

December 13, 2022

Administrator
Division of Regulations, Legislation, and Interpretation
U.S. Department of Labor
Wage and Hour Division
200 Constitution Avenue, N.W.
Room S-3502
Washington, DC 20210

Re: Comments Pertaining to Regulation Identifier Number (RIN) 1235-AA43

Dear Division of Regulations, Legislation, and Interpretation:

The following letter pertaining to Regulation Identifier Number (RIN) 1235-AA43 is submitted jointly by the Appraisal Institute and the Real Estate Valuation Advocacy Association (REVAA) regarding Proposed Revisions to Independent Contractor Classification Under the Fair Labor Standards Act (the "Proposal") issued by the Department of Labor Wage and Hour Division ("the Department").

The Appraisal Institute (www.appraisalinstitute.org) is a global professional association of real estate appraisers, with nearly 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 worldwide.

The Real Estate Valuation Advocacy Association (www.revaa.org) is a national trade association whose membership includes Appraisal Management Companies (AMC) and residential real estate valuation providers. REVAA members provide residential appraisal management services, many also create innovative technologies and provide other important lender valuation services such as Evaluations, Broker Price Opinions (BPO) and Automated Valuation Models (AVM).

Independent fee appraisers provide mortgage lenders, credit unions and financial institutions with professional opinions regarding the market value of real property.¹ The vast majority of lenders utilize the services of AMCs to help manage and support the appraisal ordering, review, and delivery process, and to help promote and maintain appraiser independence. These appraisals are vital toward ensuring a healthy residential lending market, and they must do so with autonomy and without improper influence by anyone whether a lender, AMC, or borrower.

Lenders rely on these opinions to evaluate risks associated with approving mortgage loans for which the property serves as collateral. Appraisals are also relied on in the secondary market to ensure there is proper liquidity to support ongoing lending to consumers to purchase and finance homes. The vast majority of appraisers are structured as independent contractors when preparing reports for properties located within a specific geographical area. Lenders typically work with several AMCs to simplify their compliance burdens and for efficiency, in turn AMCs will work with numerous independent fee appraisers to obtain appraisals needed by lenders. Independent fee appraisers typically work with multiple lenders, AMCs, and private parties.

The interaction between appraisers and their client in the performance of residential appraisal services, whether it be a lender or an AMC, is unique to many of the professions the Department is evaluating in issuing its Proposal, and is governed by a complex legal and regulatory structure explicitly designed to ensure a fair and independent valuation process. The reality is that while appraisers can be employees of an AMC, financial institution, or other entity, most appraisers performing residential real estate services are and choose to be independent contractors. Additional

¹ A real estate appraiser can work as a "fee appraiser," a licensed or certified appraiser who does not work as an employee of the entity obtaining the appraisal, 12 C.F.R. § 1026.42(f)(4)(i) (known as Regulation X), or a "staff appraiser," an employee of the entity obtaining the appraisal. The regulations differentiate between fee appraisers and staff appraisers regarding appraiser independence, *id.* § 323.5 (Federal Deposit Insurance Corporation "Appraisals" Regulation), but generally real estate appraisers face similar regulations regarding appraising properties. This request focuses on real estate appraisers working as independent contractor fee appraisers.

information is enclosed; however, we underscore the following as it relates to the unique but important relationship between appraisers and their clients, including AMCs:

- The appraisal ordering process is both inherently independent and collaborative: AMCs (serving as service providers to their lender customers) must provide appraisers with a certain degree of description and instruction to permit an appraiser to perform an appraisal assignment, and the appraiser is required to be independent in evaluating those instructions.
- The performance of an appraisal is inextricably independent and collaborative: Appraisers are required by law to independently develop an opinion as to a property's value, but the law also explicitly permits AMCs/lenders to ask questions and engage with the appraiser to understand and confirm the appraiser's analysis. Most importantly, federal and state law prohibit the improper influencing of an appraiser's work – ensuring they act independently when analyzing a property's value.
- The independent contractor concept is embedded into federal and state law: The Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA) and the Dodd-Frank Act, which created a regulatory structure over AMCs (and appraisers), defines an AMC as an entity that, in part, manages independent contractor appraisers. This is duplicated in all 50 states and the District of Columbia AMC laws.

