

November 12, 2014

Legislative and Regulatory Activities Division
Office of the Comptroller of the Currency
400 7th Street, SW., Suite 3E-218
Mail Stop 9W-11
Washington, DC 20219

RE: Supplemental Comments: Minimum Requirements for Appraisal Management
Companies
Docket ID 2014-00002

To Whom it May Concern:

These comments are supplemental to those our companies submitted on this issue on June 4, 2014, noting that states have continued to proceed with legislation and regulations regulating appraisal management companies (AMCs) since our earlier comments. We believe it is important to consider these actions as you finalize this Rule. Additional commentary on this issue is contained below.

As you know, we represent a coalition of the largest appraisal firms in the country, including Forsythe Appraisals, The William Fall Group and Metro-West Appraisal. Collectively our firms employ, on staff, hundreds of highly qualified professional real estate appraisers. We perform real estate valuation assignments for the entire real estate industry including national banks, regional banks, local banks, mortgage servicers, Credit Unions and appraisal management companies ("AMCs"). Each firm has been in business for decades and each has demonstrated significant dedication and commitment to the betterment of the appraisal profession; a fundamental element of consumer protection in our system of home mortgage finance.

Introduction

On April 9, 2014, the Agencies published for public comment Minimum Requirements for Appraisal Management Companies, 79 FR 68, ("proposed rules"). In our original comment letter we urged that the Agencies revise the definitions of "appraisal management company" and "appraisal management services" and add a definition of "fee appraiser" and "independent contractor" in order to clarify the scope of the proposed rules and avoid any unintended consequences or confusion surrounding the requirements for the appraisal industry. We continue to believe that such action would further clarify the Rule.

Our concern is that the interpretation of these terms contained in Dodd-Frank is leading to the misclassification of appraisal firms as appraisal management companies. Evidence of this is found in the fact that 39 states have enacted AMC legislation so far and 36 have either directly or indirectly agreed that appraisal companies employing staff appraisers are not required to "register" as AMCs, while three states require such appraisal firms to register as AMCs. Of these three states, representatives of two of the appraisal boards have suggested that (appraisal firms should not be required to register as an AMC. Credibility should be given to state legislation as most states have had appraiser licensing laws on the books since the early nineties. Deference should be given to the overwhelming majority of states that have already taken action on this issue.

In our view, Dodd-Frank recognizes appraisal firms as fee appraisers in the amendments to Regulation Z, containing the following definition of fee appraiser at 12 CFR 1026.42 (f)(4)(i)(B): "A fee appraiser is also an organization that, in the ordinary course of business, employs state-licensed or state-certified appraisers to perform appraisals and receives a fee for performing appraisals." Also, the Agencies' proposed rules reference Section 1473 of the Dodd-Frank Act which distinguishes AMC's that contract with others to perform appraisals from appraisal firms which are comprised of groups of appraisers that perform appraisals as part of a firm or partnership. As recognized throughout the industry, Congress notes that an AMC provides a process for a lender through a contract appraiser; while a firm provides a product in the form of an appraisal report to the lender or its agent (an AMC).

Some states use the term "third-party agent" in their definition of "appraisal management company." This bears out another important distinction between appraisal firms and appraisal management companies in that appraisal firms are not agents of the creditor. This is recognized in Section 226.42(f)(1) of Regulation Z, which clarifies that "agents" of the creditor do not include any fee appraiser as defined in paragraph (f)(4)(i) of Section 226.42.

Transactions between an AMC and a firm for the production of an appraisal report are no different from those between an AMC and a "natural person" since both a firm and a natural person are considered fee appraisers per Dodd Frank. In the section-by-section commentary to the IFR, it is recognized that the statute reflects that natural persons as well as appraisal companies or firms may contract with lenders/creditors and AMC's to perform appraisals. In considering these elements of Dodd-Frank, it is clear that Congress intended to recognize and uphold the viability of appraisal firms within the appraisal industry.

Specific Comments to Questions posed in the agencies' Proposed Minimum AMC Requirements

Question 1. The Agencies request comment on all aspects of the proposed definition of AMC.

