

Identifying Bias and Barriers, Promoting Equity:

An Analysis of the USPAP Standards and Appraiser Qualifications Criteria

January 2022

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About the National Fair Housing Alliance

Founded in 1988 and headquartered in Washington, DC, the National Fair Housing Alliance (“NFHA”) is the only national organization dedicated solely to ending discrimination in housing. NFHA is the voice of fair housing and works to eliminate housing discrimination and to ensure equal housing opportunity for all people through leadership, education and outreach, membership services, public policy initiatives, community development initiatives, advocacy, and enforcement.

NFHA is a consortium of nonprofit fair housing organizations, state and local civil rights agencies, and individuals from throughout the United States. NFHA recognizes the importance of home as a component of the American Dream and aids in the creation of diverse, barrier-free communities throughout the nation.

About Dane Law LLC

Dane Law LLC is a private law firm with a special focus on the Fair Housing Act, the Equal Credit Opportunity Act, and other federal civil rights laws applicable to housing discrimination. Dane Law’s founder and owner, Stephen M. Dane, is nationally recognized in the fair housing and civil rights communities, and is admitted to practice in over a dozen federal courts throughout the country, including the U.S. Supreme Court. Throughout his career, Mr. Dane has represented and advised lending and financial institutions in connection with mortgage lending compliance, and has also represented victims of mortgage lending and appraisal discrimination.

About the Christensen Law Firm

The Christensen Law Firm is focused on legal and regulatory matters concerning valuation (primarily real property) and related services. The clients the firm serves are valuation firms and professionals; technology and appraisal management companies; and also individual and commercial parties who use or rely on valuation services.

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The views and opinions expressed in the report are those of the authors and do not reflect the official policy or position of the Appraisal Subcommittee or the agencies represented on its Board.

Executive Summary

The appraiser has the power to determine the value of a mortgage borrower's most important financial asset, which can hold the key to determining whether that borrower's family can purchase a permanent home rather than rent, access credit on reasonable terms, or build wealth for their family and generations to come. Over time, Americans have seen many crises related to homeownership (the Savings and Loan Crisis, the Great Recession, the COVID pandemic) and each time, the housing market players were heavily scrutinized and regulated to prevent harm to the American consumer's greatest asset. Given the importance of homeownership to so many people, the reforms were welcomed by homeowners and largely embraced by key housing market players, such as mortgage bankers, who understood the importance of protecting the housing market and saw borrowers of color as the future of the market.

Until recently, however, the appraisal industry seems to have escaped the type of regulation and scrutiny faced by other participants in the mortgage market. Our analysis finds that the appraisal industry has operated in a relatively closed, self-regulated framework. Recent news stories have presented the shortcomings of the appraisal industry in stark relief, where individual homeowners and researchers have demonstrated that discriminatory bias continues to plague the appraisal industry, undermining value and breaking a key rung on the ladder to the middle class for families of color. Given these circumstances, it is time to examine the structure and governance of the appraisal industry, particularly as they impact borrowers of color.

Several organizations have answered the call for appraisal reform, particularly as it affects borrowers of color. For example, in 2020, The Appraisal Foundation began a series of diversity and inclusion efforts.¹ In addition, on May 14, 2021, the Appraisal Subcommittee approved an initiative for a comprehensive and independent review of the Uniform Standards of Professional Appraisal Practice ("USPAP Standards" or "Appraisal Standards") and the Real Property Appraiser Qualification Criteria ("Appraiser Criteria").² The goal of the review is to ensure that USPAP Standards and the Appraiser Criteria do not encourage or systematize bias, and that the standards and criteria consistently support or promote fairness, equity, objectivity, and diversity in both appraisals and the training and credentialing of appraisers. The Appraisal Subcommittee contracted with the Council on Licensure, Enforcement and Regulation ("CLEAR") to manage the review, which contracted with this consortium, led by NFHA. Finally, on June 1, 2021, President Biden directed U.S. Department of Housing and Urban Development ("HUD") Secretary Marcia Fudge to lead a "first-of-its-kind interagency initiative to address inequity in home appraisals." Secretary Fudge and White House Domestic Policy Council ("DPC") Director Susan Rice established the Interagency Task Force on Property Appraisal and Valuation Equity ("PAVE").³ This report was developed in response to the Appraisal Subcommittee/CLEAR initiative, and the Appraisal Subcommittee, CLEAR, and the authors of this report have closely coordinated to share findings with the President's PAVE initiative.

¹ The Appraisal Foundation, *Promoting Diversity in the Appraisal Profession*,

<https://appraisalfoundation.sharefile.com/share/view/s07b3d65a193d47e6a626af02a7aad265>.

² Appraisal Subcommittee, *Review of USPAP and AQB Criteria; Focus on Fairness, Equity, Objectivity and Diversity*, (June 4, 2021), <https://www.asc.gov/Pages/ViewWhatsNew.aspx?ID=164>.

³ See PAVE Interagency Task Force at <https://pave.hud.gov/>.

We want to acknowledge that during the course of our research, we spoke to many appraisers and appraisal organizations who recognize the challenges the industry faces and are dedicated to developing solutions. We thank them for their insights and applaud them for their earnest efforts for change. We hope that the research and recommendations provided in this report open up the conversation to more key stakeholders in the appraisal and housing industry to seek workable, sustainable solutions that benefit the whole of the housing market, including borrowers of color.

Goals and Methodology

The Appraisal Subcommittee and CLEAR provided several goals for this report, including:

- Identifying any instances in which the Appraisal Standards, Appraiser Criteria, or training facilitate or systematize racial bias;
- Identifying opportunities for reform of the Appraisal Standards, Appraiser Criteria, or training, with the goal of supporting and promoting fairness, equity, objectivity, and diversity;
- Identifying whether the Appraisal Standards, Appraiser Criteria, or training present barriers of entry to the profession that disparately impact people of color and/or women; and
- Discussing the process used to promulgate changes to the Appraisal Standards, Appraiser Criteria, or training.

The research for this report was conducted by reviewing numerous appraisal and applicable civil rights materials, including:

Appraisal Standards

- Appraisal Standards Board: 2020-2021 Uniform Standards of Professional Appraisal Practice (“USPAP Standards”) (Effective January 1, 2020 through December 31, 2022)
 - Preamble
 - Rules and Definitions
 - Standards 1-4
- Appraisal Standards Board: USPAP Advisory Opinions
- Appraisal Standards Board: Frequently Asked Questions that are related to real property

Appraiser Criteria

- Appraiser Qualifications Board: Criteria, Interpretations of the Criteria, and Guide Notes (Effective January 1, 2021)

Training

- 2020-2022 15-hour National USPAP Course (required for initial appraiser credentials)
- 2020-2021 7-hour National USPAP Update Course and 2022-2023 7-hour National USPAP Update Course (a current USPAP Update Course is required once every two years for licensed or certified appraisers)

Finally, in addition to interviews with representatives from The Appraisal Foundation, interviews were conducted with the following organizations:

Appraisal Industry

- American Society of Appraisers
- Appraisal Institute
- Collateral Risk Network
- Real Estate Valuation Advocacy Association

Fair Housing Advocates

- Fair Housing Advocates of Northern California
- Fair Housing Center of Central Indiana

Mortgage Industry

- Housing Policy Council

Researchers

- Freddie Mac
- Dr. Elizabeth Korver Glenn
- Dr. Andre M. Perry, The Brookings Institution

Outline and Recommendations

Based on our research, interviews, and reviews, we provide the following recommendations, which are discussed in more detail in the main text of the report:

Questions About the Governance of the Appraisal Industry

Legal Authority. The appraisal governance structure is unique and complex with a private entity setting the minimum appraisal standards and professional entrance criteria that must be adopted by the states. Given the importance of appraisals to the residential housing market and individual consumers' finances, it is recommended that the complex questions regarding the extent of The Appraisal Foundation's legal authority be considered for further review, including questions about the extent of the legal authority under the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"), any potential obligations under the Administrative Procedures Act, and any potential issues under the Constitution's nondelegation doctrine.

Appointments and Elections Process. The Appraisal Foundation should consider the following steps to enhance inclusiveness, to provide a more intentional and meaningful way to incorporate the voices of civil rights and consumer advocates, and to improve the ability to issue USPAP Standards and Appraiser Criteria that benefit the whole of the housing market, including homeowners and neighborhoods of color:

- Repeal the requirement that a majority of the Board of Trustees must be appraisers.
- Repeal the requirement of financial donations to appoint board members.

- Provide a mechanism allowing industry groups and civil rights/consumer advocates to appoint an equal number of trustees. (For purposes of this report, the term “civil rights/consumer advocates” means organizations that have as their primary purpose the promotion of civil rights and/or consumer protection.)
- Provide a mechanism allowing industry groups and civil rights/consumer advocates to nominate an equal number of trustees to at-large elections.
- Require that at least four of the at-large trustees must be civil rights/consumer advocates.
- Form an advisory council consisting only of nonprofit civil rights and consumer advocates.
- Require that at least a third of the members of the Appraisal Standards Board and Appraiser Qualifications Board be civil rights/consumer advocates.

Rules of Procedure and Exposure Draft Process. The Appraisal Foundation should consider the following steps to enhance transparency and inclusiveness, and to improve the ability to issue USPAP Standards and Appraiser Criteria that benefit the whole of the housing market, including homeowners and neighborhoods of color:

- Require the Appraiser Qualifications Board to provide notice to the public, exposure of drafts, and an opportunity for public participation. (The Appraiser Qualifications Board currently engages in this practice but would benefit from having the practice codified in its bylaws.)
- Require the Appraisal Standards Board and Appraiser Qualifications Board to state the legal authority under which it is promulgating standards or criteria.
- Require the Appraisal Standards Board to make the complete text of USPAP Standards, including Advisory Opinions, available to both appraisers and the public for free.
- Require the Appraisal Standards Board and the Appraiser Qualifications Board to consider the impact of proposed standards and criteria on consumers and neighborhoods, including consumers and neighborhoods of color. As a best practice, many agencies that regulate the housing finance market set up specific and regular meetings to hear feedback from civil rights and consumer advocates.
- Require the Appraisal Standards Board and the Appraiser Qualifications Board to publish the final standards and criteria at least 30 days before the effective date.
- Require the Appraisal Standards Board and the Appraiser Qualifications Board to provide to the public an easily accessible system to request the issuance, amendment, or repeal of any standard or criteria.

Gaps in Fair Housing Requirements and Training

Clear Prohibition on Discriminatory Conduct. To make it easier for appraisers and the public to understand an appraiser’s fair housing obligations, the USPAP Standards and Advisory Opinion 16 should be revised to clearly state that discrimination in appraisals is prohibited.

Guidance on Discretion. Consistent with other aspects of the housing finance market, the appraisal process should be thoroughly reviewed for fair housing risk, particularly in the exercise of discretion, and the USPAP Standards should be amended accordingly in order to provide a baseline standard for fair and equitable outcomes.

Fair Housing Training Requirements. Quality fair housing training for appraisers is critically important and should be a requirement for every appraiser to obtain and maintain their credentials. The Appraiser Criteria should be revised to clearly require comprehensive fair housing training on federal, state, and local fair housing laws at every stage of the credentialing process and at renewal.

Fair Housing Training.

Recommendations for the Training Requirements:

- There should be comprehensive fair housing training included in the initial 15-hour USPAP course (not just in the 7-hour USPAP continuing education course).
- The fair housing training module in the current 2022-2023 7-hour USPAP continuing education course for credentialed appraisers should be revised immediately and developed with the participation of fair housing experts to ensure the training is comprehensive and contains important elements needed to educate professionals about how to comply with the letter and spirit of applicable federal, state, and local fair housing laws.
- At a minimum, the fair housing training should include:
 - The history of discrimination and segregation and the role of the appraisal industry in establishing and perpetuating both;
 - Information about the costs of appraisal bias for families, communities, the housing industry, and the nation, including the impact on the racial homeownership and wealth gaps;
 - An in-depth explanation of the federal fair housing laws and implementing regulations as well as the role of state and local fair housing laws;
 - Recent case examples of appraisal discrimination;
 - The appropriate use of the free-form text sections of the appraisal report, including a reminder that the racial and ethnic composition of the neighborhood should never be a factor that influences the value of a home;
 - An explanation of how compliance with fair housing laws and standards benefits the appraisal and housing industry, consumers, communities, and the greater society; and
 - Best practices to ensure compliance with the letter and spirit of the fair housing laws.
- The Appraisal Foundation should collaborate with HUD, the U.S. Department of Justice (“DOJ”), the Federal Housing Finance Agency (“FHFA”), and other regulators and enforcement agencies to develop, improve, and implement fair housing training. In addition, The Appraisal Foundation should consider inviting civil rights experts to provide the fair housing training for appraisers.

Recommendations for the Existing Training:

- The introduction to the existing training should be revised to focus on fair housing laws and their requirements. Similarly, the overall tone of the module should be revised from one of raising questions about perception and reputational risk for appraisers to clearly identifying fact patterns that represent illegal discrimination and avoiding harm to consumers.
- The background section should be revised to focus on the history of appraisal discrimination and its impact on borrowers and communities of color.
- The legal section should be revised to accurately state the law. Currently, the module inaccurately focuses on intentional bias and unintentional bias rather than disparate

treatment and disparate impact. The definitions and commentary also require revision to explain what constitutes disparate treatment and disparate impact and how appraisers can comply with legal requirements and follow best practices.

- The illustrations and case studies should be revised to clearly identify fact patterns that represent illegal discrimination. The fact patterns should focus on situations that are common and clearly covered by the Fair Housing Act.
- The instructor's manual should be revised to provide more explicit guidance. Also, in connection with fair housing topics, the instructor's focus should be on the law first and USPAP and other guidelines second.

Barriers to Entry to the Appraisal Profession

Barriers to Entry. It is recommended that each of the barriers to entry to the appraisal profession be reviewed for disparate impact by analyzing the burden on potential appraisers of color, the business justification for the requirement, and whether there is a less discriminatory alternative that can achieve the business interest. Below is a description of each barrier and a more detailed recommendation.

Multiple Levels of Credentials. The credentialing criteria should be reviewed to consider streamlining the credentials to just two certifications: 1) certified residential appraiser and 2) certified general appraiser. This approach would:

- Follow the model of other professions where the individual is fully licensed or certified after passing the exam (e.g., real estate broker, accountant, lawyer);
- Follow the model of many large lenders and appraisal management companies, which already require appraisals to be conducted by a certified appraiser; and
- Provide a more realistic way for new entrants to earn a living in the profession.

College Degree Requirements. The criteria should be reviewed to consider whether the college degree is necessary for the profession, including whether this requirement has appreciably improved the quality of appraisals.

Appraiser Education Hours. The appraiser education hours criteria should be reviewed to consider whether the extensive hours are necessary and whether the content of the courses should be revised to better prepare the student to conduct the work of an appraiser.

Experience Hours. Given the clear racial disparate impact of the experience hours and Supervisory Appraiser criteria, this requirement should be thoroughly reviewed to consider less discriminatory alternatives, including:

- Improving the content of the education courses so that the student is better prepared to conduct appraisals after passing the exam;
- Improving the content of the exam by including a practice-based component that ensures a prospective appraiser has a clear understanding of industry practices; and
- Replacing the current experience requirement with an exam that, once passed, makes the individual a certified appraiser.

Standardized Tests. The Appraisal Foundation should collect data on race, ethnicity, and gender to measure the impact of the examinations. Also, the examinations should be reviewed for validity and consistency with federal anti-discrimination laws.

Pipeline and Future of the Profession. The Appraisal Foundation and other appraiser organizations should continue and expand their outreach to women and people of color. In addition, The Appraisal Foundation and other appraisal organizations should monitor the demographics of individuals entering the profession or renewing their credentials and share this information publicly to ensure that the demographics of the profession are more transparent. Finally, appraiser organizations should ensure that new professionals are prepared for the future with respect to the use of technology, automation, and artificial intelligence.

Compliance and Enforcement

Need for Data. Government, the Government Sponsored Enterprises (“GSEs,” that is, Fannie Mae and Freddie Mac), lenders, appraisers, researchers, and civil rights/consumer advocates should strategize and work together for the release of appropriate elements of the appraisal data sets to reduce bias and develop more robust compliance and monitoring systems. In addition, after public input and collaboration, a public repository and accessible database of complaints involving appraisals for mortgage lending should be developed to identify trends in the filing of complaints, including instances of alleged discrimination, and to identify appraisers and appraisal management companies that may be engaging in repeatedly deficient or discriminatory appraisal activity.

Compliance Management Systems. Government, the GSEs, lenders, appraisers, researchers, and civil rights/consumer advocates should use knowledge of data science and appropriate examples from the mortgage and homeowners’ insurance industries to develop more robust compliance management systems to monitor, remedy, and prevent fair housing risk and/or violations in appraisals.

Duty of Care. Fair housing advocates working on behalf of borrowers indicate that fair housing legal issues in appraisals often overlap with appraiser professional negligence. Because appraisers’ legal accountability for professional negligence under applicable case law typically extends only to those parties whom the appraiser has identified as “intended users” within the meaning of USPAP Standards and because appraisers generally do not identify borrowers as such intended users, appraisers often have no legal accountability to borrowers for instances of negligence. To increase the accountability of appraisers to borrowers who have been injured by appraisal negligence, the Appraisal Standards Board should consider amending the USPAP Standards to require appraisers to identify mortgage borrowers as “intended users” of appraisals prepared in relation to residential mortgage transactions.

Reconsideration of Value Process. A “reconsideration of value” is the term used to describe the *ad hoc* process by which borrowers challenge appraisal values. It is a process that varies highly from lender to lender and that is without any legal structure. Fair housing advocates indicate that lack of fair consideration and clear communication in the process often occurs at the beginning of fair housing claim situations. Government, the GSEs, lenders, and The Appraisal Foundation should develop standards and guidance for appraisers regarding the fair handling of and increasing the transparency and accountability in the Reconsideration of Value process.