While we appreciate the possibility of compliance with the Proposal, our concern is that the inherent relationship between appraiser and client may generate unintended consequences and confusion over the rule's application to our industry. We maintain a concern that there are unique attributes to this relationship that could be open to different interpretations. As a result, we urge the Department to provide as much clarity as possible, including specific illustrations of safe harbors for appraisers and AMCs to utilize in daily practice.

For the continuity of the residential property valuation industry, there should be no uncertainty and confusion over the status of independent fee appraisers and their clients, including AMCs. In addition to the Proposal, several states are evaluating adoption of their own definition of employees and independent contractors. As entities that are licensed in each state in accordance with federal requirements, inconsistent rules and regulations at federal and state levels could be catastrophic.

To avoid a potential disruption due to the lack of clarity of the Proposal on independent fee appraisers and AMCs, the purpose of this letter is as follows:

- Illustrate to the Department the unique nature of the independent fee appraiser and AMC relationship.
- Respectfully request the Department provide a specific exemption for independent fee appraisers in the final Proposal, in a manner that California has done. We believe that an exemption is important to reducing federal vagueness and the uncertainty that could occur with differing state interpretations. At a minimum, we request an explanation in the final rule as to how to interpret the rule's impact on independent fee appraisers and AMCs.

In conclusion, thank you for considering our comments and requests. We look forward to continuing the dialogue with the Department to improve understanding of the specific unresolved questions that deserve clarity.

Sincerely,



Jody Bishop, MAI, SRA, AI-GRS
President
Appraisal Institute
(312) 335-4100
jbishop@appraisalinstitute.org



Mark Schiffman
Executive Director
Real Estate Valuations Advocacy Association
(612) 716-1812
mark.schiffman@revaa.org

Introduction to Independent Fee Appraisers and AMCs

America's housing market is dependent on quality, timely appraisals. Not only are they essential for lenders to make decisions to fund home purchases for consumers, but appraisals are also used in home refinancing, capital markets and default servicing. Appraisals must be ordered, fulfilled, reviewed, and approved in a specific time frame to ensure that the transaction is not negatively impacted and contractual obligations between principals are met. Upsetting the fundamental and long-standing relationship between independent fee appraisers and clients has the potential of significant ramifications for housing and the mortgage origination market.

The following information seeks to highlight the uniqueness to the independent fee appraiser and AMC relationship including an overview of appraisers and AMCs; federal and state requirements of significance to the appraiser and AMC independent contractor relationship; questions/concerns with the proposed rule text; and potential unintended consequences that could debilitate AMCs, appraisers and lenders in the delivery of residential property valuations.

About Independent Fee Appraisers

Independent fee appraisers are the prototypical independent contractors. They are educated, state licensed experts with significant professional experience and training who provide an independent, objective and unbiased opinion of the value of a property for lease negotiations, mortgage lending purposes, tax assessments, among other purposes. Independent fee appraisers may choose to be an employee or choose to work as an independent contractor (independent fee appraiser). They negotiate their own fees, set their own hours, take on projects as suits them and work for a broad spectrum of clients. It is estimated that 70 to 80% of appraisers work independently and rely on multiple sources of business to sustain their practices including AMC's, lenders, attorneys, accountants, homeowners, real estate service corporations, underwriters, and government agencies such as local assessors' offices to name a few.

Many independent fee appraisers choose to service the business of an AMC's customers, the mortgage lenders. Their main duties include providing expert advice regarding the fair market value of real properties to permit the lenders to assess collateral risk associated with a loan. They regularly exercise discretion and independent judgment regarding matters of significance in performing their primary job duties.

Independent fee appraisers must meet education, experience, and state licensing or certification exam requirements. There are different paths depending on the type of appraisal work pursued. In addition to being required to meet all the requirements in the Real Property Appraisal Qualification Criteria, appraisers must fulfill rigorous continuing education pursuant to the state requirements. Independent fee appraisers are required to follow the Uniform Standards of Professional Appraisal Practice ("USPAP") promulgated by the Appraisal Foundation's Appraisal Standards Board. Under Title XI, the USPAP, which set forth the "recognized standards of practice for real estate, personal property and business appraisal[.]" are mandatory for "real estate appraisals used in conjunction with federally related transactions[.]"