In the agencies' proposed AMC definition a numerical threshold for "panel or network membership" triggers the licensing requirement. Some have used this definition to apply to appraisal firms with greater than 15 employee appraisers, thus restricting business practices that create operational scale for the industry, cost savings to the consumer and improved professionalism.

Another observation is that use of this minimum threshold could lead to unlicensed AMC practice within the states that use the threshold and would impose difficult monitoring requirements on State Appraisal Boards to keep check on which AMC's on an annual basis contract with more or less than 15 appraisers per state or 25 nationally. Some states have "carved-out" exemptions using the minimum threshold requirements as follows:

Kan Stat. Ann. 58-4705. Same; exemptions from registration.

.....(b) The provisions of this act shall not apply to:

(1) A person as defined in K.S.A. 2013 Supp. 58-4703, and amendments thereto, who exclusively employs appraisers on an employer and employee basis for the performance of appraisals; or

(2) an individual or individuals who are state-certified or state-licensed appraisers in good standing credentialed by the board and who are actively engaged in the practice of real estate appraising and, as a function of the practice, maintain a list of not more than 15 employees who are credentialed appraisers in good standing or independent contractor credentialed appraisers in good standing.

59 O.S. § 858-805 (OSCN2014)

The provisions of the Oklahoma Appraisal Management Company Regulation Act shall not apply to:3. An individual or individuals who are state-certified or state-licensed appraisers in good

standing credentialed by the Oklahoma Real Estate Appraiser Board and who are actively engaged in the practice of real estate appraising and, as a function of the practice, maintain a list of ten or fewer employees who are credentialed appraisers in good standing or independent contractor credentialed appraisers in good standing.

Note the Kansas exemption: although the appraisal firm model is specifically exempt in no. 1 above, in no. 2, the use of the term “employee” could lead to imposition of AMC registration requirements on larger appraisal firms. Also, the Oklahoma exemption for small firms references “ten or fewer employees”, potentially subjecting larger appraisal firms to AMC licensing in that state.

In order to ensure that only appraisal firms (and not AMCs or other hybrid appraisal companies that function primarily like AMCs) are excluded from the minimum requirements, we respectfully recommend the Agencies’ consider removal of the minimum threshold from the definition entirely and require all entities with AMC activities, regardless of size, to be state registered.

a. Appraisal Management Company definition

To further clarify that the definition of “appraisal management company” excludes appraisal firms from its meaning, we respectfully suggest amending the definition to state that appraisal firms are not covered within the meaning of “appraisal management company.” Specifically, we propose that a new clause **“other than a person or organization that meets the definition of ‘fee appraiser’”** be added to the existing definition of “appraisal management company” after the phrase “means a person” and a definition added for the term **“fee appraiser”**.

Appraisal Management Company.—

Appraisal management company (AMC) means a person, **other than a person or organization that meets the definition of “fee appraiser”**, that:

- (i) Provides appraisal management services to creditors or to secondary mortgage market participants, including affiliates;
- (ii) Provides such services in connection with valuing a consumer’s principal dwelling as security for a consumer credit transaction or incorporating such transactions into securitizations

b. Fee Appraiser Definition

Following is our proposed definition of “fee appraiser” to be added to the Definitions section:

Note that, consistent with the background discussion in the proposed rules, we suggest the clause “on a W-2 employment basis” to further clarify the description of an appraisal firm model. This meaning of “fee appraiser” necessarily excludes an organization that utilizes persons on a 1099-basis for the completion of appraisals.

Fee appraiser. The term “fee appraiser” means--

(A) A natural person who is a state-licensed or state-certified appraiser and receives a fee for performing an appraisal, but who is not an employee of the person engaging the appraiser; or

(B) An organization that, in the ordinary course of business, employs state-licensed or state-certified appraisers **on a W-2 employment basis** to perform appraisals, receives a fee for performing appraisals, and is not subject to the requirements of section 1124 of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (12 U.S.C. 3331 et seq.).

c. W-2 employment basis definition

We suggest adding a definition of “W-2 employment basis”, either consistent with that referenced by the Agencies in footnote 21 in Section II of the proposed rule to clarify that the defined term includes *only* companies that employ state-licensed or state-certified appraisers on a W-2 employment basis or as follows:

"W-2 employment basis" means the classification of natural persons as employees using the Internal Revenue Service's right-to-control test under the common law agency doctrine, with the results of such test generally determining whether an organization files a W-2 or a 1099 for the person.

d. Appraisal Management Services definition

In order show that only those services as provided by an AMC and not a firm are contemplated within the definition of appraisal management company, we respectfully suggest amending the definition of "appraisal management services" to specify "fee" appraisers. Specifically, we propose that the word "fee" be added to the existing definition of "appraisal management services" before the word appraiser:

Appraisal Management Services

Appraisal management services means one or more of the following **services performed by any person, (other than a person or organization that meets the definition of "fee appraiser" as that term is defined**)

1. Recruiting, selecting, and retaining **fee** appraisers;
2. Contracting with **fee** appraisers to perform appraisal services;
3. Managing the process of having an appraisal performed, including providing administrative services such as receiving appraisal orders and appraisal reports, submitting completed appraisal reports to creditors and underwriters, collecting fees from creditors and underwriters for services provided, and compensating **fee** appraisers for services performed; or
4. Reviewing and verifying the work of **fee** appraisers.

Adding the term "fee" is consistent with Dodd-Frank's recognition of the appraisal firm model as a fee appraiser. Some states' definitions provide further clarity by including "administration of an appraiser panel" as one of the services. Then, appraiser panel is defined consistent with that found in the proposed rules. [see Ariz. Rev. Stat. §32-3661, Conn. Gen Stat. §20-500 (4) and (5) and Kan. Stat. Ann. 58-4703(c)(1) and (e)]

Question 2. The Agencies request comment on the proposed definition of "appraiser network or panel" and on the alternative of defining this term to include employees as well as independent contractors. The Agencies also request comment on whether the term "independent contractor" should be defined, and if so why and how, including whether it should be defined based upon Federal law (e.g., using the standards issued by the Internal Revenue Service²⁰ or standards adopted in other Federal regulations, such as those issued under the Secure and Fair left to state law (so as to be consistent with existing AMC laws).

We agree with the agencies' proposed definition of "appraiser network or panel" as a network of State-licensed or State-certified appraisers who are independent contractors to an AMC. This is consistent with the agencies' outreach to state boards which found that most states define a panel as a group of independent contractors. Also, although Section 1473 of Dodd Frank does not specify whether a "network or panel" consists of employees of an AMC or independent contractors retained by the AMC; the definition of appraisal management services includes the term "contract" in section (B) to define the functions of an appraisal management company.

Including the term "employees" in the definition of "appraisal network or panel" would perpetuate the misclassification and cause adverse consequences to the appraisal firm model. However, use of a definition of independent contractor would help to communicate clarity. Thus, we support including a definition of independent contractor in the final AMC rules, either the use of the definition as cited in the proposed minimum requirements or:

Independent contractor – a natural person who submits a W-9 to the payer and is issued a 1099 for payments over \$600, over which the AMC has no control over the method or manner of the performance the person's work.

Question 3. The Agencies request comment on the distinction the Agencies have drawn between employees and independent contractors as a basis for exclusion of appraisal firms from the definition of an AMC.

We incorporate by reference our earlier comments regarding the definition of an appraisal management company in response to this question. It's crucial to note that the relationship of each party to individual appraisers is the basis for the distinction between an appraisal firm and an AMC. In order for states to properly regulate an AMC, the distinction must be made clear from a statutory basis with clear guidance provided. Many states do recognize and exempt firms that employ appraisers on a w-2 basis by stating that the provisions of the AMC act shall not apply to:

"A corporation, partnership, sole proprietorship, subsidiary or other business entity that employs real estate appraisers exclusively on an employer and employee basis for the performance of all real property appraisal services in the normal course of its business...." Ariz. Rev. Stat. 3663 (2)

Thus we encourage inclusion the final AMC rules a definition of appraisal firm and propose a definition structure for the term as seen in some states' regulations:

- 1) Appraisal firm is a person engaged to perform appraisals that employs appraisers on a W-2 employment basis.
- 2) Person means an individual, firm, partnership, association, corporation, or any other entity who exclusively employs appraisers on W-2 employment basis for the performance of appraisals...
- 3) W-2 employment basis. The term "W-2 employment basis" means the classification of natural persons as employees using the Internal Revenue Service's right-to-control test under the common law agency doctrine, with the results of such test generally determining whether an organization files a W-2 or a 1099 for the person. This meaning of "fee appraiser" in Section necessarily excludes an organization that utilizes persons on a 1099-basis for the completion of appraisals.