Note on the language in this report: We are aware that there is no universal agreement on the appropriate race or ethnicity label for the diverse populations in the United States or even on whether particular labels should be capitalized. We intend in all cases to be inclusive, rather than exclusive, and in no case to diminish the significance of the viewpoint of any person or to injure a person or group through our terminology. For purposes of this report, we have utilized the following language (except in cases where a resource, reference, case, or quotation may use alternate terminology): Black, Latino, Asian American, and White. We are aware that some use the term “African American,” but there are some who argue that this term is exclusive, and we intend to be as inclusive as possible. We are also aware that many people prefer the term “Hispanic” or “Latinx.” We intend in this report to include those who prefer “Hispanic” or “Latinx” in the term “Latino” and intend no disrespect. We refer to “neighborhoods of color,” “communities of color,” “people of color,” or specify the predominant race(s), rather than utilizing the term “minority.” We also use the term “disability,” rather than “handicap” (the term used in the Fair Housing Act).

Part I: Background

A. The Problem of Bias in the Appraisal Industry

The Appraisal System Historically Undervalued Homes in Communities of Color

For much of America's history, communities of color were systematically excluded from economic opportunities through explicit policy decisions.⁴ In particular, the New Deal's federal Home Owners Loan Corporation ("HOLC") developed one of the most harmful policy decisions in the housing and financial services markets by creating a system that included race as a fundamental factor in determining the desirability and value of neighborhoods.⁵ This system included Residential Security Survey forms that explicitly captured the percentage of "Negro" populations and other racial groups living in an area and then utilized that race-based data to grade the neighborhood. The HOLC's policies and procedures helped systematize redlining as well as the unfounded association between race and risk in U.S. housing and financial services markets.

The HOLC appraisal system also included the creation of appraisal maps that were color-coded to evaluate, grade, and indicate the desirability of neighborhoods. Communities of color – and even neighborhoods with small numbers of Black residents – were coded as "hazardous" and signified by red shading on the map and were assigned a lower value. Moreover, areas that were adjacent to communities with Black residents could be downgraded simply based on their proximity to a community of color.

Notably, the data used to create the maps was not just collected randomly, but was based on the opinions of the leading real estate professionals at the time, including appraisers. Later, the Federal Housing Administration adopted these maps and race-based policies as the basis for its mortgage insurance underwriting decisions. Thus, the maps not only reflected the race-conscious views of the nation's housing industry leaders at the time, but were also used to amplify and codify these views throughout the housing system.

A collaboration of academics has produced an interactive online tool known as "Mapping Inequality," which documents how real estate professionals, including appraisers, and the HOLC used their racially-biased views to determine the economic value of a community on the basis of race.⁶ Below are examples of the tool and an archived HOLC map of Baltimore.

⁴ See Lisa Rice, *The Fair Housing Act: A Tool for Expanding Access to Quality Credit*, *The Fight for Fair Housing: Causes, Consequences, and Future Implications of the 1968 Federal Fair Housing Act* (Gregory Squires, 1st ed. 2017) (providing a detailed explanation of how federal race-based housing and credit policies promoted inequality).

⁵ The Home Owners' Loan Act of 1933 established the HOLC as an emergency agency under the Federal Home Loan Bank Board. 12 U.S.C. § 1461 *et seq.*

⁶ See University of Richmond, Virginia Tech, University of Maryland, and Johns Hopkins University, *Mapping Inequality* (documenting the maps and area descriptions created by the HOLC between 1935 and 1940), <https://dsl.richmond.edu/panorama/redlining/#loc=3/41.245/-105.469&text=intro>.

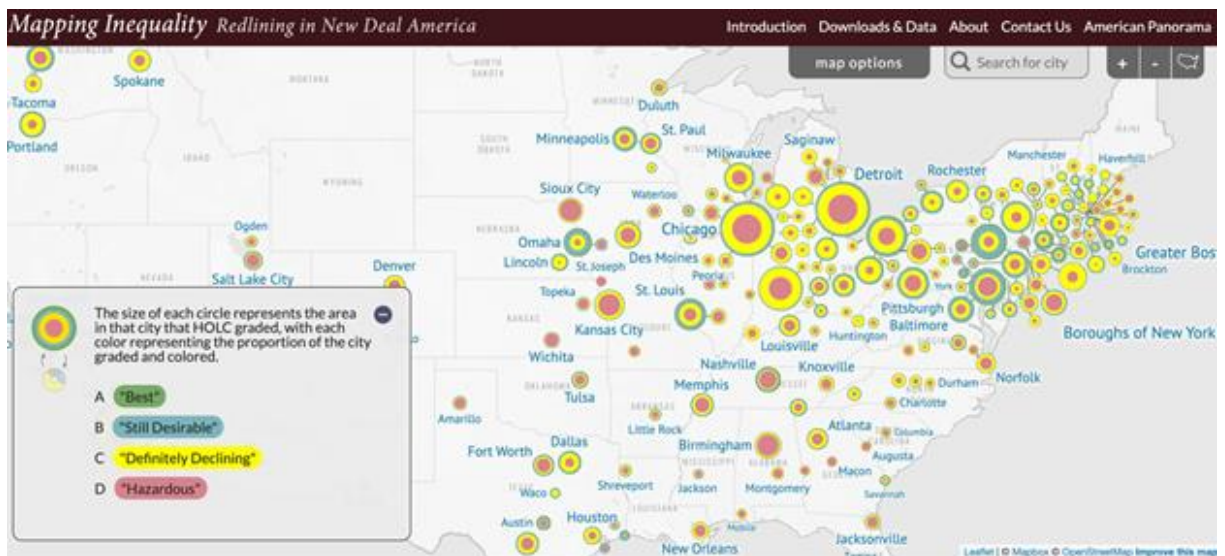


Figure 1. Source: Mapping Inequality

This is one of the initial pages of the "Mapping Inequality" tool. The graphic at the left shows the HOLC map legend where red signifies a community that was deemed "Hazardous."

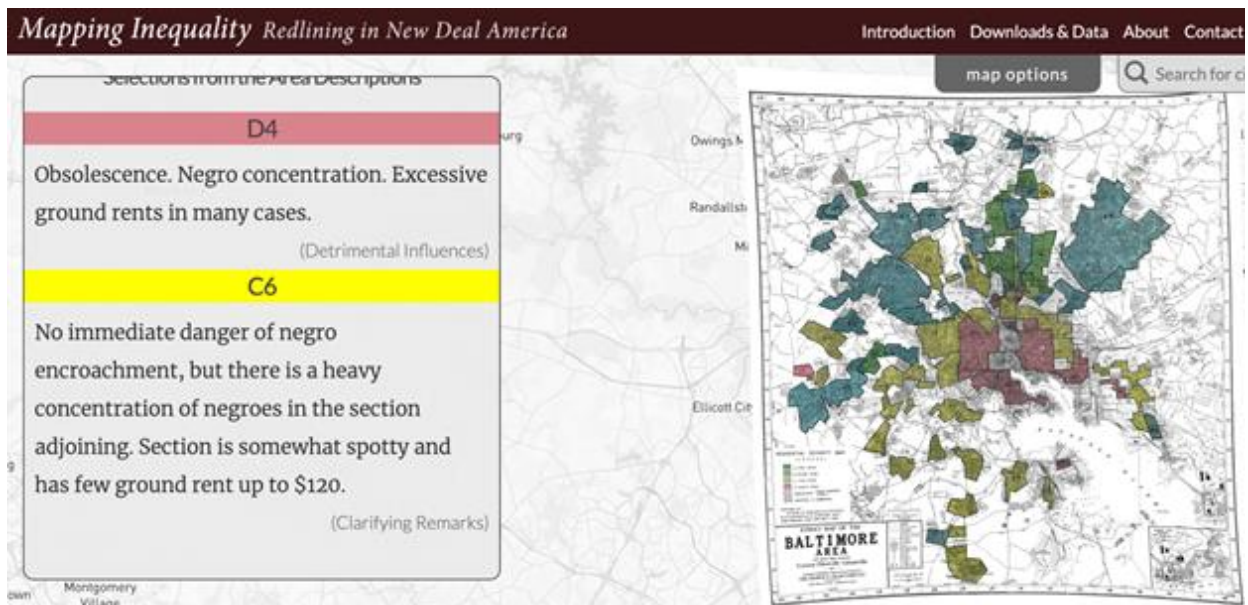


Figure 2. Source: Mapping Inequality

This is the HOLC's map of Baltimore, which color-coded the communities of color as red and "hazardous" based in part on "Negro concentration."

Appraisal Principles and Practices Perpetuated an Unfounded Association Between Race and Risk

In addition to the mapping system, explicitly discriminatory principles and practices perpetuated an unfounded association between race and risk in the nation's housing and financial markets. These practices also promoted the idea a home should be valued based on its neighborhood and that a homogenous, all-White neighborhood held the highest value. Following are excerpts from a few appraisal texts and manuals (emphasis added).

- 1932: Valuation of Real Estate –
“There is one difference in people, namely **race**, which can result in very rapid decline [in real estate values].”
- 1935: American Institute of Real Estate Appraisers Manual, Real Estate Appraisal –
“To have the attributes of a good residential area, it is essential that protection be afforded against the **infiltration of inharmonious racial groups....**”
- 1938: Federal Housing Administration Underwriting Manual –
“Areas surrounding a location are investigated to determine whether **incompatible racial and social groups** are present, for the purpose of making a prediction regarding the probability of the locations being **invaded** by such groups. If a neighborhood is to retain stability, **it is necessary that properties continue to be occupied by the same social and racial classes**. A change in social or racial occupancy generally contributes to instability and a **decline in values.**”
- 1946: McMichael's Appraising Manual, Third Edition –
“Those nationalities and races having the most favorable influence [in Chicago] come first in the list and those exerting detrimental effects come last:
 1. English, Germans, Scotch, Irish, Scandinavians.
 2. North Italians.
 3. Bohemians or Czechs.
 4. Poles.
 5. Lithuanians.
 6. Greeks.
 7. Russian, Jews (lower class)
 8. South Italians.
 9. Negroes.
 10. Mexicans.”
- 1967: American Institute of Real Estate Appraisers Textbook, The Appraisal of Real Estate –
“The causes of racial and ethnic conflicts are not the appraiser's responsibility. However, he must recognize the fact that **values change when people who are different from those presently occupying an area advance into and infiltrate a neighborhood.**”

Notably, although the Fair Housing Act had passed in 1968, the explicitly discriminatory appraisal guidance continued:

- 1973: American Institute of Real Estate Appraisers Course Material –
“Ethnological information also is significant to real estate analysis. As a general rule, homogeneity of the population contributes to stability of real estate values. Information on **the percentage of** native-born whites, foreign whites, and **non-white population is important**, and the changes in this composition have a significance.... As a general rule, minority groups are found at the bottom of the socio-economic ladder, and problems associated with **minority group segments of the population can hinder community growth.**”

In 1976, after decades of these explicitly discriminatory principles and practices, the U.S. Department of Justice (“DOJ”) filed suit against the American Institute of Real Estate Appraisers and three other defendants for alleged violations of the Fair Housing Act.⁷ The DOJ alleged that the four defendants had engaged in unlawful discriminatory practices by promulgating standards and offering educational materials which had caused appraisers and lenders to treat race and national origin as negative factors in determining the value of dwellings and in evaluating the soundness of home loans, and by failing to take adequate steps to correct the continuing effect of past discrimination and ensure non-discrimination by appraisers and lenders whose practices were subject to the influence or authority of the four organizations. The parties eventually entered into a settlement agreement in which the American Institute of Real Estate Appraisers agreed to adopt the following policy statements:

- 1) It is improper to base a conclusion or opinion of value upon the premise that the racial, ethnic, or religious homogeneity of the inhabitants of an area or of a property is necessary for maximum value.
- 2) Racial, religious, or ethnic factors are deemed unreliable predictors of value trends or price variance.
- 3) It is improper to base a conclusion or opinion of value, or a conclusion with respect to neighborhood trends, upon stereotyped or biased presumptions relating to race, color, religion, sex, or national origin or upon unsupported presumptions relating to the effective age or remaining life of the property being appraised or the life expectancy of the neighborhood in which it is located.

In sum, these historical maps and policies resulted in homes in neighborhoods with similar amenities being systematically undervalued primarily on the basis of race and national origin. This approach led to the modern-day term “redlining,” which refers to restricting access to credit in communities of color. Discriminatory valuation systems and policies developed by the HOLC, the Federal Housing Administration, the American Institute of Real Estate Appraisers, and other entities also helped create, entrench, and perpetuate residential segregation. Real estate professionals used the redlining maps to racially steer people of color into red-coded or “hazardous” areas and to establish racially restrictive covenants to keep areas racially homogenous. Unfortunately, racial disparities in homeownership, wealth, health, education, and

⁷ *United States v. American Institute of Real Estate Appraisers*, 442 F. Supp. 1072 (N.D. Ill. 1977).

other key factors of success continue to follow the harmful redlining patterns set forth in these historical maps, policies, and practices.

Discrimination in Appraisals Continues on an Individual and Systemic Basis

Discrimination in Appraisals Continues on an Individual Basis

Unfortunately, the appraisal system continues to suffer from bias on an individual and systemic basis. Recent news stories have highlighted anecdotal evidence on an individual basis:

- California. A Black couple in Marin City, California seeking to refinance received an initial appraisal of \$995,000. Suspecting that the valuation of their home was unjustifiably low, they asked a White friend to pose as the homeowner and then received an appraisal of \$1,482,500, which was almost \$500,000 more than the appraisal conducted just weeks earlier. The homeowner said, “There are implications to our ability to create generational wealth or passing things on if our houses appraise for 50 percent less than its value.”⁸
- Colorado. A mixed-race couple in Denver, Colorado scheduled an appraisal in connection with a home equity loan. When the Black husband greeted the appraiser, the home was valued at \$405,000 based on comparison to homes selected by the appraiser in a Black neighborhood in a different location. When the White wife greeted the second appraiser, the home was valued at \$550,000, which was an increase of \$145,000. The wife stated, “Race obviously played a role in how we were treated. But what’s deflating is that this experience put a dollar figure on it.”⁹
- Connecticut. After receiving an initial appraisal of \$340,000, a Black family in Bloomfield, Connecticut removed all family photos and asked a White neighbor to pose as the homeowner. This time, the home appraised for just over \$400,000. The homeowner stated, “[T]his kind of experience not only robs you of the ability to refinance, but also affects opportunities at building generational wealth.”¹⁰
- Indiana. After receiving an initial appraisal of \$110,000, a Black woman in Indianapolis, Indiana removed all family photos, Black art and books; declined to identify her race on the refinancing application; communicated with the appraiser by email only; and asked a

⁸Fair Housing Advocates of Northern California, *Discrimination Lawsuits Filed Alleging Discrimination in Home Appraisal Process*, Press Release (Dec. 2, 2021), https://www.fairhousingnorcal.org/uploads/1/7/0/5/17051262/press_release_-_austin_case.final.pdf. Julian Glover, *Black California Couple Lowballed by \$500K in Home Appraisal, Believe Race Was a Factor*, ABC7News (Feb. 12, 2021), <https://abc7news.com/black-homeowner-problems-sf-bay-area-housing-discrimination-minority-homeownership-anti-black-policy/10331076/>.

⁹ Troy McMullen, *For Black Homeowners, A Common Conundrum with Appraisers*, Washington Post (Jan. 21, 2021), https://www.washingtonpost.com/realestate/for-black-homeowners-a-common-conundrum-with-appraisals/2021/01/20/80fbfb50-543c-11eb-a817-e5e7f8a406d6_story.html.

¹⁰ *Id.*

White friend to pose as her brother and meet the appraiser.¹¹ This time, the home appraised for \$259,000. Upon seeing that amount, the homeowner was first overcome with joy. But then the hurt set in of how she had had to erase herself from her home in order to get a value that was fair and accurate.

- **Florida.** After receiving an initial appraisal of \$330,000, a mixed-race couple in Jacksonville, Florida removed all photos of the Black wife and her side of the family, books by Black authors, and holiday cards from Black friends. When the White husband greeted the second appraiser, the home appraised at \$465,000, which was an increase of more than 40 percent. After posting the story on Facebook, the homeowners received over 2,000 comments, many of which were from Black homeowners saying that they had a similar experience. The wife stated, “[I]n the Black community, it’s just common knowledge that you take your pictures down when you’re selling your house.”¹²

Discrimination in Appraisals Exists on a Systemic Basis

While the individual stories of discrimination in appraisals are alarming, the analyses of systemic bias are even more stunning and disturbing. Recent studies contain the following findings:

- **Freddie Mac.** In a groundbreaking study, researchers at Freddie Mac analyzed millions of appraisals submitted for purchase transactions and found unexplained racial disparities in the percentage of properties that received an appraisal value lower than the contract price (the “appraisal gap”).¹³ More specifically, the research showed that:
 - **For Black/Latino neighborhoods.** An appraisal gap is more likely to occur in Black or Latino census tracts than White census tracts.
 - For example, Freddie Mac’s researchers reported that 12.5% of the properties in Black census tracts received an appraisal value lower than the contract price, as compared to 7.4% of the properties in White census tracts. Thus, there was an “appraisal gap” of 5.2% – meaning that homes in majority Black census tracts were much more likely to be appraised at less than the contract price.
 - As the concentration of Black or Latino individuals in a census tract increased, there was a corresponding increase in the appraisal gap.
 - The results held at the national level and at the Metropolitan Statistical Area level (which suggests that the results are pervasive and not limited to one geographic area).
 - The results held even after controlling for structural and neighborhood characteristics.

¹¹ Fair Housing Center of Central Indiana (“FHCCI”), *FHCCI Announces HUD Complaints Alleging Discrimination in Home Appraisals*, Press Release (May 4, 2021), <https://www.fhcci.org/wp-content/uploads/2021/05/5-4-21-HUD-Appraisal-Filings-Revised.pdf>.

¹² Debra Kamin, *Black Homeowners Face Discrimination in Appraisals*, *The New York Times* (Aug. 25, 2020), <https://www.nytimes.com/2020/08/25/realestate/blacks-minorities-appraisals-discrimination.html>.

¹³ Melissa Narragon, et al., *Racial and Ethnic Valuation Gaps in Home Purchase Appraisals*, Freddie Mac Economic and Housing Research Note (Sept. 2021) (“Freddie Mac Research Note”), <http://www.freddiemac.com/fmac-resources/research/pdf/202109-Note-Appraisal-Gap.pdf>.