About Appraisal Management Companies (AMC)

AMCs are state licensed third-party service providers engaged by lenders or related secondary market entities to contract with independent fee appraisers to procure residential appraisals in compliance with federal appraisal independence requirements. Many AMCs also offer a variety of non-appraisal valuation-related products and management services, including but not limited to evaluations, broker price opinions, automated valuation models, property data collection products, post-disaster property reviews, and data analytics.

AMCs have existed since the 1960's. AMCs grew in popularity among smaller and mid-size lenders following the 2007-08 financial crisis as their attention to efficiency, compliance and regulatory responsibilities helped ensure consumer protection. Today, there are an estimated 300+ AMCs in the nation, ranging from small local businesses to large national corporations.

AMCs manage an order fulfillment process; they don't perform appraisals and instead engage numerous independent fee appraisers to complete appraisals. Activities include:

- Recruit and maintain a panel of qualified independent fee appraisers for lender valuation assignments.
- Ensure appraiser independence by safeguarding against fraud and undue influence.

- Provide quality assurance processes in the delivery of final appraisal and valuation products.
- Support a smooth, timely and responsive mortgage process for consumers and lenders.
- Ensure lender compliance with federal and state banking and mortgage regulations.
- Comply with federal and state law mandating that AMCs pay independent fee appraisers a customary and reasonable fee for their services.

Appraisal management services performed by AMCs, which is also defined in federal and state law, include:

- a) Recruiting, selecting, and retaining independent fee appraisers;
- b) contracting with independent fee appraisers to perform appraisal assignments;
- c) managing the process of having an appraisal performed, including providing administrative duties such as receiving appraisal orders and appraisal reports, submitting completed appraisal reports completed by others to creditors and secondary mortgage market participants, collecting fees from creditors and secondary mortgage market participants for services provided, and paying appraisers for services performed; and
- d) reviewing and verifying the work of appraisers.

AMCs operate with both a panel of independent fee appraisers and staff appraisers who are employed to perform operational functions associated with appraisal management services and valuations. As part of managing the order fulfillment process, AMCs are required to engage in quality control processes which may include completing appraisal review assignments to validate that quality requirements are met. Therefore, to perform this work, some AMCs also employ appraisers to perform state-required quality control analyses of the appraisals, and in some instances these quality control reviews meet the definition of being appraisals themselves. However, these functions are completely different than the function that is being contracted with an independent fee appraiser. An AMC that employs appraisers and engages independent fee appraisers is referred to as a hybrid AMC, which is also required to meet all the federal and state AMC requirements.

AMCs are under continuous, vigorous, and extensive scrutiny by their lender clients through the lender client third-party oversight programs. AMCs are required to regularly participate in client audits to ensure compliance with federal banking regulations and lender policies and procedures. In addition, lender transactions with AMCs are regulated by state and federal banking regulators.

Dodd-Frank Act Created Guidance on the AMC and Independent Fee Appraiser Relationship

Following the 2008 economic downturn, the appraisal industry faced demanding regulatory standards promulgated under the Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C. § 5301 et. seq., along with other reforms, designed to ensure greater independence of appraisers.

The Dodd-Frank Act was rooted in the objective to restore public trust in the safety and soundness of the financial industry. Specific to appraisal and AMCs, Dodd-Frank adopted several important consumer protections including but not limited to:

- The Truth in Lending Act (“TILA”) was amended to make it unlawful, in extending credit or in providing any services for a consumer credit transaction secured by the principal dwelling of the consumer, to engage in any act or practice that violates appraisal independence.
- Section 1473 of the Dodd-Frank Act added a section 1124 to Title XI of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA) to include AMCs within the scope of appraisal activity overseen by the Appraisal Subcommittee and applicable federal regulators. It was followed by regulation to establish state AMC licensing programs and a National AMC Registry.
- Created a mandate for minimum interagency federal AMC rules for state licensing of AMCs that provide appraisal management services related to a federally related transaction.