Question 11. Are any questions raised by any differences between State laws and the proposed AMC rules? Should these be addressed in the final AMC rules and, if so, how?

One of the major differences between State laws and the proposed AMC rules is that states recognize exemptions for appraisal firms. While the manner of exemption among the states varies, at least there is some treatment of this topic. Following are some examples:

- Colorado Rev. Statutes 12.61.702 (1.5)(b)(I) "Appraisal management company does not include: a Corporation, limited liability company, sole proprietorship, or other entity that directly performs appraisal services..."
- 47 Kansas Rev. Statutes 58-4705(b): The provisions of this act shall not apply to: (1) a person as defined in K.S.A 2013 Supp 58-4703,....who exclusively employs appraises on an employer and employee basis for the performance of appraisals, or....
- Utah Code 61-2e-104: "This chapter does not apply to: (1) an entity that:
 - (a) exclusively employs an individual on an employer-employee basis for the performance of a real estate appraisal activity in the normal course of the entity's business;

(b) is responsible for ensuring that the real estate appraisal activity being performed by an employee is performed in accordance with applicable appraisal standards; and..."

Exemptions are in place for firms that have an "employer-employee" relationship with appraisers. Others imply that firms are not subject to licensing through (1) references to AMC's as third party agents; (2) defining the term appraisal panel as made up of independent contractors (not employees); and use of the term contract. These features of current state exemptions imply the AMC business model of contracting with independent appraisers to fulfill the goal of the appraisal management service process.

The questions that arise regarding exemptions could be addressed through regulatory definition and guidance. Clearly illustrating the features of both models through definition or exemption can assure industry participants of the viability of both models, and permit the proper licensure of appraisal management companies, as intended.

Conclusion

It is important to recognize that appraisal firms represent a long standing tradition and model for the development and delivery of real estate appraisals vital to our system of mortgage finance. Congress essentially endorsed this model through enactment of the Dodd Frank Act where attention focused on Appraisal Management Companies as a part of the industry in need of additional regulation and oversight. Individual appraisers have been licensed by the states for decades and appraisal firms continue the tradition of that individual responsibility and integrity. As we said in our earlier comments, appraisal firms offer an alternative for the real estate appraiser to join an environment to practice their profession in an environment of collegiality and mentorship, which are important resources in appraiser professional development. Tangible benefits for the appraiser who prefers the employment model include: training and professional support; payment of FICA/FUTA taxes; allowances for MLS fees, cell phone and automobile usage; payment for background checks required for employment and client approval, E&O coverage; 401k plan participation, group medical and dental and vision benefits and more.

Just as important and perhaps more convincing is the fact that 39 states have already determined how to proceed with AMC regulation, essentially focusing on agent based management companies. And, all states have long ago concluded on how real estate appraisers should be regulated. States have concluded that state licensing for individuals (appraisers) is the model for appropriate consumer protection and the preservation of sound financial policy regarding mortgage lending. Appraisal firms are subject to state business registration and are liable for improper acts of their employees.

We urge you to consider our suggestions as a way to clarify the scope of the Rule and to avoid any unintended consequences or confusion.

Thank you for your time and consideration of this letter.

Sincerely,

John Forsythe
Chief Executive Officer, Forsythe Appraisals, LLC
612-333-9922 or JohnC@ForsytheAppraisals.com

William Fall
Executive Officer, The William Fall Group,
419-418-5251 or wfall@williamfallgroup.com

Don Rousseau
Chief Executive Officer, Metro-West Appraisal
888-676-9237 or drousseau@metrowestappr.com