



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

November 19, 2020

Ms. Sara Oates
Chair, Texas Appraiser Licensing & Certification Board
Post Office Box 12188
Austin, Texas, 78711-2188

Opinion No. KP-0342

Re: Authority of the Texas Appraiser Licensing and Certification Board to exempt licensed or certified appraisers from the statutory requirement to comply with the Uniform Standards of Professional Appraisal Practice when performing a property “evaluation” allowed under the federal Interagency Appraisal and Evaluation Guidelines (RQ-0355-KP)

Dear Ms. Oates:

You ask whether the Texas Appraiser Licensing and Certification Board (the “Board”) may “adopt a rule exempting appraisers licensed or certified under Chapter 1103 of the Texas Occupations Code from the statutory requirement to comply with [the Uniform Standards of Professional Appraisal Practice] when performing an evaluation allowed under the *Interagency Guidelines*[.]”¹

Your question requires some context. The federal Financial Institutions Reform, Recovery and Enforcement Act of 1989, or FIRREA, created a system to protect “real estate related transactions” by requiring real estate appraisals used in connection with “federally related transactions” to conform to certain standards. *See* Financial Institutions Reform, Recovery, and Enforcement Act of 1989, 12 U.S.C. §§ 3331–3356. FIRREA directs the federal agencies that regulate financial institutions² to prescribe those standards. *Id.* § 3339. The federal agencies responded with the *Interagency Appraisal and Evaluation Guidelines* (“Interagency Guidelines”).³

¹Letter from Ms. Sara Oates, Chair, Tex. Appraiser Licensing & Certification Bd., to Honorable Ken Paxton, Tex. Att’y Gen. at 2 (May 20, 2020), <https://www2.texasattorneygeneral.gov/opinions/opinions/51paxton/rq/2020/pdf/RQ0355KP.pdf> (“Request Letter”).

²The agencies are the Office of the Comptroller of the Currency, Treasury (“OCC”); the Board of Governors of the Federal Reserve System (“Reserve”); the Federal Deposit Insurance Corporation (“FDIC”), the Office of Thrift Supervision, and the National Credit Union Administration (“NCUA”) (collectively the “federal agencies”). *See* 12 U.S.C. § 3339; *see also* 12 U.S.C. § 3350(6) (defining “federal financial institutions regulatory agencies”).

³The Interagency Guidelines are located at <https://www.fdic.gov/news/financial-institution-letters/2010/fil10082a.pdf>. *See* Interagency Appraisal & Evaluation Guidelines, 75 Fed. Reg. 77450 (Dec. 10, 2010); *see also* Real Estate Lending & Appraisals, 12 C.F.R. §§ 34.41–47 (subpart C) (OCC); Appraisal Standards for

FIRREA also creates a comprehensive framework wherein the states license and certify real estate appraisers and supervise appraisal-related activities. *Id.* § 3346 (providing for establishment of state appraiser certifying and licensing agencies). At the core of the comprehensive framework is the “real estate related financial transaction,” which is a transaction involving the sale, lease, exchange, or refinancing of real property, including property interests, and the “use of real property or interests in property as security for a loan or investment.” *Id.* § 3350(5). Relevant to your question, only a subset of the real estate-related financial transactions—“federally related transactions”—require an appraisal. *See id.* §§ 3339, 3350(4)(B) (defining “federally related transaction” in part as one that requires the services of an appraiser); *see also id.* §§ 3341(b) (authorizing the federal agencies to establish a threshold level at or below which an appraisal is not required), 3356 (exempting certain real estate located in rural areas). An appraisal must at a minimum “[c]onform to generally accepted appraisal standards as evidenced by the Uniform Standards of Professional Appraisal Practice.” 12 C.F.R. § 34.44(a) (OCC); *id.* § 225.64(a) (same) (Reserve); *id.* § 323.4(a) (same) (FDIC); *id.* § 722.4(a) (NCUA). These appraisal standards, known as the Uniform Standards of Professional Appraisal Practice (“USPAP”), are “an evolving set of professional standards developed by the Appraisal Standards Board of the Appraisal Foundation, which is authorized by the U.S. Congress [in FIRREA] as the independent source of appraisal standards and appraiser qualifications.” *Dwiggins v. Mo. Real Estate Appraisers Comm’n*, 515 S.W.3d 765, 767 (Mo. Ct. App. 2016). However, if a real estate-related transaction is not a “federally related transaction,” an appraisal is not required. *See* 12 U.S.C. §§ 3339, 3350(4)(B). Instead, an evaluation is required, and an evaluation need not comply with the USPAP. *See* 12 C.F.R. § 34.43(b) (requiring the evaluation be consistent with safe and sound banking practices) (OCC), *id.* § 225.63(b) (same) (Reserve), *id.* § 323.3(b) (same) (FDIC).⁴ You explain generally that licensed and certified appraisers in Texas must comply with the USPAP, and you are concerned “that some appraisers will lose business opportunities if they are required to conduct evaluations under the more stringent USPAP standards solely because of their professional certification while others are able to conduct evaluations without following those same standards.” Request Letter at 1.