Federal Minimum AMC Rules Provide Guidance to State Regulatory Programs

The Board of Governors of the Federal Reserve System, the Comptroller of the Currency, the Federal Deposit Insurance Corporation, the National Credit Union Administration Board, the Federal Housing Finance Agency, and the Bureau of Consumer Financial Protection were tasked in Dodd Frank to jointly, by rule, establish minimum requirements to be applied by a state in the registration of AMCs.

These minimum rules became effective on August 10, 2015. FIRREA provided that no appraisal management company may perform services related to a federally related transaction in a State after the date that is 36 months after their rules' effective date, unless such company is registered with such State or subject to oversight by a Federal financial institution regulatory agency. There was also an opportunity for States to obtain a one-year extension - the firm deadline was August 10, 2019.

State Licensing of AMCs and Independent Fee Appraisers

The Dodd-Frank amendments to FIRREA and their subsequent regulations promulgated after Dodd-Frank's enactment created the path for States to register AMCs providing appraisal management services related to a federally related transaction. Pursuant to these minimum rules established by the federal Appraisal Subcommittee, a state registration program must include a requirement that AMCs:

- Register with and be subject to supervision by a State appraiser certifying and licensing agency in each state in which such company operates;
- Verify that only licensed or certified independent fee appraisers are used for federally related transactions;
- Require that appraisals coordinated by an AMC comply with the Uniform Standards of Professional Appraisal Practice; and
- Require that appraisals be conducted independently and free from inappropriate influence and coercion pursuant to the appraisal independence standards established under section 129E of the Truth in Lending Act.

In all 50 states and the District of Columbia, independent fee appraisers and AMCs are regulated as mandated by federal requirements. Bank and non-bank lenders providing residential mortgages to homebuyers must comply with federal and state laws requiring appraisal independence requirements. As licensees, appraisers and AMCs must comply with important requirements, including but not limited to:

Appraiser

- Minimum appraisal qualification requirements
- Continuing education requirements
- USPAP compliance
- Register through the state to be on the National Appraiser Registry

AMC

- Only engaging with appraisers who have an active appraiser credential in good standing;
- Requiring disclosure of its registration number to appraisers when ordering appraisals;
- Not employing persons who have had appraiser credentials revoked;
- Disclosing to customers fee information about completed appraisals;
- Maintaining a process to require that an appraiser comply with USPAP and state law;
- Paying appraisers a customary and reasonable fee within a defined period;
- Maintaining a process for reviewing the work of appraisers;
- Being subject to audit by state regulators
- Register through the state to be on the National AMC Registry

Violations of any of these requirements, and others, may result in disciplinary action of an AMC or independent fee appraiser by state regulators.

Relevant Federal and State Public Policy Regarding AMC and Appraiser Relationship

The federal and state public policies below help define the unique relationship between AMCs and independent fee appraisers, including the reference and requirements for independent fee appraisers to be independent contractors.