- *For Black/Latino individuals.* Similarly, an appraisal gap is more likely to occur for Black or Latino mortgage applicants than White mortgage applicants, regardless of the neighborhood where the property is located.
- *Across appraisers.* The majority of appraisers reviewed showed an appraisal gap. (That is, the issue was not limited to just “a few bad apples,” but rather the majority of appraisers reviewed were more likely to show an appraisal gap for properties in Black or Latino census tracts than for properties in White census tracts.)
- Federal Housing Finance Agency (“FHFA”). FHFA recently analyzed appraisal reports and found that thousands of the reports contained potential race-related flags in the “Neighborhood Description” and other free-form text fields.¹⁴ FHFA advised that “[i]nstitutions and other market participants should be aware that the discretionary nature of the free-form commentary is a key risk factor that requires appropriate risk mitigation.” FHFA further noted that “[t]he racial and ethnic composition of the neighborhood should never be a factor that influences the value of a family’s home. [FHFA’s] observation of appraisals suggests that racial and ethnic compositions of a neighborhood are still sometimes included in commentary, clearly indicating the writer thought it was important to establishing value.” Some examples that FHFA found in its analysis include:
 - The languages spoken in an area: “The most common language spoken is English. Other important languages spoken here include Italian and Spanish.”
 - Amenities specifically geared to a race, ethnic, or religious group: a “commercial strip featuring storefronts supplying Jewish Households.”
 - A town was described as having a “Black race population above state average.”
 - Noting that “Koreatown is considered ‘highly diverse’ ethnically,” listing the percentages of residents from various races and nationalities and describing that the number of foreign-born persons was “considered high compared to the city as a whole.”
 - The ethnic groups that have immigrated to a neighborhood over the course of many years and noted it was “one spicy neighborhood.”
 - A reference to a neighborhood being originally “White-Only,” before becoming a “White-Flight Red-Zone” to explain why the neighborhood is mostly “Working-Class Black” now.
 - A neighborhood described as “predominately Hispanic” and that the residents have “assimilated their culture heritage” into the neighborhood.
 - Noting that “there is more Asian influence of late” buying the market.
 - Noting an area’s “decline in population, which transitioned from being predominately Eastern European to having a substantial amount of Black and Hispanic people.”
 - An area that was “‘not especially-diverse’ ethnically, with a high percentage of white people.”
 - A property being in a “homogenous neighborhood with good schools.”
- The Brookings Institution. A 2018 Brookings Institution study of 2016 American Community Survey homeowner estimates and 2012-2016 Zillow data found that homes in majority Black neighborhoods had values that were 23 percent less than properties in

¹⁴ FHFA, *Reducing Valuation Bias by Addressing Appraiser and Property Valuation Commentary*, FHFA Insights Blog (Dec. 14, 2021), <https://www.fhfa.gov/Media/Blog/Pages/Reducing-Valuation-Bias-by-Addressing-Appraiser-and-Property-Valuation-Commentary.aspx>.

mostly White neighborhoods, even after controlling for home features and neighborhood amenities.¹⁵ That is, differences in home and neighborhood quality could not fully explain the devaluation of homes in Black neighborhoods, raising questions about whether discrimination was the determining factor. The study estimated that homes in majority-Black neighborhoods were undervalued by \$48,000 per home on average, leading to a \$156 billion cumulative loss in value nationwide. One of the study's authors summarized, "We still see Black people as risky."

- This study was recently updated to address concerns raised¹⁶ about model selection and potential omitted variables that could explain the disparity. Researchers found that even after controlling for additional variables, a statistically significant unexplained disparity remained.¹⁷ Thus, the study continues to raise questions about whether discrimination was the determining factor.
- Howell/Korver-Glenn. A 2020 study of American Community Survey homeowners' estimates from 1980 to 2015 found that neighborhood racial composition was an even stronger determinant of a home's value in 2015 than it was in 1980.¹⁸ Researchers Dr. Junia Howell and Dr. Elizabeth Korver-Glenn found that the value gap had in fact doubled since 1980.¹⁹ The researchers suggested that this was primarily because the sales comparison approach predominantly utilized by appraisers results in historically undervalued properties continuing to determine current values. The study stated, "Since no steps were taken to rectify the historic inequities, this approach has enabled such inequalities to persist."

¹⁵ Andre M. Perry, Jonathan Rothwell, and David Harshbarger, *The Devaluation of Assets in Black Neighborhoods*, The Brookings Institution Metropolitan Policy Program (Nov. 2018), https://www.brookings.edu/wp-content/uploads/2018/11/2018.11_Brookings-Metro_Devaluation-Assets-Black-Neighborhoods_final.pdf. https://www.brookings.edu/research/biased-appraisals-and-the-devaluation-of-housing-in-black-neighborhoods/?utm_campaign=Brookings%20Brief&utm_medium=email&utm_content=184613964&utm_source=hs_email; See also Junia Howell and Elizabeth Korver-Glen, *Neighborhoods, Race, and the Twenty-first Century Housing Appraisal Industry*, 4 *Sociology of Race and Ethnicity* 473 (2018), <https://journals.sagepub.com/doi/abs/10.1177/2332649218755178?journalCode=srea> (finding substantial differences in home values in communities of color even after controlling for home features, neighborhood amenities, socioeconomic status and consumer demand).

¹⁶ See, e.g., Edward J. Pinto and Tobias Peter, *Special Briefing on the Impact of Race and Socio-Economic Status on the Valuation of Homes by Neighborhood*, American Enterprise Institute (Aug. 5, 2021), <https://www.aei.org/economics/special-briefing-the-impact-of-race-and-socio-economic-status-on-the-value-of-homes-by-neighborhood/>.

¹⁷ Jonathan Rothwell and Andre M. Perry, *Biased Appraisals and The Devaluation of Housing in Black Neighborhoods*, The Brookings Institution Metropolitan Policy Program (Nov. 17, 2021), https://www.brookings.edu/research/biased-appraisals-and-the-devaluation-of-housing-in-black-neighborhoods/?utm_campaign=Brookings%20Brief&utm_medium=email&utm_content=184613964&utm_source=hs_email.

¹⁸ Junia Howell and Elizabeth Korver-Glenn, *The Increasing Effect of Neighborhood Racial Composition on Housing Values, 1980-2015*, *Social Problems* (2020), <https://academic.oup.com/socpro/advance-article-abstract/doi/10.1093/socpro/spaa033/5900507?redirectedFrom=fulltexthttps://journals.sagepub.com/doi/abs/10.1177/2332649218755178?journalCode=srea>.

¹⁹ Brentin Mock, *Decades after Housing Reform, Race Has Become an Even Greater Determinant of Home Appraisal in Black and Latino Neighborhoods, New Research Finds*, Bloomberg CityLab (Sept. 21, 2020), <https://www.bloomberg.com/news/articles/2020-09-21/race-gap-in-home-appraisals-has-doubled-since-1980>.

As Currently Structured, the Sales Comparison Approach Can Perpetuate the Unfounded Association between Race and Risk

As currently structured, the sales comparison approach to valuation predominantly used by appraisers for single family residential valuation is a highly subjective process that gives the appraiser broad discretion to determine a home's value and opens the door for implicit or explicit discrimination. Essentially, the primary role of appraisals in the mortgage loan process is to provide evidence that the collateral value of the property is sufficient to avoid losses for the lender if the borrower is unable to repay the loan.²⁰ While there are several possible methods of valuation, the GSEs generally require the use of the sales comparison approach.

On its face, the sales comparison approach is not necessarily discriminatory. According to the Fannie Mae Single Family Selling Guide: "The sales comparison approach to value is an analysis of comparable sales, contract sales, and listings of properties that are the most comparable to the subject property."²¹ However, the GSEs give appraisers broad discretion to determine each aspect of the appraisal, including the selection of comparable homes, and also emphasize the connection between the home's value and the neighborhood. Both discretion and geography-based decisioning have long been viewed as key fair lending risk factors.²² The Fannie Mae Single Family Selling Guide states: "The appraiser is responsible for determining which comparables are the best and most appropriate for the assignment... Comparable sales from within the same neighborhood (including subdivision or project) as the subject property should be used when possible."²³ Again, on its face, this is a race-neutral approach, but it must be understood in the context of historical discrimination.

From the very beginning, the nation's housing finance market inextricably linked the sales comparison approach to the unfounded association between race and risk. In the 1930's, the sales comparison approach was first officially adopted by the HOLC and Federal Housing Administration, which, as described above, also adopted a valuation method explicitly equating race with risk.²⁴ In particular, the Federal Housing Administration Underwriting Manual instructed appraisers to focus on the homogeneity of neighborhoods, with the presumption that the highest value would be assigned to all-White neighborhoods. For example, the manual instructed appraisers that "[a]reas surrounding a location are investigated to determine whether **incompatible racial and social groups** are present, for the purpose of making a prediction regarding the probability of the locations being **invaded** by such groups."²⁵ (emphasis added) As

²⁰ See General Accounting Office ("GAO"), *Regulatory Programs: Opportunities to Enhance Oversight of the Real Estate Appraisal Industry*, GAO-03-404, at 6 (May 2003), <https://www.gao.gov/assets/gao-03-404.pdf>.

²¹ Fannie Mae Single Family Selling Guide, *Sales Comparison Approach Section of the Appraisal Report*, B4-1.3-07 (April 15, 2014), <https://selling-guide.fanniemae.com/Selling-Guide/Origination-thru-Closing/Subpart-B4-Underwriting-Property/Chapter-B4-1-Appraisal-Requirements/Section-B4-1-3-Appraisal-Report-Assessment/1032992461/B4-1-3-07-Sales-Comparison-Approach-Section-of-the-Appraisal-Report-04-15-2014.htm>.

²² See, e.g., FFIEC, *Interagency Fair Lending Examination Procedures* (2009), <https://www.ffiec.gov/PDF/fairlend.pdf>.

²³ See *id.* at *Comparable Sales*, B4-1.3-08 (Oct 2, 2018).

²⁴ See Elizabeth Korver-Glenn, *Race Brokers: Housing Markets and Segregation in 21st Century Urban America* at 117 (2021).

²⁵ FHA, *Underwriting Manual* (1938) (emphasis added).

described above, even after passage of the Fair Housing Act in 1968, the American Institute of Real Estate Appraisers continued this race-based approach well into the 1970s until the DOJ reached a settlement requiring a non-racialized approach to valuation.

Although guidance on the sales comparison approach no longer contains explicit race-based references, the historical undervaluation of communities of color as well as the broad discretion leaves open the opportunity for appraisers to perpetuate bias on a passive or active basis. That is, appraisers may passively or unwittingly perpetuate bias by continuing to use the undervalued comparable sales in neighborhoods of color. The undervaluation began in the 1930s and was never rectified. Under the current structure of the sales comparison approach, appraisers are instructed to limit the comparable sales to homes within the same undervalued neighborhood of color, even if there are similar homes with higher values in comparable White neighborhoods. Thus, appraisers must rely on biased data, which further perpetuates the bias.

In some instances, appraisers may be more active participants in perpetuating discrimination. For example, the Freddie Mac Research Note showed that the majority of the appraisers in the sample were more likely to determine that the appraisal value was lower than the contract price in majority Black or Latino census tracts than in majority White census tracts.²⁶ In other words, even when a buyer and seller agreed upon a value in an arms-length transaction, the appraiser was less likely to support and validate that value in neighborhoods of color than in White neighborhoods. This raises the question of whether these appraisers were actively distorting the market and further depressing the value of homes that were already undervalued because they were located in historically-redlined neighborhoods of color. That is, it may be difficult to rely on arms-length market forces to increase the values of the homes in these neighborhoods of color to match the value of homes in comparable White neighborhoods, because some appraisers are actively distorting the market and keeping the values lower based on unfounded associations between race and risk.

The qualitative research conducted by Dr. Elizabeth Korver-Glenn also raises concerns about the extent to which appraisers may be active participants in a race-based market distortion using the sales comparison approach. In the recent book *Race Brokers*, Dr. Korver-Glenn details the results of interviews with appraisers, including appraisers of color, regarding the steps they use to value a home based on their interpretation of the sales comparison approach.²⁷ Many of the appraisers in the study “assumed that White buyers were the standard for determining an area’s desirability, with White areas meeting this standard and receiving the highest values and non-White areas falling below the standard.”²⁸ Following is a sample of the feedback from some of the appraisers in the study:

- Allan, a White appraiser, assumed that neighborhoods of color were low-income and poorly maintained, stating: “It’s kind of generalizing, but it seems to me that neighborhoods where I go to [appraise] where there are pockets where they’re very

²⁶ Melissa Narragon, et al., *Racial and Ethnic Valuation Gaps in Home Purchase Appraisals*, Freddie Mac Economic and Housing Research Note (Sept. 2021) (“Freddie Mac Research Note”), <http://www.freddiemac.com/fmac-resources/research/pdf/202109-Note-Appraisal-Gap.pdf>.

²⁷ Elizabeth Korver-Glenn, “Appraising Value,” *Race Brokers: Housing Markets and Segregation in 21st Century Urban America*, at 116-143 (2021).

²⁸ *Id.* at 141.

strictly one ethnicity – it just seems like they’re generally lower priced, and overall the properties aren’t as well kept.”²⁹

- Allan also assumed that values would rise as a neighborhood became more homogenous and whiter, stating: “And then up here [north of Montrose] it’s getting better because of all the Mexican people moving out....”³⁰
- Larry, a White appraiser, stated that an “influx of minorities” to a neighborhood would be perceived by White homeowners as having a “negative impact,” which would cause White homeowners to leave, which would lower home values.³¹
- Carl, a White appraiser, explained how he thought a White prospective homeowner would react to a home being sold by a Black homeowner: “I did [appraise] a house one time over in Riverstone. And you walked inside and it was purple, it was Black. I guess he was very ethnic to his race. I thought when I walked in – because [the homeowner wasn’t] home – but I thought right away when I walked in, this is a Black guy. I think people want to be near their own kind. And I feel 100 percent about that. And I think it’s factual when you look at the racial makeup of neighborhoods.”³²

It seemed that the appraisers in this study did not necessarily feel that they were injecting their own biases into the valuation, but that they felt that, under the sales comparison approach, their valuation should reflect the market’s biased perception of certain neighborhoods, based on that neighborhood’s dominant race or ethnicity.

Dr. Korver-Glenn’s research also raises questions about the limits of the usefulness of increasing diversity in the appraisal profession as a way to minimize bias. One Latino appraiser in her study seemed to fully subscribe to the notion that buyers make their decisions based on their racial identities and, under the sales comparison approach, the market value of a home should follow accordingly. This Latino appraiser stated:

- “I think that ethnicity has something to do with [where a person buys a home]. So a person who’s buying for that market group is buying in [the majority Latino] Second Ward, they probably aren’t going to go to [the majority Black] Fifth Ward and buy a house. Ultimately, I think what’s important to look at is your quality of buyer.”³³
- “If I didn’t buy this house in [the majority Black] Fifth Ward today, what else am I going to buy? Well, so, the demographics are going to dictate that I’m probably going to go to [the majority Black] Kashmere Gardens.... But am I going to go to [the majority Latino] Second Ward? The demographics are completely different, and I don’t think that they directly compete because of that.”³⁴

Thus, although the appraisal profession would benefit from greater diversity, such diversity should not be viewed as a silver bullet that will solve the problem of biased valuations. With little guidance and unfettered discretion, even appraisers of color may believe that the sales comparison approach requires incorporating the market’s perceived racial bias into the valuation.

²⁹ *Id.* at 126.

³⁰ *Id.* at 131.

³¹ *Id.* at 128.

³² *Id.* at 129.

³³ *Id.* at 129.

³⁴ *Id.* at 137.

Recent appraisal bias cases, as well as expert research, also suggest that appraisers may be using their discretion to establish neighborhood boundaries and, in this way, arbitrarily restricting which comparables are used to establish a property's value. The above statements reflected in Dr. Korver-Glenn's research clearly illustrate that some appraisers link the demographics of an area with neighborhood boundaries. The high levels of segregation in many communities likely contribute to perceptions about neighborhood boundaries. But those boundaries are not objective and fixed, and, in some instances, can be changed when the homeowner's race changes. Such was the case with Carlette Duffy, a Black homeowner who asked a White friend to stand in for her when a third appraisal was performed on her home. The price of her home doubled with the third appraisal when comparables closer to her home were used to evaluate her property because the homeowner was perceived to be White.³⁵

In sum, as these individual stories and systemic analyses show, discrimination persists in the appraisal system, which unfairly limits the ability of many borrowers and communities of color to receive a fair valuation of their biggest financial asset and to build wealth and opportunities. Moreover, while many appraisers determine a home's value in a fair and unbiased manner, without rectifying previous historical undervaluation, controlling for discretion, and conducting robust compliance oversight, the opportunity remains for the appraiser to perpetuate discrimination in an active or passive manner. Given the continued bias, the appraisal industry would benefit from a comprehensive review of the current structure, approach, policies, forms, and practices.

Appraisal Discrimination Is One of the Key Drivers of Today's Wealth Gap

These discriminatory policies have created distinct advantages for White families, leading to massive homeownership, wealth, and credit gaps that persist today. In particular, because home value has been the cornerstone of intergenerational wealth in the United States, the historical appraisal practices have had long-term effects in creating some of the current wealth inequalities where White wealth has soared while Black wealth has remained stagnant. In 2019, White family wealth sat at \$188,200 (median) and \$983,400 (mean).³⁶ In contrast, Black families' median and mean net worth were \$24,100 and \$142,500, respectively.³⁷ These wealth disparities, in turn, reflect intergenerational transfer disparities: 29.9 percent of White families have received an inheritance, compared with only 10.1 percent of Black families.³⁸

³⁵ See, *Black Homeowner's Appraisal Doubled After White Friend Stood in for Her*, CNN (May 19, 2021), <https://www.cnn.com/videos/business/2021/05/19/black-woman-says-home-appraisal-increased-after-white-friend-stood-in-for-her-carlette-duffy-newday-vpx.cnn>.