Set in this federal context, your question involves the rulemaking authority of the Board, which is governed by state statute. Chapter 1103 of the Texas Occupations Code regulates the licensure and certification of persons conducting real estate appraisals. *See* TEX. OCC. CODE §§ 1103.001–.5545 (“Texas Appraiser Licensing and Certification Act”). Chapter 1103 prohibits a person from performing a real estate appraisal “unless the person is licensed or certified as an appraiser under this chapter.” *Id.* § 1103.201(a). Section 1103.405 provides that a “person who holds a certificate, license, or registration issued under . . . chapter [1103] shall comply with . . . the most current edition of the Uniform Standards of Professional Appraisal Practice” or other standards at least as stringent as the USPAP. *Id.* § 1103.405. While the Board may adopt rules concerning an appraiser’s professional conduct that require compliance with the USPAP or its

Federally Related Transactions, *id.* §§ 225.61–.67 (subpart G), and Real Estate Lending, Appraisal Standards, & Minimum Requirements for Appraisal Management Companies, *id.* §§ 208.50–.51 (subpart E) (Reserve); Appraisals Generally, *id.* §§ 323.1–.7 (subpart A) (FDIC); Appraisals, *id.* §§ 722.1–.7 (NCUA).

⁴NCUA’s regulation for transactions not requiring an appraisal requires a written estimate of market value, performed by a qualified and experienced person who has no interest in the property. 12 C.F.R. § 722.3(d).

equivalent, section 1103.405 imposes that requirement. *See id.* § 1103.154(1)–(3) (authorizing the Board to adopt rules for professional conduct); 22 TEX. ADMIN. CODE § 153.8(a) (Tex. Appraiser Licensing & Certification Bd., Scope of Practice).

An administrative agency “has only those powers that the Texas Legislature has expressly conferred upon it and those implied powers that are reasonably necessary to carry out its statutory duties.” *Tex. State Bd. of Exam’rs of Marriage & Family Therapists v. Tex. Med. Ass’n*, 511 S.W.3d 28, 33 (Tex. 2017); *see also* TEX. OCC. CODE §§ 1103.151, .154. An agency rule must be consistent with its statutory authority. *Tex. State Bd. of Exam’rs of Marriage & Family Therapists*, 511 S.W.3d at 33. Here, chapter 1103 prohibits a person from performing “an *appraisal* of real estate” without being licensed or certified. TEX. OCC. CODE § 1103.201(a) (emphasis added). Section 1103.405 requires a person who holds a certificate, license, or registration to appraise real estate under chapter 1103 to comply with the USPAP. *Id.* § 1103.405. A board rule exempting a licensed or certified appraiser from compliance with the USPAP when performing an appraisal conflicts with that statutory requirement. Therefore, a court would likely conclude that the Board may not adopt a rule exempting an appraiser licensed or certified under chapter 1103 from complying with the USPAP when performing an evaluation under the federal Interagency Guidelines, insofar as an evaluation constitutes an appraisal under that chapter.⁵ *See id.* § 1103.003(1) (“‘Appraisal’ means, *regardless of whether prepared for a federally related transaction . . .* an opinion of value” (emphasis added)); *but see id.* § 1103.004(1) (providing that chapter 1103 “does not prohibit . . . a person authorized by law from performing an *evaluation* of real property” (emphasis added)).

⁵Although you do not directly ask it, we recognize the importance of the question whether an “evaluation” is an “appraisal,” as it may implicate the scope of the regulatory authority of the Board under chapter 1103. *See* TEX. OCC. CODE § 1103.003(1) (defining “appraisal”); *see also* Request Letter at 1. Whether a person conducts an “evaluation” or “appraisal” for purposes of chapter 1103 requires consideration of fact issues outside the scope of an attorney general opinion. *See* Tex. Att’y Gen. Op. No. GA-0867 (2011) at 2 (“Attorney general opinions do not answer fact questions.”).

S U M M A R Y

Section 1103.405 of the Occupations Code governing real estate appraisals requires a person who is certified, licensed, or registered under chapter 1103 to follow the Uniform Standards of Professional Appraisal Practice. Under Texas law, an administrative agency rule must be consistent with its statutory authority. A rule exempting an appraiser licensed under chapter 1103 from complying with the Uniform Standards when performing an evaluation as allowed under the federal *Interagency Appraisal and Evaluation Guidelines* would conflict with section 1103.405, insofar as an evaluation constitutes an appraisal under that chapter. A court would likely conclude the Texas Appraiser Licensing and Certification Board may not adopt such a rule.

Very truly yours,

A handwritten signature in black ink that reads "Ken Paxton". The signature is written in a cursive, flowing style.

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