- Federal law applies to any AMC that, in part, oversees a particular size of appraisers on its appraiser panel – an appraiser “is an independent contractor for purposes of this rule if the appraiser is treated as an independent contractor by the AMC for purposes of Federal income taxation.” 12 C.F.R. 34.211(e).
- Federal law defines “appraisal management company,” which means in connection with valuing properties collateralizing mortgage loans or mortgages incorporated into a securitization, any external third party authorized either by a creditor of a consumer credit transaction secured by a consumer’s principal dwelling or by an underwriter of or other principal in the secondary mortgage markets, that oversees a network or panel of more than 15 certified or licensed appraisers in a State or 25 or more nationally within a given year—
 - a) to recruit, select, and retain appraisers;
 - b) to contract with licensed and certified appraisers to perform appraisal assignments;
 - c) to manage the process of having an appraisal performed, including providing administrative duties such as receiving appraisal orders and appraisal reports, submitting completed appraisal reports to creditors and underwriters, collecting fees from creditors and underwriters for services provided, and reimbursing appraisers for services performed; or
 - d) to review and verify the work of appraisers.
12 U.S.C. 3350 (11).
- Federal law defines “appraisal management services,” which reflects the selection, contracting, order management, and review of work performed by independent contractor appraisers. 12 U.S.C. 3350(11).
- Federal guidance in the 2015 AMC rule defines appraisal management services to include:
 - a) administer an appraiser panel;
 - b) recruit, retain or select appraisers;
 - c) qualify or verify licensing or certification and negotiate fees and service level expectations with persons who are part of an appraiser panel;
 - d) contract with appraisers to perform appraisal assignments;
- Federal guidance in the 2015 AMC rule says that an appraiser panel means a network, list or roster of licensed or certified appraisers approved by an AMC to perform appraisals as independent contractors for the AMC. Appraisers on an AMC’s “appraiser panel” under this part include both appraisers accepted by the AMC for consideration for future appraisal assignments in covered transactions or for secondary mortgage market participants in connection with covered transactions and appraisers engaged by the AMC to perform one or more appraisals in covered transactions or for secondary mortgage market participants in connection with covered transactions. An appraiser is an independent contractor for the purposes of this subpart if the appraiser is treated as an independent contractor by the AMC for purposes of Federal income taxation.
- Federal guidance in the 2015 AMC rule says “The Agencies believe that additional guidance on the meaning of “independent contractor” under the final rule facilitates compliance and, therefore, are amending the proposed definition of appraiser panel accordingly. As noted, the definition of appraiser panel in §34.211(e) provides that that an appraiser is deemed an “independent contractor” for purposes of this rule if the appraiser is treated as such by the AMC for purposes of Federal income taxation.”
- Federal guidance in the 2015 AMC rule requires AMCs to pay independent fee appraisers a customary and reasonable for their services as determined by the independent fee appraiser. “Establish and comply with processes and controls reasonably designed to ensure that the AMC conducts its appraisal management services in accordance with the requirements of section 129E(a)-(i) of the Truth in Lending Act, 15 U.S.C. 1639e(a)-(i), and regulations thereunder.”
- All 50 states and the District of Columbia AMC laws, which must be consistent with federal guidance, also define “Appraisal panel” in the same way as “a network, list or roster of licensed or certified appraisers approved by the appraisal management company to perform appraisals as independent contractors of the appraisal management company.”

California Independent Contractor Law Serves as a Valuable Example

Lenders, AMCs, appraisers, federal regulators, and state regulators will benefit greatly from your guidance on these issues. In 2019, the California legislature passed A.B. 5, which was signed into law, to change the state’s ABC test to determine an employee from an independent contractor. However, there was a lack of clarity in the new law about how it impacted the relationship between independent fee appraisers and AMCs.

This uncertainty was problematic thus in 2020, the Appraisal Institute and REVAA partnered to successfully lead a coalition of stakeholder organizations to work with lawmakers to amend (by unanimous vote in the Assembly and Senate) California's new independent contractor law to include an exemption for appraisers. This amendment was signed into law by California’s governor.

Request for Department of Labor Interpretation Regarding the AMC and Appraiser Relationship

Following are topics for which we are seeking interpretation and clarity from the Department of Labor:

1. How do the Department’s proposed rules “Extent to Which the Work Performed is an Integral Part of the Employer’s Business” (Proposed § 795.110(b)(5)) and “Nature and Degree of Control” (Proposed § 795.110(b)(4)) apply to independent fee appraisers and AMCs, and how will the proposed rule interact with federal and state requirements that AMCs maintain panels of independent-contractor appraisers?
 - Existing federal and state requirements directly conflict with the proposed rule, when applied to AMCs. First, by definition under federal and state law, AMCs maintain panels of independent fee appraisers. Without these independent contractors, AMCs would not meet the statutory requirements for state licensing. This means AMCs have no choice but to depend on the work of independent fee appraisers as completing appraisals is outside the usual course of an AMCs business. At the same time, however, the work of these independent contractors—completing appraisals—is likely to be considered an “integral part of the [AMC’s] business” under the proposed rule. We believe compliance with the federal and state requirements for AMCs makes the reliance on independent fee appraisers unavoidable. Thus, the proposed rule threatens to create an impossible legal framework for AMCs and independent fee appraisers.
 - Similarly, the unique regulatory framework of the appraisal industry conflicts with the “control” factor of the proposed rule. The Department suggests that when the employer, as opposed to the worker, exercises “control” in the form of enforcement of contractual requirements, quality control standards, or other legal or regulatory obligations, this may suggest employee status. As explained above, the appraisal industry is subject to a complex regulatory framework.

