institution.

While the IAEG is not, in and of itself, a law (a statute or regulation), the basis for the IAEG is formed within Title XI and regulations adopted pursuant thereto. The IAEG are intended to interpret and provide guidance to financial institutions as to how they should comply with the statute and regulations. Without Title XI and its corresponding regulations, there would be no statutory basis for the IAEG. As such, the provisions of the IAEG must be consistent with, and cannot conflict with, the requirements of both Title XI and corresponding regulations.

As such, we believe that a person who holds a license or certification to provide appraisals in accordance with Title XI is “authorized by law” to perform evaluations for purposes of the TALC Act. If an appraiser were not “authorized by law” to perform an evaluation by either Title XI or corresponding regulation, that portion of the IAEG that allows persons licensed as appraisers to perform evaluations would be inconsistent with the statute and/or regulation, and could not be part of the IAEG.

Once the determination that a person who holds an appraiser’s license is “authorized by law” to provide an evaluation, no other portion of the TALC Act, which only regulates appraisers and appraisals, would apply. This includes any requirement that a person holding an appraiser’s license or certification must comply with USPAP when providing an evaluation.

If an appraiser that is “authorized by law” to provide an evaluation was required to comply with USPAP when providing that service, it would have the effect of prohibiting that person from providing an evaluation, in direct conflict with the TALC Act that says that appraisers cannot be prohibited from providing evaluations.

In effect, § 1103.004 allows a person who holds a license or certification as an appraiser to remove their appraiser “hat” when providing services to federally regulated financial institutions that are not appraisals, including evaluations.

Requiring Appraisers to Comply with Requirements Not Imposed on Other Service Providers is Anti-Competitive

If the TALCB were to attempt to impose regulatory requirements on persons who are state-licensed or state-certified as appraisers when they are performing federally regulated evaluations that are not similarly imposed upon non-appraisers providing the same services, it would create an unlevel regulatory environment and would make it impossible for appraisers to compete in the market for evaluations. Likewise, imposition of regulatory requirements on appraisers when they are providing evaluation services that are not imposed on other service providers would, in effect, reserve that segment of the market for real estate evaluation services being provided to federally regulated financial institutions exclusively to non-appraisers.

Title XI and policies adopted by the federal bank regulatory agencies clearly contemplated a role for appraisers in providing evaluations. It would be patently unfair and anti-competitive for a state appraiser regulatory agency to come in on the back end and impose regulations that preclude appraisers from being able to participate in the market for those services.

Most appraisers in Texas are sole-proprietors or small businesses. Lacking clarity from the TALCB on whether they are permitted to provide evaluations, and fear of disciplinary action on the part of the TALCB, has had a “chilling effect” on appraisers and has resulted in most appraisers being unwilling to offer evaluation services to federally regulated financial institutions.

Summary

We believe that TALCB legal staff correctly interpreted both federal and state law in an October 5, 2012 internal Memorandum with the subject, “Evaluations under the Act and USPAP” (included herein as “Exhibit B”).

In that Memo, we believe that TALCB legal staff correctly opined that:

“The Act allows those authorized by law to perform Evaluations without being licensed under the Act. Thus, the intent of the Act seems to indicate that if a qualified Evaluation is not represented as an appraisal and is not signed as an appraisal, then the valuation does not fall under the Act. Accordingly, it would seem an appraiser, not acting as an appraiser, performing a qualified evaluation, would not be bound by the Act.”

The answer to the question posed by the TALCB in RQ-0355-KP is that no specific exemption need be adopted by the TALCB because federal law and policy is clear that licensed and certified appraisers can perform evaluations, and state law specifically contemplates an exclusion for legally authorized providers of evaluations.

What is needed, however, is an Attorney General Opinion that clarifies that the authority of the TALCB as it relates to valuations provided to federally regulated financial institution is limited only to appraisals and appraisers, and that the TALCB’s jurisdiction does not extend to evaluations – regardless of whether they are provided by an appraiser or non-appraiser. In addition, written clarification is needed that persons who hold a state-issued license or certification to perform appraisals are “authorized by law” to also provide evaluations and are not subject to the TALC Act or the jurisdiction of the TALCB when providing those services.

We respectfully request that the Attorney General Opinion issued in response to the TALCB’s request be consistent with the points outlined in this letter. Such an Opinion will give appraisers in Texas the confidence that they need to offer evaluation services to federally regulated financial institutions without fear of being subject to administrative action by the TALCB.

Thank you in advance for your consideration of our comments, and our position on this matter.

If you have any questions, or need additional information, please do not hesitate to contact the undersigned AI regional leaders and chapter presidents or Scott DiBiasio, Appraisal Institute Manager of State and Industry Affairs at (202) 298-5593 or sdibiasio@appraisalinstitute.org.

Sincerely,

Robert L. Moorman, MAI, SRA, AI-GRS
Region VIII Chair
Brenham, TX
(979) 251-1998
Robert.l.moorman@gmail.com

Linda M. Powers, MAI
Region VIII Vice Chair
El Paso, TX
(915) 479-2093
Powersgroup2004@yahoo.com

AI Letter Re: Opinion Request No. RQ-0355-KP

June 26, 2020

Page - 9 -

Keith T. Bodungen, MAI, SRA, AI-GRS
Austin Chapter
(512) 655-2163
Keith@ktbrealestate.com

Carl K. Eisenhauer
South Texas Chapter
(210) 222-9128
carl@eckmannngroll.com

Matthew D. Brown, MAI
Central Texas Chapter
(817) 806-1499
Matt.brown@cbre.com

Anthony Kuna, MAI
Rio Grande Chapter
(505) 314-3461
Tonyk@dominionproperty.com

Sara E. Payne, MAI
Houston Chapter
(717) 300-7976
Sara.payne@ngkf.com

George Timothy Patrick Murfee, MAI
Texas Plains Chapter
(806) 765-8015

Mark Lowery, MAI, AI-GRS
North Texas Chapter
(214) 347-8558
mark@lowerypa.com