³⁶ Neil Bhutta, Jesse Bricker, Andrew Chang, et al., *Changes in U.S. Family Finances from 2016 to 2019: Evidence from the Survey of Consumer Finances*, 106(5) Fed. Res. Bulletin (Sept. 2020), <https://www.federalreserve.gov/publications/files/scf20.pdf>.

³⁷ *Id.*

³⁸ Neil Bhutta, et al., *Disparities in Wealth by Race and Ethnicity in the 2019 Survey of Consumer Finances*, FEDS Notes, Board of Governors of the Federal Reserve System (Sept. 2020), <https://www.federalreserve.gov/econres/notes/feds-notes/disparities-in-wealth-by-race-and-ethnicity-in-the-2019-survey-of-consumer-finances-20200928.htm>.

In addition to the wealth gap, undervalued home appraisals can have other significant consequences. Inaccurate appraisals can result in distortions in the loan-to-value ratio and in cancelled home sales contracts or refinancing offers. Finally, low appraisals can pose significant challenges for using home equity for advancement opportunities, such as payment for college tuition or security for small business loans. Accurate home valuations are critically important to the advancement and security of people and communities of color.

Appraisals Can Also Raise the Unique Challenge of Overvaluation

While the vast majority of recent instances of appraisal bias affecting communities of color has been comprised of an undervaluation of properties, there have also been cases of harmful, excessive, and abusive overvaluation of properties. That is, the discretion in the appraisal system can be used to overvalue homes, target people of color for predatory loans, and further rob communities of color of wealth. Specifically, many subprime loans were based on appraisals that were highly inflated resulting in homeowners being upside down in their mortgages. In many instances, the subprime home loan involved some collusion between loan originators and appraisers.³⁹ Even ten years after the Great Recession, six million homeowners still owed more on their mortgage loans than what their properties were valued.⁴⁰ This problem disproportionately impacted communities of color who were much more likely to receive subprime loans than their White counterparts⁴¹ and were also more likely to receive subprime loans when they qualified for prime mortgages.⁴²

The overvaluation of appraisals has a deleterious impact on consumers and communities because it is often tied to abusive and excessive fees and equity stripping. It serves to lock borrowers in unfair and often unsustainable loans, prohibits the ability of consumers to refinance into safer and more affordable products, limits people's ability to sell their homes, and often leads to other predatory practices.

³⁹ See, e.g., National Consumer Law Center and National Association of Consumer Advocates, Comment Letter to the Federal Reserve, *Interim Final Rule on Appraiser Independence Standards*, https://www.nclc.org/images/pdf/foreclosure_mortgage/predatory_mortgage_lending/comments-appraisal-independence.pdf.

⁴⁰ NPR, *A Decade Out from The Mortgage Crisis, Former Homeowners Still Grasp for Stability*, (May 22, 2016), <https://www.npr.org/2016/05/22/479038232/a-decade-out-from-the-mortgage-crisis-former-homeowners-still-grasp-for-stabilit>.

⁴¹ Debbie Gruenstein Bocian, Keith Ernst, and Wei Li, *Unfair Lending: The Effect of Race and Ethnicity on the Price of Subprime Mortgages*, Center for Responsible Lending (May 31, 2006), https://www.responsiblelending.org/mortgage-lending/research-analysis/rr011-Unfair_Lending-0506.pdf.

⁴² See, e.g., DOJ, *Justice Department Reaches \$335 Million Settlement to Resolve Allegations of Lending Discrimination by Countrywide Financial Corporation* (Dec. 21, 2011), <https://www.justice.gov/opa/pr/justice-department-reaches-335-million-settlement-resolve-allegations-lending-discrimination>.

The Appraiser Workforce Suffers from a Lack of Diversity

A diverse workforce of appraisers and inspectors may help mitigate the fact that the current appraisal system undervalues homes for borrowers and communities of color. That is, appraisers from diverse communities may be better prepared to value the community appropriately. Unfortunately, the appraisal profession does not currently reflect the racial composition of the U.S. According to the U.S. Bureau of Labor Statistics, about 96.5% of property appraisers are White and about 70% are men.⁴³

Increasing the diversity of the appraiser workforce is likely to lead to better outcomes for all,⁴⁴ as well as help solve the problem of appraiser shortages across the country.⁴⁵ A diverse workforce may be less susceptible to unconscious or intentional bias based on the race or ethnicity of the borrower or community, and may be better prepared to train others to spot such bias. Such a workforce may better understand value based on objective factors, such as housing features and neighborhood amenities, rather than preconceived or historical notions of value based on race. Moreover, research has shown that diverse teams are more innovative and productive⁴⁶ and that companies with more diversity are more profitable.⁴⁷ Finally, people with diverse backgrounds and experiences bring unique and important perspectives to understanding different segments of a market.⁴⁸

⁴³ See U.S. Bureau of Labor Statistics, *Labor Force Statistics from the Current Population Survey*, (Jan. 22, 2021), <https://www.bls.gov/cps/cpsaat11.htm>. See also, Cherelle L. Parker, Ira Goldstein, and Gregory D. Squires, *Home Appraisals Drive America's Racial Wealth Gap - 95% of Philly's Appraisers Are White*, PBS WHYY (Feb. 25, 2021), <https://whyy.org/articles/home-appraisals-drive-americas-racial-wealth-gap-95-of-phillys-appraisers-are-white/>.

⁴⁴ See, e.g., Michael Neal and Peter J. Mattingly, *Increasing Diversity in the Appraisal Profession Combined with Short-Term Solutions Can Help Address Valuation Bias for Homeowners of Color*, Urban Institute (July 1, 2021), <https://www.urban.org/urban-wire/increasing-diversity-appraisal-profession-combined-short-term-solutions-can-help-address-valuation-bias-homeowners-color>.

⁴⁵ See Jeff Ostrowsky, *How Big Mortgage Lenders Hope to Clear the Appraisal Logjam*, Bankrate.com (Oct. 27, 2021), <https://www.bankrate.com/mortgages/fannie-freddie-expand-desktop-appraisals/>.

⁴⁶ See, e.g., John Rampton, *Why You Need Diversity on Your Team and 8 Ways to Build It*, Entrepreneur (Sept. 6, 2019), <https://www.entrepreneur.com/article/338663>.

⁴⁷ See, e.g., Patrick Kline, Evan Rose, and Christopher Walers, *Systemic Discrimination among Large U.S. Employers*, National Bureau of Economic Research (Aug. 2021), <http://www.nber.org/papers/w29053> (finding that racially discriminatory hiring practices among firms are negatively correlated with firm profitability); David Rock and Heidi Grant, *Why Diverse Team Are Smarter*, Harvard Business Review (Nov. 4, 2016), <https://hbr.org/2016/11/why-diverse-teams-are-smarter> (reporting that companies in the top quartile for ethnic and racial diversity in management were 35% more likely to have financial returns above their industry mean, and those in the top quartile for gender diversity were 15% more likely to have returns above the industry mean); Cedric Herring, *Does Diversity Pay? Race, Gender, and the Business Case for Diversity*, American Sociological Review (2009), <https://www.jstor.org/stable/27736058> (finding that among for-profit business organizations, racial diversity in the workforce is associated with positive performance indicators like increased sales revenue, greater market share, and greater relative profits).

⁴⁸ See, e.g., Inioluwa Deborah Raji et al., *Closing the AI Accountability Gap: Defining an End-to-End Framework for Internal Algorithmic Auditing*, Conference on Fairness, Accountability, and Transparency 33, 39 (2020), <https://dl.acm.org/doi/pdf/10.1145/3351095.3372873> (stressing the importance of "standpoint diversity" as algorithm development implicitly encodes developer assumptions of which they may not be aware).

B. Civil Rights Laws and Regulations Applicable to the Appraisal Industry

Federal and state civil rights laws prohibit home appraisal discrimination on the basis of race, color, religion, national origin, sex, disability, familial status, and other protected classes. For almost 30 years, courts have held that appraisal discrimination can violate federal and state civil rights laws.⁴⁹

In the mid-1970s, the DOJ successfully challenged the use of appraisal standards and training materials that steered appraisers to lower values in racially mixed neighborhoods.⁵⁰ The resulting settlement agreement between the DOJ and the American Institute of Real Estate Appraisers called for the adoption of several policy statements, including one in repudiation of the so-called “principle of conformity,” that notes: “it is improper to base a conclusion or opinion of value upon the premise that the racial, ethnic, or religious homogeneity of the inhabitants of an area or a property is necessary for maximum value.”⁵¹

Under existing civil rights laws, cases brought against appraisers, appraisal firms, and lenders have alleged discrimination based on the race and other protected characteristics of both individual borrowers and the neighborhoods where the appraised properties are located.

The Fair Housing Act and the HUD Regulation

The principal federal statute that prohibits appraisal discrimination is Title VIII of the Civil Rights Act of 1968 as amended by the Fair Housing Amendments Act of 1988 (the “Fair Housing Act”), which bars discrimination in home appraisals and other housing-related transactions on the basis of race, color, religion, national origin, sex, disability, and familial status (known as “prohibited bases,” “protected classes,” or “protected characteristics”).⁵²

- The Fair Housing Act makes it unlawful for “any person or other entity whose business includes engaging in residential real estate-related transactions to discriminate against any person in making available such a transaction or in the terms or conditions of such transaction” on the basis of any protected class under the statute.⁵³ The term “residential real estate-related transaction” is defined in the statute to include “the appraising of residential real property.”⁵⁴
- Courts have relied on other provisions of the Fair Housing Act to prohibit discrimination in the appraisal industry, including provisions associated with housing-related services that “otherwise make unavailable...a dwelling” or that discriminate in the “terms,

⁴⁹ See, e.g., *Stephoe v. Savings of America*, 800 F. Supp. 1542 (N.D. Ohio 1992).

⁵⁰ *United States v. American Institute of Real Estate Appraisers*, 442 F. Supp. 1072 (N.D. Ill. 1977), appeal dismissed, 590 F.2d 242 (7th Cir. 1978). Additional information about the scope of this settlement is detailed above.

⁵¹ *Id.* at 1077.

⁵² 42 U.S.C. § 3601, *et seq.*

⁵³ *Id.* at § 3605(a).

⁵⁴ *Id.* at § 3605(b).

conditions, or privileges of sale or rental of a dwelling.”⁵⁵ Courts have observed that “an appraisal sufficient to support a loan request is a necessary condition precedent to a lending institution making a home loan.”⁵⁶ Because an appraisal is a critical service associated with securing a home loan, a discriminatory appraisal may lead to the denial of a home, thereby making housing “unavailable.” Appraisals may be regarded as a service provided in connection with the sale of a home, such that discriminatory appraisal practices may result in unlawful differences in treatment.

- Implementing regulations under the Fair Housing Act, promulgated by HUD , broadly define the term “appraisal” to mean “an estimate or opinion of the value of a specified residential real property made in a business context in connection with the sale, rental, financing or refinancing of a dwelling or in connection with any activity that otherwise affects the availability of a residential real estate-related transaction, whether the appraisal is oral or written, or transmitted formally or informally. The appraisal includes all written comments and other documents submitted as support for the estimate or opinion of value.”⁵⁷
- According to these regulations, the Fair Housing Act squarely bars persons and entities engaged in appraising residential real property from discriminating against any person “in making available such services, or in the performance of such services, because of race, color, religion, sex, handicap, familial status, or national origin.”⁵⁸ The regulation also states that prohibited practices include “[u]sing an appraisal of residential real property in connection with the sale, rental, or financing of any dwelling where the person knows or reasonably should know that the appraisal improperly takes into consideration race, color, religion, sex, handicap, familial status, or national origin.”⁵⁹
- This prohibition against discrimination as it expressly applies to appraisal services was added to the Fair Housing Act in 1988, essentially clarifying the existing scope of the Fair Housing Act as the courts had come to interpret its application in the appraisal industry.⁶⁰ The update also included a section titled “Appraisal Exemption,” which notes that nothing in these mandates prohibits a person “engaged in the business of furnishing appraisals of real property to take into consideration factors other than race, color, religion, national origin, sex handicap, or familial status.”⁶¹

The Equal Credit Opportunity Act and the CFPB’s Regulation B

Appraisal-related services are necessary in the provision of housing-related credit services. Accordingly, a discriminatory appraisal that results in the denial of home financing may also violate the Equal Credit Opportunity Act of 1974 (“ECOA”), which prohibits creditors from

⁵⁵ *Id.* at § 3604(a) and § 3604(b).

⁵⁶ *Steptoe v. Savings of America*, 800 F. Supp. 1542, 1546 (N.D. Ohio 1992).

⁵⁷ 24 C.F.R. § 100.135(b).

⁵⁸ 24 C.F.R. § 100.135(a).

⁵⁹ 24 C.F.R. § 100.135(d)(1).

⁶⁰ Robert Schwemm, *Housing Discrimination and the Appraisal Industry*, in *Mortgage, Lending, Racial Discrimination, and Federal Policy* (John Goering and Ron Wienk eds., 1996), <https://www.fhcci.org/wp-content/uploads/2021/05/Schwemm-Housing-Discrimination-Appraisal-1996.pdf>.

⁶¹ 42 U.S.C. § 3605(c).

discriminating on the basis of race, color, religion, national origin, sex, marital status, age, and source of income (known as “prohibited bases,” “protected classes,” or “protected characteristics”).⁶² In 2013, the Consumer Financial Protection Bureau (“CFPB”) amended Regulation B, which implements the ECOA, by requiring creditors to provide to applicants free copies of all appraisals and other written valuations developed in connection with an application for a loan to be secured by a first lien on a dwelling, and to notify applicants in writing that copies of appraisals will be provided to them promptly.⁶³ Notably, these provisions of ECOA and Regulation B only apply to the “creditor” and only if the appraisal was conducted in connection with the issuance of credit.

The Civil Rights Act of 1866

Racial discrimination in the appraisal of housing may also violate the Civil Rights Act of 1866.⁶⁴ Section 1981 of this law, among other things, guarantees to all persons within the jurisdiction of the United States the same right as White citizens to make and enforce contracts. Section 1982 of this law provides all citizens with the same right as is enjoyed by White citizens to purchase, lease, sell, hold, and convey real and personal property. The Civil Rights Act of 1866 generally applies only to intentional racial discrimination, but the Supreme Court has expanded the scope of the Act to include certain types of ethnic discrimination. In conjunction with the Fair Housing Act, this law has been used in the courts to challenge appraisal discrimination.

State Laws and Other Prohibited Bases

In addition to these federal laws, most states and many localities have statutes prohibiting discrimination in housing-related transactions, including home appraisals.⁶⁵ Moreover, compliance with federal and state fair housing laws requires understanding each prohibited basis. With respect to state law, while the theories of discrimination generally are the same, the prohibited bases may be broader. For example, the state of California prohibits discrimination in appraisals on the basis of gender expression and military status.⁶⁶ Similarly, while rare, the interpretation of a prohibited basis under federal law may evolve. For example, based on a recent Supreme Court holding in the employment context, the CFPB and HUD have recently interpreted the ECOA and the Fair Housing Act’s prohibition on discrimination on the basis of “sex” to include discrimination on the basis of sexual orientation and gender identity.⁶⁷

⁶² 15 U.S.C. § 1619(a); see e.g., *Cartwright v. American Savings & Loan Ass’n*, 880 F.2d 912, 925-27 (7th Cir. 1989).

⁶³ CFPB, *Disclosure and Delivery Requirements for Copies of Appraisals and Other Written Valuations Under the Equal Credit Opportunity Act (Regulation B)*, 78 Fed. Reg. 7215 (Jan. 31, 2013) (codified at 12 C.F.R. § 1002).

⁶⁴ 42 U.S.C. §§ 1981-1982; See, e.g., *Steptoe v. Savings of America*, supra, 800 F. Supp. at 1547.

⁶⁵ A recent survey of state fair housing laws is available here: <http://lawatlas.org/datasets/state-fair-housing-protections-1498143743>.

⁶⁶ Cal. Business and Professions Code § 11424(a).

⁶⁷ See CFPB, *Equal Credit Opportunity (Regulation B); Discrimination on the Bases of Sexual Orientation and Gender Identity, Interpretive Rule*, 86 Fed. Reg. 14363 (March 16, 2021), <https://www.govinfo.gov/content/pkg/FR-2021-03-16/pdf/2021-05233.pdf>; HUD, *Implementation of Executive Order 13988 on the Enforcement of the Fair Housing Act* (Feb. 11, 2021), https://www.hud.gov/sites/dfiles/PA/documents/HUD_Memo_EO13988.pdf.

Theories of Proof

Courts have relied on different theories of proof when assessing claims of discrimination under civil rights statutes. The primary means of establishing discriminatory conduct under the Fair Housing Act include disparate treatment (through either direct evidence or circumstantial evidence), or disparate impact.⁶⁸

Disparate Treatment

Both the Fair Housing Act and the ECOA prohibit explicit intentional or differential discrimination, known as “disparate treatment discrimination.” Although this form of discrimination is often referred to as “intentional discrimination,” the law does not require proof that the lender or appraiser acted with malice, but that they acted in part on the basis of the alleged discriminatory reason rather than on some other, non-prohibited consideration.⁶⁹

Direct Evidence: One means of establishing disparate treatment discrimination is through direct evidence. For example, disparate treatment discrimination may be established through evidence of instances where a home appraiser makes express discriminatory statements when performing appraisal services or utilizes policies that, in their terms, limit or otherwise restrict services to individuals or neighborhoods on the basis of a protected class.

- *Example*: A bank provides appraisers with written guidelines requiring the appraisers to assign a higher value to mobile home parks that are for childless adults than to mobile home parks that allow families. This policy would likely violate the Fair Housing Act’s prohibition against discrimination on the basis of familial status.⁷⁰
- *Example*: An appraiser indicates on an appraisal form that a deduction has been made with respect to the location of a property due to its close proximity to a group home for persons with disabilities. This policy would likely violate the Fair Housing Act’s prohibition on discrimination on the basis of disability.

Circumstantial (or Comparative) Evidence: Absent direct discriminatory statements or policies, disparate treatment discrimination may be established through an analysis of relevant circumstantial (or comparative) evidence. One means of using circumstantial evidence to prove disparate treatment discrimination in home appraisals is by examining divergent activities from otherwise standard business practices, such as soliciting information from only some prospective borrowers on appropriate comparable sales on a prohibited basis.⁷¹ An appraiser’s seemingly race-neutral policy may be unequally applied, resulting in different treatment based on race or some other protected characteristics.