The independent fee appraiser structure exists due to legal requirement, and the fact that AMCs take seriously their regulatory obligations should not be interpreted as evidence of an employer-employee relationship with independent fee appraisers. We note with serious concern the lack of clarity in the “control” factor with respect to highly regulated industries like appraisal management.

Therefore, we respectfully request that the Department addresses these concerns by:

- specifically exempting appraisers and AMCs with respect to the proposed rule, in whole or in part;
 - clarifying that the proposed rule is not intended to affect the structure of the appraisal management industry; and/or
 - including in the final rule examples or explanations of how these sections of the proposed rule will apply to appraisal management services, with specific attention to AMCs’ constraints and obligations under federal and state law.
2. How do the Department’s proposed rules “Investments by the Worker and the Employer (Proposed § 795.110(b)(2))” apply to educational investments made by independent fee appraisers to obtain their credential and the ongoing continuing education investments that are required to maintain the credential?

This section of the proposed rule lacks clarity, specifically regarding the definition of “capital or entrepreneurial” investment by the worker. For highly regulated industries such as appraisal management, this, in conjunction

with the “control” factor, creates uncertainty about how professional credentials will be interpreted by the Department. For example, will an appraiser seeking out specialized education, training, and certification be interpreted as making a “capital or entrepreneurial” investment, thus suggesting independent contractor status, even when those trainings or certifications are industry requirements for certain categories of work? Do such certifications still suggest independent initiative if they are mandatory?

We request the Department clarify the meaning of “capital or entrepreneurial” investment, as well as provide examples illustrating how this element will apply to professional development investments by appraisers and workers in other industries with complex certification and regulatory schemes.

Without an Exemption and/or Clarity, there are Potential Adverse Consequences

Federal and State law both define an AMC and explicitly define those appraisers on an AMC’s panel as independent contractors. 12 C.F.R. 34.211; BPC 11302(f). Unpredictability from the new proposed rule will cause confusion in the valuation and appraisal fulfillment marketplace. This raises the potential for significant negative consequences:

- The AMC and independent fee appraiser relationship, which is relied upon by most traditional financial institutions as well as non-bank lenders, would be disrupted and redefined in a way not intended by Congress in the enactment of the Dodd-Frank Act, the federal minimum AMC Standards that were promulgated per Dodd-Frank to guide state licensing, or a state’s appraiser and AMC public policy requirements.
- AMCs are defined in federal and state law as entities that manage independent contractor appraisers. Each of the 50 states and District of Columbia federally compliant AMC licensing programs will be effectively nullified as AMCs would no longer be subject to state regulation because AMCs will not meet the state or federal legal definition required for licensing.
- The cost and delays nationwide to homeowners, buyers and other end users and beneficiaries of residential appraisal services will increase if lenders, appraisers and AMCs are forced to create new untested business models to comply with the new proposed rule.
- AMCs will need time and expend significant resources to change their business model to employ appraisers instead of using independent contractor appraisers. Independent fee appraisers who perform residential appraisals will need to change business models to become employees of each AMC with whom they intend to continue contracting. (It is not unusual for appraisers to contract with 10, 15 or more AMCs throughout the year).
- Appraisals are very location specific. If AMCs cannot timely provide a panel of appraisers for their clients that cover needed geographic areas to fulfill appraisal needs, homebuyers will be negatively impacted as rate locks and other contractual obligations of the principals are delayed or go unfulfilled, damaging relationships among listing and selling agents, escrow and title companies, closing agents, inspectors and others.
- Independent fee appraisers who typically work with multiple AMCs will face enormous challenges to re-evaluate and re-tool their business model. They also work with other non-homebuying clients including financial planners, attorneys and probate courts.