⁶⁸ Based on legal precedent, the federal financial regulators have also based fair lending risk assessments on these theories of discrimination. See FFIEC, *Interagency Fair Lending Examination Procedures* (2009), <https://www.ffiec.gov/pdf/fairlend.pdf>.

⁶⁹ See 12 C.F.R. Part 1002, 4(a)-1: “Disparate treatment on a prohibited basis is illegal whether or not it results from a conscious intent to discriminate.”

⁷⁰ See OCC, *Appeal of Potential Violations of the Fair Housing Act* (Second Quarter 1998), <https://www.occ.gov/topics/supervision-and-examination/dispute-resolution/bank-appeals/summaries/files/appeal-potential-violation-fha-q2-1998.html>.

⁷¹ See, e.g., *Cartwright v. American Savings & Loan Ass’n*, supra, 880 F.2d at 912.

Some cases alleging disparate treatment discrimination hinge on a loan denial based on an undervaluation of a prospective borrower's home for purchase where the appraisal may have been based on racial considerations.⁷² Cases involving these claims rely on testimony that the challenged appraisal was unjustifiably undervalued and improperly done. One court identified the elements of a *prima facie* case of appraisal discrimination involving the race of the neighborhood to include: (1) that the home in question is in a community of color; (2) that a loan application for the home was made; (3) that an independent appraisal determined that the home in question was equal to the sales price; (4) that the buyers were creditworthy; and (5) that the loan was denied.⁷³

- *Example:* An appraisal management company allows appraisers the discretion to select the distance from the subject property from which the appraiser will select comparable homes. For refinancings, several appraisers who work mainly in majority White census tracts select comparable homes within a small radius of the subject property for White homeowners, but select comparable homes in majority Black census tracts that are a greater distance from the subject property for Black homeowners. This results in lower valuations for homes owned by Black homeowners. These actions would likely violate the Fair Housing Act's and the ECOA's prohibition on discrimination on the basis of race.⁷⁴
- *Example:* An appraiser works in majority White census tracts and majority Latino census tracts. For home purchase transactions, the appraiser routinely determines a valuation that is at or above the contract price for homes in majority White census tracts, but routinely determines a valuation that is below the contract price for comparable homes in majority Latino census tracts. These actions would likely violate the Fair Housing Act's and the ECOA's prohibition on discrimination on the basis of national origin.⁷⁵
- *Example:* A lender conducts a study of the appraisals from a certain appraisal management company with whom it regularly does business. After controlling for all of the home and neighborhood characteristics that the company uses to determine value, the lender finds that there is still an unexplained, statistically significant disparity between the home values in majority White census tracts and those in majority Black or Latino census tracts. These results provide evidence of a likely violation of the Fair Housing Act's and the ECOA's prohibition on discrimination on the basis of race and national origin.⁷⁶

⁷² See, e.g., *Thomas v. First Federal Savings Bank of Indiana*, 653 F. Supp. 1330, 1339 (N.D. Ind. 1987); *Steptoe v. Savings of America*, 800 F. Supp. at 1542.

⁷³ *Id.* at 1546-47.

⁷⁴ See, e.g., *United States v. Countrywide Financial Corp. et al.*, CV11-10540-PSG (C.D. Cal. Complaint filed Dec. 21, 2011) at Paragraph 48,

<https://www.justice.gov/sites/default/files/crt/legacy/2011/12/21/countrywidecomp.pdf>. The settlement resolved allegations that, among other things, the lender "had knowledge that the subjective and unguided discretion that it granted to loan officers and other [lender] employees in its retail loan policies and practices was being exercised in a manner that discriminated against Hispanic and African-American borrowers, but continued to implement its policies and practices with that knowledge."

⁷⁵ See *id.* Under the Fair Housing Act and the ECOA, the term "national origin" includes discrimination on the basis of ethnicity, such as Latino individuals or neighborhoods.

⁷⁶ See *id.*

Disparate Impact

Under the “disparate impact” theory of discrimination, home appraisal services may be performed in a discriminatory manner if they employ neutral policies that have an unjustified discriminatory effect. In 2015, the U.S. Supreme Court upheld broad consensus among the circuit courts in its *Texas Department of Housing and Community Affairs v. Inclusive Communities Project* decision holding that disparate impact is a viable means for proving discrimination under the Fair Housing Act.⁷⁷ Disparate impact claims arise when there is a policy that is otherwise non-discriminatory on its face, but when put into practice has an unjustified discriminatory effect on the basis of a protected class. Disparate impact claims may be brought in conjunction with intentional discrimination claims but can occur absent any showing of intentional discrimination.

To establish a case of disparate impact liability in the appraisal context, a prospective borrower first must identify a specific policy or practice that has a discriminatory impact on the basis of race or some other prohibited basis.⁷⁸ Often, statistical evidence is used to show the discriminatory effect.⁷⁹ Second, the lender or appraiser must then defend the challenged policy by showing that it serves some legitimate, nondiscriminatory purpose. Finally, if a legitimate justification is identified, the prospective borrower may still establish a policy is unlawful if the borrower identifies a less discriminatory alternative for achieving the stated purpose.

- *Example:* An appraisal management company has a policy of not conducting any appraisals for homes valued at less than \$100,000. Although this policy does not explicitly mention race or national origin, the loan amount threshold has a disproportionate adverse impact on borrowers of color and on borrowers in neighborhoods of color. Assuming the appraisal management company cannot provide a legitimate, non-discriminatory purpose for the policy (or that a plaintiff can provide a less discriminatory alternative to the policy), this policy likely would violate the Fair Housing Act’s and the ECOA’s prohibition on discrimination on the basis of race and national origin.⁸⁰

⁷⁷ *Texas Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project*, 135 S. Ct. 2507 (2015).

⁷⁸ HUD, *Implementation of the Fair Housing Act’s Discriminatory Effects Standard*, 78 Fed. Reg. 11460 (Feb. 15, 2013) (codified at 24 C.F.R. § 100.500). See also HUD, *Proposed Rule: Reinstatement of HUD’s Discriminatory Effects Standard*, 86 Fed. Reg. 33590 (June 25, 2021) (“HUD 2021 Disparate Impact Proposed Rule”) (proposing to reinstate HUD’s 2013 rule).

⁷⁹ See, e.g., *Hanson v. Veterans Administration*, 800 F.2d 1381, 1388-89 (5th Cir. 1986).

⁸⁰ See, e.g., HUD, *Conciliation Agreement between National Community Reinvestment Coalition and SouthStar Funding LLC*, Sept. 25, 2006), <https://archives.hud.gov/news/2006/pr06-120.cfm>. The conciliation agreement resolved allegations that SouthStar Funding LLC discriminated against Blacks and Latinos by refusing to make loans on any row house valued at less than \$100,000 and on all row houses in Baltimore.

Increase in Appraisal Discrimination Enforcement

The limited set of published court decisions in cases alleging appraisal discrimination suggests that proving such claims may be difficult, often involving the use of statistical analysis and expert testimony. However, there has been a recent uptick in appraisal discrimination claims being filed with HUD and in court.⁸¹

- In March 2020, HUD approved a conciliation agreement between a Black woman and JPMorgan Chase Bank.⁸² The complainant alleged that JPMorgan Chase discriminated on the basis of race in violation of the Fair Housing Act by relying on an appraisal that valued her home at an amount lower than its actual value because of her race. JPMorgan Chase agreed to revise its Reconsideration of Value (“ROV”) process – the process followed when borrowers raise challenges concerning the accuracy of appraisals – to ensure that borrowers are appropriately informed of the ROV process as well as of their right and ability to raise concerns about discrimination in appraisals. The bank further agreed that its home lending advisors and client care specialists would receive training on fair lending issues related to appraisals and on the revised ROV process. As part of the conciliation agreement, JPMorgan Chase also agreed to pay the complainant \$50,000.

This case involves a lender, which is a reminder that the general rule followed by the federal courts is that the duty not to discriminate is non-delegable.⁸³ Under the Fair Housing Act, a corporation and its officers can be responsible for the discriminatory acts of a subordinate employee even though those acts were neither directed nor authorized.⁸⁴ In addition, the Fair Housing Act imposes liability in accordance with traditional agency principles, so in limited circumstances, a lender may be liable for the wrongdoing of an appraiser, even if the appraiser is an independent contractor.

⁸¹ See e.g., Marilyn Odendahl, *HUD Complaints Allege Racial Bias in Indianapolis Home Appraisals*, The Indiana Lawyer (May 4, 2021), <https://www.theindianalawyer.com/articles/hud-complaints-allege-racial-bias-in-indianapolis-home-appraisals>; see also, Julian Glover, *HUD Investigates \$439k Difference in Oakland Homeowner’s Appraisals*, ABC-7 News (July 22, 2021), <https://abc7news.com/home-appraisal-oakland-homeowner-too-low-discrimination/10902427/>.

⁸² HUD, *Conciliation Agreement between Complainant and JPMorgan Chase Bank, N.A.*, FHEO No. 05-21-0635-8 (HUD March 8, 2021), https://www.hud.gov/press/press_releases_media_advisories/hud_no_21_037.

⁸³ See, e.g., *Alexander v. Riga*, 208 F.3d 419, 433 (3rd Cir. 2000).

⁸⁴ See, e.g., *Saunders v. General Services*, 659 F. Supp. 1042, 1059 (E.D. Va. 1987).

Part II: Analysis and Recommendations

C. Questions about the Governance of the Appraisal Industry

Overview of the Appraisal Regulatory System

The governance of the appraisal industry is overseen by a complex interplay of federal, state, and private entities. This structure was largely developed in response to the savings and loan crisis of the 1980s, which among other things, resulted in Congress passing the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (“FIRREA”).⁸⁵ Title XI of FIRREA set forth many aspects of the appraisal industry governance that are in effect today. Following is a description of each entity and its current role in the governance of the appraisal industry.

⁸⁵ 12 U.S.C. §§ 3331-3356 (as amended by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (“Dodd-Frank Act”), and the Economic Growth, Regulatory Relief, and Consumer Protection Act of 2018). In addition, the U.S. Department of Housing and Urban Development (“HUD”) sets appraisal requirements for FHA loans, the Federal Housing Finance Agency (“FHFA”) reviews Fannie Mae and Freddie Mac’s appraisal requirements, and the Consumer Financial Protection Bureau (“CFPB”) issues valuation independence rules.

Governance of the Appraisal Industry

ENTITY	TYPE AND DESCRIPTION	GOVERNANCE ROLE
Appraisal Subcommittee ("ASC")	<ul style="list-style-type: none"> • Federal government agency • The ASC's board consists of members of the Federal Financial Institutions Examination Council ("FFIEC") • Congress created the Appraisal Subcommittee in 1989 through FIRREA 	<ul style="list-style-type: none"> • Monitor and review the practices of The Appraisal Foundation (no enforcement authority) • Supervise and enforce the states' compliance with Title XI of FIRREA • Monitor the requirements established by the federal financial institution regulatory agencies • Maintain a national registry of appraisers and appraisal management companies
The Appraisal Foundation ("TAF")	<ul style="list-style-type: none"> • Private entity • Established in 1987 as a non-profit organization under the laws of Illinois • Has three boards: <ul style="list-style-type: none"> ○ Board of Trustees ("BOT") ○ Appraisal Standards Board ("ASB") ○ Appraiser Qualifications Board ("AQB") 	<ul style="list-style-type: none"> • The Board of Trustees is the governance body for The Appraisal Foundation. It provides funding and financial oversight for and appoints members to The Appraisal Standards Board and The Appraiser Qualifications Board • The Appraisal Standards Board promulgates the USPAP Standards, which are the minimum appraisal standards that must be adopted by the states • The Appraiser Qualifications Board promulgates the Appraiser Criteria, which are the minimum education, experience, and examination requirements that must be adopted by the states
Federal Financial Institution Regulatory Agencies	<ul style="list-style-type: none"> • Federal government agencies: Federal Deposit Insurance Corporation ("FDIC"); Federal Reserve Board; National Credit Union Administration ("NCUA"); Office of the Comptroller of the Currency ("OCC"); and formerly the Office of Thrift Supervision ("OTS," now defunct) 	<ul style="list-style-type: none"> • Each agency issues rules for federally related transactions, which require, among other things, that real estate appraisals must: <ul style="list-style-type: none"> ○ Be performed in accordance with the USPAP Standards, and ○ Must be subject to review for compliance with the USPAP Standards
State Government	<ul style="list-style-type: none"> • State government agencies 	<ul style="list-style-type: none"> • License and certify appraisers • Ensure compliance with state and USPAP Standards • Register appraisal management companies and enforce requirements

The Appraisal Foundation's Legal Authority Is Not Clear

Although the appraisal governance structure has been in place for over 30 years, The Appraisal Foundation's legal authority is not clear and raises several complex legal questions. In order to build the public's trust in the valuation of critical assets, these questions merit further in-depth review.

Does the FIRREA statute provide The Appraisal Foundation with clear legal authority to promulgate the USPAP Standards and the Appraiser Criteria?

Although many assume that The Appraisal Foundation's authority is derived from FIRREA, the text of the statute is not clear. On its website, The Appraisal Foundation states: "In 1989, the U.S. Congress enacted the Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA), which authorized The Appraisal Foundation (Foundation) as the source of appraisal

standards and appraiser qualifications.” However, FIRREA only states that the federal financial institution regulatory agencies must require certain minimum criteria, including that appraisals for federally related transactions comply with standards set by the Appraisal Standards Board of The Appraisal Foundation. FIRREA also states that these appraisals be performed by appraisers who meet the requirements set by the Appraiser Qualifications Board of The Appraisal Foundation. There is no direct express grant in FIRREA of power to these boards. To illustrate the point, below is a chart showing the Dodd-Frank Act’s clear delegation of rulemaking authority to the CFPB as compared to FIRREA’s references to The Appraisal Foundation.

Example: Dodd-Frank Act Authority v. FIRREA

STATUTE	TEXT
Dodd-Frank Act 12 USC § 5512	“(b)Rulemaking, orders, and guidance. (1) General authority. The Director [of the CFPB] may prescribe rules and issue orders and guidance, as may be necessary or appropriate to enable the Bureau to administer and carry out the purposes and objectives of the Federal consumer financial laws, and to prevent evasions thereof.”
FIRREA 12 USC § 3339	“Functions of Federal financial institutions regulatory agencies relating to appraisal standards...These rules [prescribed by the Federal financial institution regulatory agencies and the Resolution Trust Corporation] shall require, at a minimum-- <ol style="list-style-type: none"> (1) That real estate appraisals be performed in accordance with generally accepted appraisal standards as evidenced by the appraisal standards promulgated by the Appraisal Standards Board of the Appraisal Foundation; (2) That such appraisals shall be written appraisals; and (3) That such appraisals shall be subject to appropriate review for compliance with the Uniform Standards of Professional Appraisal Practice....”
FIRREA 12 USC § 3345	“Certification and licensing requirements... <p>(b) Restriction. No individual shall be a State certified real estate appraiser under this section unless such individual has achieved a passing grade upon a suitable examination administered by a State or territory that is consistent with and equivalent to the Uniform State Certification Examination issued or endorsed by the Appraiser Qualification Board of the Appraisal Foundation.</p> <p>(c) “State licensed appraiser” defined. As used in this section, the term “State licensed appraiser” means an individual who has satisfied the requirements for State licensing in a State or territory whose criteria for the licensing of a real estate appraiser currently meet or exceed the minimum criteria issued by the Appraisal Qualifications Board of The Appraisal Foundation for the licensing of real estate appraisers...</p> <p>(e) Minimum qualification requirements. Any requirements established for individuals in the position of ‘Trainee Appraiser’ and ‘Supervisory Appraiser’ shall meet or exceed the minimum qualification requirements of the Appraiser Qualifications Board of The Appraisal Foundation....”</p>

If The Appraisal Foundation has the legal authority to promulgate the USPAP Standards and the Appraiser Criteria based on FIRREA, is that legal authority limited to “federally related transactions”?

If The Appraisal Foundation’s authority is based on FIRREA, then that authority may need to be read in the context of FIRREA, which is limited to “federally-related transactions.” From the outset, Title XI of FIRREA states that its purpose “is to provide that Federal financial and public policy interests in real estate related 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.”⁸⁶ (emphasis added) Although the definition of a “federally related transaction” is fairly complex, the key takeaway is that it covers only a small portion of residential mortgage transactions because the definition exempts several types of transactions, including any transaction that qualifies for sale to a U.S. government agency or U.S. government-sponsored agency.⁸⁷ Given that the vast majority of residential mortgage transactions qualify for sale to Fannie Mae or Freddie Mac, federally related transactions are only a small part of the mortgage market. According to the Appraisal Institute: “a significant percentage of the transactions engaged in by financial institutions do not require appraisals and are not federally related transactions.”⁸⁸ The narrow coverage of the term “federally related transactions” raises questions about the extent of The Appraisal Foundation’s authority if that authority is based on FIRREA.

Is The Appraisal Foundation an “agency” with notice and comment obligations under the Administrative Procedures Act?

If The Appraisal Foundation’s powers are based on a delegation of authority from Congress under FIRREA, then this raises questions about whether The Appraisal Foundation is an “agency” with notice and comment obligations under the Administrative Procedures Act. Congress provides agencies with considerable power when it delegates to them the authority to implement statutes through rules that have the force of law and that often have important implications for industry and consumers. As a check on these powers, Congress has passed the Administrative Procedures Act⁸⁹ and other laws to impose certain procedural protections and to ensure the opportunity for public participation and review.

It is not clear whether The Appraisal Foundation would qualify as an “agency” for purposes of the Administrative Procedures Act. The act defines “agency” as “**each authority of the Government of the United States**, whether or not it is within or subject to review by another agency....”⁹⁰ (emphasis added) The question of whether The Appraisal Foundation is an “authority of the Government of the United States” is a complex question as the courts have not established a definitive test. For example, an entity with purely advisory functions would probably not qualify as an “authority.”⁹¹ On the other hand, an entity that performs important governmental functions and exercises powers entrusted to it by the U.S. government may qualify as an “agency.”⁹² Thus, there may be an argument that The Appraisal Foundation is an

⁸⁶ 12 U.S.C. § 3331 (emphasis added). See also GAO, *Regulatory Programs: Opportunities to Enhance Oversight of the Real Estate Appraisal Industry*, GAO-03-404, at 11 (May 2003), <https://www.gao.gov/assets/gao-03-404.pdf> (stating that “[u]nder Title XI, these minimum standards apply to all federally related transactions”). The GAO’s report also states that FIRREA only requires the states to adhere to the Appraiser Criteria for certified residential and certified general appraisers.

⁸⁷ 12 U.S.C. § 3350(4); See, e.g., FDIC Regulation, 12 C.F.R. § 323.2(g) and 323.3(a)(10)(i).

⁸⁸ Appraisal Institute, *Federally Related Transactions* (July 17, 2018), <http://appraisalinstitutedc.org/pdf/AI-FederallyRelatedTransactions.pdf>.

⁸⁹ 5 U.S.C. §§ 551-559.

⁹⁰ 5 U.S.C. § 551(1) (emphasis added).

⁹¹ See, e.g., *Washington Research Project, Inc. v. Dep’t of Health, Ed. & Welfare*, 504 F.2d 238, 248 (D.C. Cir. 1974). See generally, Jared P. Cole and Daniel T. Shedd, *Statutory Definitions of “Agency” and Characteristics of Agency Independence*, Congressional Research Services, R43562 (May 22, 2014), <https://sqp.fas.org/crs/misc/R43562.pdf>.

⁹² See, e.g., *Flight Int’l Group v. Fed. Reserve Bank*, 583 F. Supp. 674, 678 (N.D. Ga. 1984).

“agency” because its functions are not purely advisory and it does appear to exercise the important governmental functions of setting minimum standards for appraisals and appraisers.

Even if The Appraisal Foundation does not have notice and comment obligations under the Administrative Procedures Act because it is not an “agency,” FIRREA may still impose those responsibilities. FIRREA states:

*Procedures for establishing appraisal standards and requiring use of certified and licensed appraisers. **Appraisal standards** and requirements for using State certified and licensed appraisers in federally related transactions pursuant to this chapter **shall be prescribed in accordance with procedures set forth in section 553 of title 5 [of the Administrative Procedures Act]**, including the publication of notice and receipt of written comments or the holding of public hearings with respect to any standards or requirements proposed to be established.⁹³ (emphasis added)*

That is, the statute does not limit the Administrative Procedures Act requirements to the federal financial institution regulatory agencies, but rather simply states that “[a]ppraisal standards...shall be prescribed in accordance with” the Administrative Procedures Act. Accordingly, there is an argument that the promulgation of the Appraisal Standards should follow the procedures set forth in the Administrative Procedures Act, which would include:

- Placing a notice of the proposed rulemaking in the Federal Register, which includes:
 - A statement of the time, place, and nature of the public rulemaking;
 - Reference to the legal authority under which the rule is proposed; and
 - Either the terms or the substance of the proposed rule or a description of the subjects and issues involved;
- Giving interested persons an opportunity to participate in the rulemaking through submission of written data, views, or arguments;
- Considering the relevant matter presented;
- Publishing the rule 30 days before its effective date; and
- Providing interested persons the right to petition for the issuance, amendment, or repeal of a rule.⁹⁴

At this time, while The Appraisal Foundation does make its standard-setting process public, the USPAP Standards themselves cost a member of the public \$80 (at the time of this report’s production) to access, making it more challenging to comment on a standard or to consider a petition for a change. The Appraisal Foundation recently decided, however, that it would make the Real Property Development, Real Property Reporting and Appraisal Review Standards (USPAP Standards 1-4) available online for no charge, but without the Advisory Opinions relating to those standards.⁹⁵ Notably, the Appraisal Standards Board’s explanation of an appraiser’s obligations under fair housing and fair lending laws currently resides in an Advisory Opinion.

⁹³ 12 U.S.C. § 3336 (emphasis added).

⁹⁴ 5 U.S.C. § 553.

⁹⁵ See *USPAP Standards 1-4*, available at:

https://www.appraisalfoundation.org/iMIS/TAF/USPAP_Standards_1-4.aspx. Advisory Opinion 16, which will be discussed below, is the key material offered by the Appraisal Standards Board in relation to appraisers’ responsibilities under fair housing laws and remains behind the paywall.

If The Appraisal Foundation is not an “agency,” then did Congress violate the nondelegation doctrine of the Constitution when it delegated the appraisal standard-setting functions to a private entity?

If The Appraisal Foundation is not an “agency,” then this raises the question of whether Congress impermissibly delegated its authority to a private entity. Under FIRREA, the terms “Appraisal Foundation” and “Foundation” are defined to mean “the Appraisal Foundation established on November 30, 1987, as a not for profit corporation under the laws of Illinois.”⁹⁶ This suggests that Congress recognized that The Appraisal Foundation is a private, nonprofit organization.

Under Article I of the Constitution, “[a]ll legislative Powers herein granted shall be vested in a Congress of the United States.”⁹⁷ Accordingly, the courts have limited the types of authority and functions that Congress can delegate to a purely private entity.⁹⁸ Over 80 years ago, in the seminal case of *Carter v. Carter Coal Co.*, the Supreme Court struck down a statute that allowed one group of coal producers to set binding regulations applicable to the entire industry.⁹⁹ The Court stated that the regulation of coal production was “necessarily a government function.”¹⁰⁰ However, other courts have upheld limited delegation of authority to private entities so long as the government retained “pervasive surveillance and authority” over the entity in question.¹⁰¹

Regardless of whether The Appraisal Foundation is required to follow Administrative Procedures Act requirements, both fair housing advocacy organizations and appraisal organizations echoed a common theme in interviews for this report that it would be beneficial to see more rigor in the revision process of USPAP Standards (and Advisory Opinions) and the Appraiser Criteria. The organizations raised concerns about changes being introduced without careful calculation of the unintended and negative consequences and about changes being made without the input of expertise outside the field of appraising (such as legal expertise or consumer protection/civil rights expertise).

Moreover, concerns were raised about the frequency of changes¹⁰² to the USPAP Standards and Appraiser Criteria. In some cases, states can take years to adopt the changes through the state’s legislative or regulatory process. In other cases, the state merely incorporates the standards and criteria by reference, placing the burden on the appraisers to educate themselves on the various changes. This is consistent with a 2003 GAO report by in which states reported that the frequency of changes in the USPAP Standards was an administrative burden and created challenges in investigating and enforcing complaints of violations of the USPAP Standards.¹⁰³ Finally, concerns were raised that because of the insular nature of the Appraisal Standards Board and Appraiser Qualifications Board and their processes, the changes often

⁹⁶ 12 U.S.C. § 3350(9).

⁹⁷ U.S. Const. art. I, § 1.

⁹⁸ See generally, Linda Tsang and Jared P. Cole, *Privatization and the Constitution: Selected Legal Issues*, Congressional Research Service, R44965 (Sept. 25, 2017), <https://sgp.fas.org/crs/misc/R44965.pdf>.

⁹⁹ 298 U.S. 238, 311 (1936).

¹⁰⁰ *Id.*

¹⁰¹ See, e.g., *United States v. Frame*, 885 F.2d 1119, 1128-29 (3d Cir. 1989).

¹⁰² See Walitt Solutions LLC, *USPAP Historical Review and Discussion* (Sept. 2021).

¹⁰³ See GAO, *Regulatory Programs: Opportunities to Enhance Oversight of the Real Estate Appraisal Industry*, GAO-03-404, at 20 (May 2003), <https://www.gao.gov/assets/gao-03-404.pdf>.

center on small details, rather than significant issues such as fair housing or the impact of the standards and criteria on consumers of color.

Recommendation

The appraisal governance structure is unique and complex with a private entity setting the minimum appraisal standards and professional entrance criteria that must be adopted by the states. Given the importance of appraisals to the residential housing market and individual consumers' finances, it is recommended that the complex questions regarding the extent of The Appraisal Foundation's legal authority be considered for further review, including questions about the extent of the legal authority under FIRREA, any potential obligations under the Administrative Procedures Act, and any potential issues under the Constitution's nondelegation doctrine.

The Appointments and Elections Processes Would Benefit from Inclusion of Viewpoints that Represent Consumers, Including Consumers of Color

The Appraisal Foundation's current processes tend to favor a closed-loop system of industry viewpoints rather than a governance structure that is open to diverse viewpoints, including those of civil rights and consumer advocates. Although The Appraisal Foundation recently received favorable feedback from a Diversity, Equity, and Inclusion consultant who reviewed their Board processes with respect to recruiting more people of color,¹⁰⁴ the consultant did not review whether the processes would yield candidates who would be ready to address the challenge of appraisal bias and lack of appraiser diversity and seek solutions that would benefit the whole of the housing market, including consumers of color. Given the far-reaching impacts of The Appraisal Foundation's standards and minimum licensing criteria across the 50 states, it seems prudent to include the voices of affected consumers.

The Appraisal Foundation has three boards: the Board of Trustees, the Appraisal Standards Board, and the Appraiser Qualifications Board. Following is a discussion of each board, with an analysis of how each board may favor well-connected appraisers and exclude voices of consumers affected by appraisal practices, particularly consumers of color.

The Appraisal Foundation's bylaws require that a majority of the Board of Trustees must be appraisers

The Appraisal Foundation is directed by a Board of Trustees that is responsible for the governance of the organization. In addition, the Board of Trustees appoints members and provides financial support and oversight to two independent boards: the Appraisal Standards Board, which promulgates the USPAP Standards; and the Appraiser Qualifications Board, which promulgates the Appraiser Criteria.

The challenge in the structure of the Board of Trustees can be summed up in this sentence from The Appraisal Foundation's bylaws:

¹⁰⁴ See The Appraisal Foundation, *Task Force to Promote Board Diversity: Fall 2021 Report*.

The Trustees appointed by the Appraisal Sponsors and those elected At-Large who are **appraisers together must constitute a majority** of the Trustees on the Board of Trustees.¹⁰⁵ (emphasis added)

That is, The Appraisal Foundation has intentionally designed its governing board to always favor the industry viewpoint. Although appraisers actively engaged in the business will certainly provide helpful expertise, it may be difficult for The Appraisal Foundation to develop solutions to the problems of appraisal bias and lack of appraiser diversity while mainly relying on a closed-loop system of appraiser input, especially because the appraisal industry tends to consist of mostly White, older males.¹⁰⁶ It is helpful to review the details of how the trustees are appointed and elected to understand precisely how the process heavily favors the appraisal industry, especially organizations with financial resources to cover the application and donation prerequisites. The chart below details who is allowed to appoint or elect trustees and the credentials and financial resources they must possess to participate in the process.

¹⁰⁵ The Appraisal Foundation, Restated Bylaws, § 6.02(b)(viii) (Nov. 16, 2019) (emphasis added) , <https://appraisalfoundation.sharefile.com/share/view/s11d4d879051545738887fa0015cad511> (“Bylaws”).

¹⁰⁶ See U.S. Bureau of Labor Statistics, *Labor Force Statistics from the Current Population Survey*, (Jan. 22, 2021), <https://www.bls.gov/cps/cpsaat11.htm>. . See also, Cherelle L. Parker, Ira Goldstein, and Gregory D. Squires, *Home Appraisals Drive America’s Racial Wealth Gap - 95% of Philly’s Appraisers Are White*, PBS WHYY (Feb. 25, 2021), <https://whyy.org/articles/home-appraisals-drive-americas-racial-wealth-gap-95-of-phillys-appraisers-are-white/>.

Appointment and Election of the Board of Trustees

APPOINTING/ELECTING ENTITY	POWERS	CURRENT MEMBERSHIP
<p>Appraisal Sponsor -Must be an appraiser organization that meets the Appraisal Sponsor Criteria -Must be elected by ⅔ of the Board of Trustees -Must pay an application fee of \$2,500 -Must make a financial donation (currently \$3,000)</p>	<ul style="list-style-type: none"> • Each Appointing Appraisal Sponsor has the right to appoint one trustee • Each Nominating Appraisal Sponsor has the right to nominate one trustee for election at-large to the Board of Trustees 	Appointing Appraisal Sponsors (no more than 6): <ul style="list-style-type: none"> • American Society of Appraisers • American Society of Farm Managers and Rural Appraisers • International Association of Assessing Officers • International Right of Way Association • Massachusetts Board of Real Estate Appraisers
<p>Affiliate Sponsor -Non-profit with a demonstrable interest in the appraisal profession --Must be elected by ⅔ of the Board of Trustees -Must pay an application fee of \$2,500 -Must make a financial donation (currently \$7,500)</p>	<ul style="list-style-type: none"> • Each Appointing Affiliate Sponsor has the right to appoint one trustee • Each Nominating Affiliate Sponsor has the right to nominate one trustee for election at-large to the Board of Trustees 	Appointing Affiliate Sponsors (no more than 3): <ul style="list-style-type: none"> • American Bankers Association • Farm Credit Council • National Association of Realtors
<p>International Sponsor -Organization that meets the International Sponsor Criteria --Must be elected by ⅔ of the Board of Trustees -Must pay an application fee of \$2,500 -Must make a financial donation (currently \$7,500)</p>	<ul style="list-style-type: none"> • Has the right to nominate one trustee for election at-large to the Board of Trustees 	Not available
<p>Industry Advisory Council ("IAC") -Recommended by vote of current IAC members, approved by Board of Trustees -For-profit organizations with a demonstrated interest in the practical use of appraisals -Annual membership fee (\$2,500)</p>	<ul style="list-style-type: none"> • Has the right to appoint one trustee 	There are currently 38 for-profit organizations on the IAC.
<p>The Appraisal Foundation Advisory Council ("TAFAC") -Selected by Board of Trustees -Not less than 20 organizations with a demonstrated concern regarding sound appraisal practices</p>	<ul style="list-style-type: none"> • Has the right to appoint one trustee 	There are currently 60 non-profit and governmental organizations on the TAFAC. The non-profits are industry trade associations; there do not appear to be any consumer advocates.
<p>Board of Trustees</p>	<ul style="list-style-type: none"> • Not more than 10 trustees may be elected at-large by the Board of Trustees • Of the at-large trustees, at least one must be from each of these categories: academia; consumer interest group; state-certified or licensed appraiser not affiliated with an Appraiser Sponsor 	Board of Trustees

Source: The Appraisal Foundation, Restated Bylaws (Nov. 16, 2019), <https://appraisalfoundation.sharefile.com/share/view/s11d4d879051545738887fa0015cad511>.

As detailed in The Appraisal Foundation's bylaws and the chart above, there are up to 11 appointed trustees and 10 elected trustees. Notably, each Appraisal Sponsor and Affiliate Sponsor has the right to appoint a trustee, but only if it pays an application fee of \$2,500; makes a donation of \$3,000 (for an Appraisal Sponsor) or \$7,500 (for an Affiliate Sponsor); and is elected by $\frac{2}{3}$ of the current Board of Trustees. Thus, the sponsor itself must have the financial resources to cover the application and donation prerequisites and be well-connected to participate in the process. Moreover, although the nonprofits on The Appraisal Foundation Advisory Council can participate in the appointment process without making a donation, they are comprised of 60 organizations with the right to appoint only one trustee. Also, none of the current nonprofits are civil rights or consumer advocates; they are all government entities or industry trade associations. But even if a few civil rights and consumer advocates were to join the advisory council, their voices would be easily outnumbered.

The industry-heavy Board of Trustees appoints the Appraisal Standards Board and the Appraiser Qualifications Board, which tends to further amplify the industry viewpoint

The Board of Trustees, which must mainly consist of appraisers, appoints the Appraisal Standards Board¹⁰⁷ and the Appraiser Qualifications Board.¹⁰⁸ Although the bylaws do not require that these board members be appraisers,¹⁰⁹ they have exclusively been active appraisers until recently.¹¹⁰ Moreover, there is no conflict-of-interest rule that would require the member to step down from their current employment as an appraiser in order to serve as a member.

An analogy may be useful here to understand the implications of The Appraisal Foundation's appointments and election processes. As an example, Congress has delegated to the CFPB the authority to promulgate rules to implement the Equal Credit Opportunity Act, which prohibits a creditor from discriminating on a prohibited basis. If the process for selecting the CFPB staff to write the rule were analogous to the process used by The Appraisal Foundation, the process might look something like the following:

Hypothetical Analogy if the CFPB Were Structured Like The Appraisal Foundation:

- Financial industry sponsors that made donations to the CFPB of up to \$7,500 would have the right to appoint the CFPB's Board of Trustees.
- The majority of the CFPB's Board of Trustees would have to be industry creditors.
- The CFPB's Board of Trustees, which would be almost exclusively industry creditors, would appoint the rulewriting staff, which would also be industry creditors.
- The staff would not be required to step down from their current industry positions while they write the rules.
- Industry creditors would write the minimum standards for the regulation of the industry as well as the minimum criteria for entering the industry; the standards and criteria would have to be adopted by all 50 states.

¹⁰⁷ The Appraisal Standards Board must consist of 5-9 members. See Bylaws §§ 12.01, 12.02.

¹⁰⁸ The Appraiser Qualifications Board must consist of 5-9 members. See Bylaws at §§ 13.01, 13.02.

¹⁰⁹ For the Appraisal Standards Board and the Appraiser Qualifications Board, the member must only "have extensive knowledge of appraising and sound appraisal practice and a concern for the public interest in matters involving appraisals." Bylaws at §§ 12.02, 13.02.

¹¹⁰ The only current non-appraiser serving on either board is Roberta Ouellette, who formerly served as legal counsel to the North Carolina Appraiser Board.

This analogy as well as the description above show how The Appraisal Foundation's current processes tend to favor and replicate the appraisal industry point of view rather than a wider range of viewpoints that might favor the public interest, including the interests of homeowners of color. This approach may pose a structural challenge to solving the complex problems of appraisal bias and lack of appraiser diversity. Moreover, it may be challenging to make changes in the public interest if those changes would contradict the interests of the industry to whom the board members are beholden for their position and livelihood.

With near uniformity, both fair housing organizations and appraisal organizations interviewed for this report agreed that the work of The Appraisal Foundation's boards would benefit from including more voices from outside the field of appraising and financial institutions.

Recommendation

The Appraisal Foundation should consider the following steps to enhance inclusiveness, to provide a more intentional and meaningful way to incorporate the voices of civil rights and consumer advocates, and to improve the ability to issue USPAP Standards and Appraiser Criteria that benefit the whole of the housing market, including homeowners and neighborhoods of color:

- **Repeal the requirement that a majority of the Board of Trustees must be appraisers.**
- **Repeal the requirement of financial donations to appoint board members.**
- **Provide a mechanism allowing industry groups and civil rights/consumer advocates to appoint an equal number of trustees. (For purposes of this report, the term "civil rights/consumer advocates" means organizations that have as their primary purpose the promotion of civil rights and/or consumer protection.)**
- **Provide a mechanism allowing industry groups and civil rights/consumer advocates to nominate an equal number of trustees to at-large elections.**
- **Require that at least four of the at-large trustees must be civil rights/consumer advocates.**
- **Form an advisory council consisting only of nonprofit civil rights and consumer advocates.**
- **Require that at least a third of the members of the Appraisal Standards Board and Appraiser Qualifications Board be civil rights/consumer advocates.**

The Rules of Procedures and Exposure Draft Process Would Benefit from Greater Transparency and Inclusion of Viewpoints that Represent Consumers, Including Consumers of Color

As with the appointments and elections process, The Appraisal Foundation's rules of procedures and exposure draft process tend to favor industry access and industry viewpoints instead of ensuring that the public – including civil rights and consumer advocates – have full access and meaningful opportunities for input. A comparison to the Administrative Procedures Act and the CFPB's standards for rulemaking may be instructive.

As explained above, the Administrative Procedures Act requires agencies to do the following with respect to rulemaking:

- Place a notice of the proposed rulemaking in the Federal Register, which includes:
 - A statement of the time, place, and nature of the public rulemaking;
 - Reference to the legal authority under which the rule is proposed; and
 - Either the terms or the substance of the proposed rule or a description of the subjects and issues involved;
- Give interested persons an opportunity to participate in the rulemaking through submission of written data, views, or arguments;
- Considering the relevant matter presented;
- Publish the rule 30 days before its effective date; and
- Provide interested persons the right to petition for the issuance, amendment, or repeal of a rule.¹¹¹

Similarly, the CFPB must consider a proposed rule’s potential benefits and costs to consumers, and potential reduction of consumer access to financial products and services.¹¹² Given the power of agency rulemaking to affect the life of consumers, the Administrative Procedures Act and the CFPB’s governing statute ensure that the public’s viewpoints and consumer interests are considered.

The Appraisal Foundation’s bylaws set forth the rules of procedure that the Appraisal Standards Board and the Appraiser Qualifications Board must use in issuing the USPAP Standards and the Appraiser Criteria. Generally, these boards use an “exposure draft process,” which provides the public with an opportunity to review and comment on drafts. However, the bylaws contain gaps in requiring a transparent and inclusive process. For example, the boards’ rules of procedures, including for the exposure draft process, are not available on The Appraisal Foundation’s website, making the process less transparent. Following is a chart summarizing the gaps by showing The Appraisal Foundation’s processes with a comparison (in the far left column) to the topics covered by the Administrative Procedure Act and the CFPB rulemaking requirements.

¹¹¹ 5 U.S.C. § 553.

¹¹² 12 U.S.C. § 5512(b).

Rules of Procedure and Exposure Draft Process

TOPIC	APPRAISAL STANDARDS BOARD	APPRAISER QUALIFICATIONS BOARD
Authority for Rules of Procedure	Two-thirds majority of Board of Trustees may overrule any change to the rules of procedure issued by the Appraisal Standards Board.	Two-thirds majority of Board of Trustees may overrule any change to the rules of procedure issued by the Appraiser Qualifications Board.
Requirement for Notice to the Public*	Rules of procedure must provide for giving notice and exposure of the proposal.	Not required.
Requirement to Specify the Legal Authority*	Not required.	Not required.
Requirement to Provide Opportunity for Public Participation*	Rules of procedure must provide for a public hearing. However, the full text of USPAP Standards with its Advisory Opinions require a payment, which makes it difficult for the public to provide robust comments.	Not required. However, the Appraiser Criteria is free to the public.
Requirement to Consider the Consumer Perspective**	Rules of procedure must provide for consultation with the advisory councils. Consultation with other interested persons and organizations is optional. No requirement to consult with civil rights or consumer advocates or to consider the consumer perspective.	Not required.
Approval of Draft	Requires approval by the majority of the board.	Requires approval by the majority of the board.
Approval of Final Standard/Criteria	Requires approval by 70% of the board.	Requires approval by 70% of the board.
Requirement to Publish the Final 30 Days before the Effective Date*	Not required.	Not required.
Requirement to Petition for the Issuance, Amendment, or Repeal*	Not required.	Not required.

Source: The Appraisal Foundation Bylaws §§ 12, 13

*Administrative Procedures Act Requirement, 5 U.S.C. § 553

**CFPB Rulemaking Requirement, 12 U.S.C. § 5512(b)

Recommendation

The Appraisal Foundation should consider the following steps to enhance transparency and inclusiveness, and to improve the ability to issue USPAP Standards and Appraiser Criteria that benefit the whole of the housing market, including homeowners and neighborhoods of color:

- **Require the Appraiser Qualifications Board to provide notice to the public, exposure of drafts, and an opportunity for public participation. (The Appraiser Qualifications Board currently engages in this practice but would benefit from having the practice codified in its bylaws.)**

- **Require the Appraisal Standards Board and Appraiser Qualifications Board to state the legal authority under which it is promulgating standards or criteria.**
- **Require the Appraisal Standards Board to make the complete text of USPAP Standards, including Advisory Opinions, available to both appraisers and the public for free.**
- **Require the Appraisal Standards Board and the Appraiser Qualifications Board to consider the impact of proposed standards and criteria on consumers and neighborhoods, including consumers and neighborhoods of color. As a best practice, many agencies that regulate the housing finance market set up specific and regular meetings to hear feedback from civil rights and consumer advocates.**
- **Require the Appraisal Standards Board and the Appraiser Qualifications Board to publish the final standards and criteria at least 30 days before the effective date.**
- **Require the Appraisal Standards Board and the Appraiser Qualifications Board to provide to the public an easily accessible system to request the issuance, amendment, or repeal of any standard or criteria.**

D. Gaps in Fair Housing Requirements and Training

As described above, the evidence clearly shows that the current appraisal system can result in biased valuations, both at the individual and neighborhood level. The causes of such bias are varied and complex. Following is a discussion of four gaps in the USPAP Standards' fair housing requirements and training that should be addressed in order to help remedy the issue:

- Lack of a clear prohibition on discriminatory conduct
- Lack of guidance on the use of discretion
- Lack of clear fair housing training requirements
- Lack of effective fair housing training

Gap: Lack of a Clear Prohibition on Discriminatory Conduct

The USPAP Standards fail to clearly prohibit discrimination in appraisals in accordance with the federal, state, and local fair housing and fair lending laws. According to the Appraisal Standards Board's Advisory Opinion 16 on fair housing,¹¹³ the following sources are meant to inform appraisers of the prohibition against illegal discrimination in appraisals.

- Preamble, page 1, lines 2-4
 - "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."
- Ethics Rule: Conduct, page 7, lines 185-186
 - "An appraiser must not engage in criminal conduct."
 - "An appraiser must perform assignments with impartiality, objectivity, and independence, and without accommodation of personal interests."
- Ethics Rule: Conduct, page 7, lines 198-200
 - "An appraiser must not use or rely on unsupported conclusions relating to characteristics such as race, color, religion, national origin, gender, marital status, familial status, age, receipt of public assistance income, handicap, or an unsupported conclusion that homogeneity of such characteristics is necessary to maximize value."
- Competency Rule, page 11, lines 298-300, 307-310, 311-313
 - "An appraiser must: (1) be competent to perform the assignment; (2) acquire the necessary competency to perform the assignment; or (3) decline or withdraw from the assignment. In all cases, the appraiser must perform competently when completing the assignment."
 - "Competency requires (1) the ability to properly identify the problem to be addressed; and (2) the knowledge and experience to complete the assignment competently; and (3) recognition of, and compliance with, laws and regulations that apply to the appraiser or to the assignment."

¹¹³ The Appraisal Standards Board issues non-binding advisory opinions that are meant to interpret the USPAP Standards. They are not part of the USPAP Standards and, with only a few exceptions, are not adopted by the states as enforceable requirements. AO-16 was issued in 1997 and has remained relatively unchanged since then.

- Comment: “Competency may apply to factors such as, but not limited to, an appraiser’s familiarity with a specific type of property or asset, a market, a geographic area, an intended use, specific laws and regulations, or an analytical method.”
- Standards Rule 1-1(a), page 16, lines 444-449
 - Comment: “Social change has also had an effect on appraisal theory and practice. To keep abreast of these changes and developments, the appraisal profession is constantly reviewing and revising appraisal methods and techniques and developing new methods and techniques to meet new circumstances. For this reason, it is not sufficient for appraisers to simply maintain the skills and the knowledge they possess when they become appraisers. Each appraiser must continuously improve his or her skills to remain proficient in real property appraisal.”
- Standards Rule 2-1(a), page 20, line 575
 - “Each written or oral real property appraisal report must clearly and accurately set forth the appraisal in a manner that will not be misleading.”

In addition, the appraiser is required to provide the following certification on each appraisal report:

“I certify that, to the best of my knowledge and belief...the reported analyses, opinions, and conclusions are my personal, impartial, and unbiased professional analyses, opinions, and conclusions...[and] my analyses, opinions, and conclusions were developed, and this report has been prepared, in conformity with the Uniform Standards of Professional Appraisal Practice.”

Although Advisory Opinion 16 provides reference to these different sections of the USPAP Standards, it does not clearly demonstrate how these disjointed concepts are meant to prohibit discrimination. These passages only provide vague references to an appraiser’s obligations under laws that are not even identified.

In particular, the following Ethics Rule has received criticism and is currently under review by the Appraisal Standards Board:

“An appraiser must not use or rely on **unsupported** conclusions relating to characteristics such as race, color, religion, national origin, gender, marital status, familial status, age, receipt of public assistance income, handicap, or an **unsupported** conclusion that homogeneity of such characteristics is necessary to maximize value.” (Emphasis added.)

This language implies that conclusions on a prohibited basis are permissible as long as they are *supported*, which then raises the question of what is permissible “support.” At this time, the Appraisal Standards Board has proposed the following clarifying comment in a First Exposure Draft (dated August 18, 2021):

“In most instances, even supported conclusions based on one or more of the characteristics noted above must be avoided. Supported conclusions based on the characteristics of protected classes may be allowed if those conclusions are: (1) not

precluded by applicable law; (2) necessary for credible assignment results; and (3) based on relevant evidence and logic.”

Even with this comment, however, the language remains unclear, and still raises more questions than answers. It seems more efficient to restate the law more clearly in the USPAP Standards, and then provide a new Advisory Opinion and training module based on the applicable federal, state, and local fair housing laws.

One useful example of prohibiting discriminatory conduct in appraisals comes from HUD’s Federal Housing Administration. On November 17, 2021, HUD issued Mortgagee Letter 2021-27, which now contains the following Nondiscrimination Policy:

“The Appraiser must be knowledgeable of and fully compliant with all federal, state, and local laws, including any antidiscrimination laws, rules applicable to the subject property, or any provisions of the Fair Housing Act.

“No part of the appraisal analysis or reporting may be based on the race, color, religion, sex, actual or perceived sexual orientation, actual or perceived gender identity, age, actual or perceived marital status, disability, familial status, [or] national origin of either the prospective owners or occupants of the Property, present owners or occupants of the Property, or the present owners or occupants of the properties in the vicinity of the Property, or on any other basis prohibited by federal, state, or local law.”¹¹⁴

Following are additional examples from the GSEs and state laws that provide sample language for articulating a clear prohibition on discriminatory conduct in appraisals.¹¹⁵

¹¹⁴ HUD, *Appraisal Fair Housing Compliance and Updated General Appraiser Requirements*, Mortgagee Letter 2021-27 (Nov. 17, 2021), https://www.hud.gov/sites/dfiles/OCHCO/documents/2021-27hsgml.pdf?utm_medium=email&utm_source=govdelivery.

¹¹⁵ In addition, real estate law and policy provides useful examples of clear prohibitions on discriminatory conduct. See, e.g., California, 10 Cal. Code. Reg. § 2780(b); N.Y. Comp. Codes, R. & Regs., Tit. 19 § 175.17; National Association of Realtors Code of Ethics and Standard of Practice, Article 10, at <https://www.nar.realtor/about-nar/governing-documents/code-of-ethics/2021-code-of-ethics-standards-of-practice>.

Prohibitions on Discriminatory Conduct in Appraisals

SOURCE	TEXT
Fannie Mae	“The following are examples of unacceptable appraisal practices...development of a valuation conclusion based either partially or completely on the sex, race, color, religion, disability, familial status, or including a reference to any protected class of either the prospective owners or occupants of the subject property or the present owners or occupants of the properties in the vicinity of the subject property.” Fannie Mae, Single Family Selling Guide, B4-1.1-04 (Nov. 3, 2021).
Freddie Mac	“The following are examples of unacceptable appraisal practices...”[c]onsideration of the race, color, religion, sex, age, marital status, handicap, familial status or national origin of the prospective owners or occupants of the subject or of the present owners or occupants of the properties in the vicinity of the subject property.” Freddie Mac, Single Family Seller/Service Guide, § 5601.4 (June 2, 2021).
California	“Licensees shall not base, either partially or completely, their analysis or opinion of market value on the basis of race, color, religion (creed), gender, gender expression, age, national origin (ancestry), disability, marital status, source of income, sexual orientation, familial status, employment status, or military status of either the present or prospective owners or occupants of the subject property, or of the present owners or occupants of the properties in the vicinity of the subject property, or on any other basis prohibited by the federal Fair Housing Act.” Cal. Business and Professions Code § 11424.
Minnesota	“An appraiser must not knowingly make any of the following unacceptable appraisal practices...develop a valuation conclusion that is based either partially or completely on factors identified in chapter 363A, including race, color, creed, religion, sex, marital status, status with regard to public assistance, disability, sexual orientation, familial status of the owner or occupants of nearby property, or national origin of either the prospective owners or occupants of the properties in the vicinity of the subject property.” Minn. Stat. 82B.195 subd. 3(1)(vii).
Illinois	(Introduced): “Discrimination prohibited. An appraiser shall not discriminate when preparing a comparative market analysis for residential real estate. For the purposes of this Section, an appraiser discriminates when he or she considers the actual or perceived race, color, religion, or national origin of the owner of the real estate or the residents of the geographic area in which the real estate is located when determining the market value of the real estate.” Ill. HB 93.
New Jersey	(Introduced): Holders of appraisal licenses or certifications, or appraisal management company registrations “shall not discriminate in the appraisal of a residential property on the basis of the race, creed, color, or national origin of the property buyer or property seller.” N.J. AB 5185.

Recommendation

To make it easier for appraisers and the public to understand an appraiser’s fair housing obligations, the USPAP Standards and Advisory Opinion 16 should be revised to clearly state that discrimination in appraisals is prohibited.

Gap: Lack of Guidance on the Use of Discretion

Although the USPAP Standards' Ethics Rules require an appraiser to perform assignments with "impartiality [and] objectivity," appraisers can use their discretion to make many choices that can affect the valuation of a home. For example, as described above, under the sales comparison approach, the appraiser can choose the distance from the subject property from which they will select comparable homes and which properties within the chosen distance will be used as comparables for the appraisal.¹¹⁶ Also, the appraiser can use their discretion to decide which adjustments to make and the extent of those adjustments. A review of the role of discretion in fair lending risk may be instructive as this could hold the key to developing a fairer, more equitable appraisal system.¹¹⁷

In fair lending, discretion has long been recognized as one of the key risk factors that can lead to violations of fair lending laws.¹¹⁸ Since the 1990s, the DOJ has highlighted the role that discretion has played in mortgage underwriting and pricing cases alleging unlawful discrimination. For example, with respect to underwriting, fair lending issues typically arise when loan officers have the discretion to make decisions on marginal applicants. They might choose to spend more time helping marginal White borrowers get approved, but immediately deny Black or Latino applicants with similar credit profiles. In the 1997 case of *United States v. First National Bank of Doña Ana County*,¹¹⁹ the DOJ described the issue in this way:

"Since at least 1990, First National Bank has provided its loan officers with vague and non-specific application processing and loan underwriting guidelines and instructions. As a consequence, loan officers were left with de facto authority to establish minimum application processing procedures and loan underwriting standards to establish minimum application processing procedures and loan underwriting standards for determining which applications should be approved and which applications should be denied..."

¹¹⁶ The GSE guidelines prohibit discriminatory practices. For example, the Fannie Mae Single Family Selling Guide lists the following as an unacceptable appraisal practice: "...failure to use comparable sales that are the most locationally and physically similar to the subject property." Fannie Mae Single Family Selling Guide, *Unacceptable Appraisal Practices*, Section B4-1.1-04 (Nov. 3, 2021), <https://selling-guide.fanniemae.com/Selling-Guide/Origination-thru-Closing/Subpart-B4-Underwriting-Property/#Unacceptable.20Appraisal.20Practices>.

¹¹⁷ There are numerous other factors, such as discriminatory historical values and data, but discretion appears to be a key component and has long been recognized as a key factor in identifying discrimination in the mortgage market.

¹¹⁸ See FFIEC Interagency Fair Lending Examination Procedures (2009) <https://www.ffiec.gov/PDF/fairlend.pdf>. Other industry leaders have also made the connection between the broad discretion seen in the appraisal industry today and the mortgage loan underwriting of decades ago. See, e.g., Faith Schwartz, *Three Keys to the Future of Appraisals*, MBA Newslink (Nov. 18, 2021), https://newslink.mba.org/mba-newslinks/2021/november/mba-newslink-thursday-nov-18-2021/faith-schwartz-of-housing-finance-strategies-three-keys-to-the-future-of-appraisal/?utm_campaign=MBA%20NewsLink%20Thursday%20Nov.%2018%202021&utm_medium=email&utm_source=Eloqua.

¹¹⁹ *United States v. First National Bank of Doña Ana County*, Civ. Action No. 97-0096 HB (D.N.M. 1997), <https://www.justice.gov/crt/housing-and-civil-enforcement-cases-documents-588>.

“...The loan files reveal that in processing applications, the lender’s loan officers made greater efforts to obtain information from Anglo applicants that would demonstrate their eligibility for financing compared to the efforts expended in processing the applications of Hispanics. For example, First National Bank’s loan officers have:

1. Failed to make comparable efforts to allow Hispanic applicants to explain adverse items on credit reports;
2. Failed to make comparable efforts to verify credit sources listed on Hispanics’ mobile home loan applications; and
3. Failed to make comparable efforts to elicit from Hispanic applicants possible ‘offsetting’ qualifications that may compensate for any deficiencies in the required qualifying information.”

As evidenced by this case, a lender’s decision to provide their loan officers with broad discretion can result in discriminatory outcomes in the loan approval process.

Discretion also played a key role in the pricing cases that the DOJ began to file in the 2000s. With respect to pricing, the fact pattern usually consisted of a lender using an automated pricing system, but providing mortgage loan officers with the discretion to increase the interest rate. In the 2011 case of *United States v. Countrywide Financial Corp., et al.*,¹²⁰ the DOJ described a two-tier pricing system in which the lender first set the interest rate based on objective, credit-related characteristics (“par” or “base price”), but then provided its mortgage loan officers with broad discretion to increase the price up to a certain cap (“overage”), decrease the price (“shortage” or “underage”), and alter the standard fees. The complaint stated: “This subjective and unguided pricing discretion resulted in Hispanic and African-American borrowers paying more not based on borrower risk.”¹²¹

Notably, in the context of fair lending, discrimination resulting from the exercise of discretion can be proven under either the disparate treatment or disparate impact theory of discrimination and litigants often use both. Disparate treatment occurs when similarly-situated individuals receive different outcomes on a prohibited basis, and the difference cannot be explained by a legitimate non-discriminatory reason.¹²² For example, disparate treatment occurs if there is a statistically significant difference in pricing outcomes on a prohibited basis, even after controlling for all of the factors that the lender states it considers in pricing the loan.¹²³ Similarly, disparate impact liability can result if the lender’s race-neutral policy of discretion causes discriminatory pricing on a prohibited basis, even if not intentionally so.¹²⁴ The lender may assert that the policy of discretion is justified by business necessity, but the plaintiff can still prevail by showing that there are less discriminatory alternatives, such as reducing discretion or monitoring the outcomes of the policy of discretion and taking appropriate action.¹²⁵

¹²⁰ *United States v. Countrywide Financial Corp. et al.*, CV11-10540-PSG (C.D.Cal. Complaint filed Dec. 21, 2011), <https://www.justice.gov/sites/default/files/crt/legacy/2011/12/21/countrywidecomp.pdf>.

¹²¹ See *id.* at Para. 29.

¹²² See *id.* at Para. 47.

¹²³ See *id.*

¹²⁴ See *id.* See also, HUD 2021 Disparate Impact Proposed Rule, 86 Fed. Reg. 33597.

¹²⁵ See *id.*

Over time, lenders have understood the significant risk that discretion creates under both the disparate treatment and disparate impact theories of discrimination. To minimize this exposure to legal liability (and for other reasons), lenders have gradually moved from the subjective “5 C’s of credit” (character, capacity, capital, collateral, and conditions) to more objective factors that are often automated. There was a time when lenders felt they had to meet the applicant in person to make a subjective assessment of “character,” which often disadvantaged women and people of color. Now lenders can offer a mortgage through a simple electronic interface after receiving objective information. These systems are not perfect and can still be based on discriminatory historical data or discriminatory models, but lenders are now much more aware of the interplay between discretion and fair lending risk and actively work toward more objective, equitable systems. Moreover, lenders understand that borrowers of color are the future of the market, and it is in their business interest to treat their customers fairly.¹²⁶

Just as lenders came to understand the risk of discretion in underwriting and pricing mortgage loans, appraisers will similarly need to understand the fair housing risk inherent in each discretionary decision and understand how to manage that risk appropriately. As FHFA recently stated in its recent findings of race-related language in appraisal reports: “Generally, the use of discretion can present fair lending risk because it allows overt or indirect references to race, ethnicity, or other prohibited bases to enter the process and can be applied unequally to favor or disfavor neighborhoods based on race or other prohibited bases.”¹²⁷ In addition, the appraisal process should be reviewed to determine the best methods of monitoring compliance, such as how to compare the outcomes in appraisal reports for similar subject properties that are in White communities vs. communities of color. The current USPAP Standards provide little guidance on how to identify discretionary decisions and manage the fair housing risk. Following is a small sample of USPAP Standards that may benefit from greater clarity with respect to discretion and fair housing risk as well as methods for managing that risk.

¹²⁶ See Laurie Goodman and Jun Zhu, *The Future of Headship and Homeownership*, Urban Institute (Jan. 2021), <https://www.urban.org/sites/default/files/publication/103501/the-future-of-headship-and-homeownership.pdf> (estimating that between 2020 and 2040, there will be 6.9 million net new homeowners comprised of 4.8 million more Latino homeowners, 2.7 million more Asian and other homeowners, and 1.2 million more Black homeowners but 1.8 million fewer White homeowners).

¹²⁷ FHFA, *Reducing Valuation Bias by Addressing Appraiser and Property Valuation Commentary*, FHFA Insights Blog (Dec. 14, 2021), <https://www.fhfa.gov/Media/Blog/Pages/Reducing-Valuation-Bias-by-Addressing-Appraiser-and-Property-Valuation-Commentary.aspx>.

USPAP Standards and Fair Housing Risk

USPAP STANDARD	FAIR HOUSING RISK
<p>Standards Rule 1-2 "In developing a real property appraisal, an appraiser must... (e) identify, from sources the appraiser reasonably believes to be reliable, the characteristics of the property that are relevant to the type and definition of value and intended use of the appraisal, including: (i) its location..." (emphasis added)</p>	<p>-Location and geography are often highly correlated with race. -Here, the risk is that the appraiser may perpetuate segregation by describing the location based on perceptions of racial boundaries rather than objective factors. -The USPAP Standards could manage the fair housing risk by providing examples of the objective methods for identifying the location.</p>
<p>Standards Rule 1-4 "When a sales comparison approach is necessary for credible assignment results, an appraiser must analyze such comparable sales data as are available to indicate a value conclusion."</p>	<p>-As described above, the sales comparison approach probably represents the highest fair housing risk, but the USPAP Standards do not provide any other guidance or baseline standards for avoiding discriminatory outcomes. -The USPAP Standards could manage the fair housing risk by identifying each facet of the sales comparison approach that contains a discretionary decision that could result in disparate treatment or a disparate impact on a prohibited basis and providing guidance on how to manage the risk.</p>
<p>Standards Rule 2-1(a) "Each written or oral real property appraisal report must (a) clearly and accurately set forth the appraisal in a manner that will not be misleading..."</p>	<p>-Advisory Opinion 16 states that this is one of the standards that supports fair housing. However, the term "misleading" has a special definition adopted by the Appraisal Standards Board for the 2020-22 USPAP. It is wholly unrelated to the subject of discrimination: "Intentionally or unintentionally misrepresenting, misstating, or concealing relevant facts or conclusions." The Appraisal Standards Board current exposure draft for the 2023 USPAP proposes to delete that definition and revert to the "dictionary definition," but even conventional dictionary meanings of "misleading" are associated more with deception than discrimination. -This USPAP Standard could be revised to more clearly state that the report must set forth the appraisal in a way that is not discriminatory and provide examples of best practices.</p>
<p>Standards 2-3(a) Regarding the signed certification: "I certify that, to the best of my knowledge and belief...I have no bias with respect to the property that is the subject of this report or to the parties involved with this assignment."</p>	<p>-This certification may speak to ensuring that the appraiser has not engaged in a fair housing violation, but the statement is not clear and appraisers interviewed for this study indicated that "bias" also refers to other concepts such as avoiding advocacy or favoring the cause of the appraiser's client. -The USPAP Standards could add a comment to clarify the circumstances under which an appraiser could make such a certification and the consequences for a false statement.</p>

With respect to setting baseline standards for managing fair housing risk, it should be noted that ensuring fair housing protects consumers as well as the safety and soundness of financial institutions and the housing market. FIRREA, which The Appraisal Foundation cites as the basis for its authority, states its purpose is to:

“Provide that Federal financial and public policy interests in real estate related 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.”¹²⁸

Title XI of FIRREA was passed in response to the Savings and Loan Crisis and was later amended by the Dodd-Frank Act in response to the Great Recession. Each time, incorrectly appraised values for residential homes had adverse consequences for the housing market and the economy as a whole. And each time, the adverse effects were disproportionately felt by homeowners of color. Moreover, many other players in the mortgage market have undergone the process of scrutinizing their procedures for discretion and fair lending risk in order to ensure fair outcomes. Accordingly, ensuring that appraisers follow the letter and spirit of fair housing laws is important not just for homeowners of color but for the health of the market overall.

Recommendation

Consistent with other aspects of the housing finance market, the appraisal process should be thoroughly reviewed for fair housing risk, particularly in the exercise of discretion, and the USPAP Standards should be amended accordingly in order to provide a baseline standard for fair and equitable outcomes.

Gap: Lack of Clear Fair Housing Training Requirements

Until recently, the Appraiser Criteria did not include a requirement for any fair housing training. Beginning in 2022, however, the Appraiser Criteria will be updated to require that the course on “Basic Appraisal Principles” required for all credentials must include the topic of “Valuation Bias, Fair Housing, and/or Equal Opportunity.”¹²⁹ In addition, continuing education credit may be granted for this same topic.

The Appraiser Criteria’s new requirement is a welcome addition in concept, but falls short on a number of levels. First, the topic of “Valuation Bias, Fair Housing, and/or Equal Opportunity” is imprecise. The term “valuation bias” is not defined and the “and/or” suggests that any one of the three topics will suffice. Second, there is no guidance as to the required content for such an important topic or the time that must be devoted to it. Third, there is no requirement for the appraiser to learn the fundamentals of the state and local fair housing laws for the geographic area in which they operate. In some areas, the state and local fair housing laws can be much broader than the federal law. Finally, the requirement only applies to the initial credential for the

¹²⁸ 12 U.S.C. § 1331.

¹²⁹ Appraiser Qualifications Board, *Guide Note 1* (effective Jan. 1, 2022), <https://appraisalfoundation.sharefile.com/share/view/s63f99dc2b9f241e0b3fd1645f7b63680>.

course on “Basic Appraisal Principles.” There is no requirement for ongoing fair housing training once the credential is obtained. Significantly, the current version of the initial 15-hour USPAP course that must be taken for initial appraiser credentialing does not contain any instruction or discussion about fair housing issues or discrimination.

Several members of appraisal organizations interviewed for this report believed that appraisers in general do not have a good understanding of the fair housing laws that apply to residential appraising. It was also noted that several states have extensive fair housing education requirements for real estate brokers. For example, the state of California requires real estate agents to complete a three-hour course that must include federal and state fair housing laws; how to avoid practices that could be considered discriminatory; and specific topics, such as redlining, advertising, refusing to show property, and block busting.¹³⁰ Similarly, the state of New York requires education on federal and state fair housing laws, including the Fair Housing Act and the Civil Rights Act of 1866; specific cases; and specific discriminatory acts, such as unequal treatment, steering, and block busting.¹³¹ New York requires an initial four-hour fair housing course as well as a three-hour fair housing continuing education requirement.

Following are some examples of state laws that articulate clear requirements with respect to comprehensive fair housing training for appraisers.

¹³⁰ Cal. Bus. & Prof. Code § 10170.5(a)(4). The Department of Real Estate's Course Guidelines are available at <https://www.dre.ca.gov/files/pdf/forms/re329.pdf>.

¹³¹ New York Real Estate Salesperson Curriculum, available at: <https://dos.ny.gov/system/files/documents/2019/09/2018RESalespersonCurriculum.pdf>.

Fair Housing Training Requirements for Appraisers

SOURCE	TEXT
California	<p>“The director shall adopt regulations governing the process and procedures for renewal of a license or restoration of a license to active status that shall include, but not be limited to, continuing education requirements, which shall be reported on the basis of a four-year continuing education cycle, and, for each licensee renewing on or after January 1, 2023, include at least two hours of elimination of bias training, either individually or as part of a broader course.”</p> <p>“Beginning January 1, 2023, as part of the continuing education required by this section, a licensee shall complete at least one hour of instruction in cultural competency every four years. For purposes of this section, ‘cultural competency’ means understanding and applying cultural and ethnic data to the process of care that includes, but is not limited to, information on the appropriate treatment of, and provision of care to, the lesbian, gay, bisexual, transgender, and intersex communities, ethnic communities, and religious communities.” Cal. Business and Professions Code § 11360.</p>
Minnesota	<p>“Education. Within two years of receiving a license under this chapter and as required by the Appraiser Qualifications Board, a real property appraiser shall provide to the commissioner evidence of satisfactory completion of a continuing education course on the valuation bias of real property.”</p> <p>“For the purposes of this section, ‘valuation bias’ means to explicitly, implicitly, or structurally select and apply data to an appraisal methodology or technique in a biased manner that harms a protected class, as defined by the Fair Housing Act of 1968, as amended.” Minn. Stat. § 82B.021.</p>
New York	<p>“For State license and certification periods that commence on or after January 1, 2022, real estate appraisers and real estate appraiser assistants who hold State licenses or certifications must successfully complete an approved course of study in Fair Housing and Fair Lending, every two years, or its equivalent, as required in subdivisions (b) or (c) of this section, in order to renew their licenses or certifications.” Tit. 19 NYCRR § 1107.33.</p>
Ohio	<p>Applicants for residential real estate appraiser license, residential real estate appraiser certification, or general real estate appraiser certification must include in their hours of education instruction “at least one course devoted exclusively to federal, state, and municipal fair housing law.” Ohio Admin. Code 1301:11-3-03.</p>

Recommendation

Quality fair housing training for appraisers is critically important and should be a requirement for every appraiser to obtain and maintain their credentials. The Appraiser Criteria should be revised to clearly require comprehensive fair housing training on federal, state, and local fair housing laws at every stage of the credentialing process and at renewal.

Gap: Lack of Effective Fair Housing Training

The persistence of bias in appraisal markets suggests that fair housing training programs for appraisers have not been as comprehensive or effective as they could be. To address this gap, The Appraisal Foundation has just recently added a module seeking to address the subject of fair housing in the 7-hour continuing education course that appraisers must complete every two years regarding USPAP Standards.

The new fair housing module contained in the 7-hour continuing education course reflects welcome effort, but fails to provide accurate and effective guidance to appraisers. The module provides an inaccurate summary of fair housing law, while failing to include any content from the applicable statutes themselves (namely, the federal Fair Housing Act) or its implementing regulations. It also fails to provide specific guidance and examples of what is prohibited by law.

This outcome is consistent with views expressed in interviews conducted with members of national appraisal organizations. They observed that The Appraisal Foundation has not produced accurate and effective guidance with respect to fair housing issues (and other topics of a legal nature, such as privacy laws). This results from the organization's insular approach. Interviewees familiar with The Appraisal Foundation's operations noted a hesitancy of the organization to consult with subject matter experts outside the field of appraising, such as fair housing and civil rights experts. The misleading training could lead to detrimental results for consumers including inappropriate property devaluations, improper loan denials, loss of housing opportunities, and other harms. It could also contribute to appraisers failing to realize the extent of their legal obligations which could expose them to liability. Finally, it could result in harm to communities of color, contributing to the racial wealth and homeownership gaps, disinvestment, and the perpetuation of segregation. Below is a list of the general recommendations followed by detailed recommendations and examples of areas for improvement from the training.

Recommendations for the Training Requirements:

- **There should be comprehensive fair housing training included in the initial 15-hour USPAP course (not just in the 7-hour USPAP continuing education course).**
- **The fair housing training module in the current 2022-2023 7-hour USPAP continuing education course for credentialed appraisers should be revised immediately and developed with the participation of fair housing experts to ensure the training is comprehensive and contains important elements needed to educate professionals about how to comply with the letter and spirit of applicable federal, state, and local fair housing laws.**
- **At a minimum, the fair housing training should include:**
 - **The history of discrimination and segregation and the role of the appraisal industry in establishing and perpetuating both;**
 - **Information about the costs of appraisal bias for families, communities, the housing industry, and the nation, including the impact on the homeownership and wealth gap;**
 - **An in-depth explanation of the federal fair housing laws and implementing regulations as well as the role of state and local fair housing laws;**
 - **Recent case examples of appraisal discrimination;**
 - **The appropriate use of the free-form text sections of the appraisal report, including a reminder that the racial and ethnic composition of the neighborhood should never be a factor that influences the value of a home;**
 - **An explanation of how compliance with fair housing laws and standards benefits the appraisal and housing industry, consumers, communities, and the greater society; and**
 - **Best practices to ensure compliance with the letter and spirit of the fair housing laws.**
- **The Appraisal Foundation should collaborate with HUD, DOJ, the Federal Housing Finance Agency ("FHFA"), and other regulators and enforcement agencies to develop, improve, and implement fair housing training. In addition, The Appraisal Foundation should consider inviting civil rights experts to provide the fair housing training for appraisers.**

Recommendations for Improvements to the Fair Housing Module in the 7-Hour Training

Below are excerpts from the new fair housing module in the 7-hour continuing education training required by The Appraisal Foundation. Below each excerpt is a recommendation for improvement.

Recommendation for the Introduction

Excerpt from the Training

Introduction

“Black Homeowners Face Discrimination in Appraisals”

(Headline from *New York Times*, August 25, 2020, and updated August 27, 2020.)

This is a shocking headline, but it does get our attention! What could have taken place that resulted in such a headline? Is the headline accurate? Does it have merit? Is its conclusion based on perception or facts?

Recommendation

The introduction to the existing training should be revised to focus on fair housing laws and their requirements. Similarly, the overall tone of the module should be revised from one of raising questions about perception and reputational risk for appraisers to clearly identifying fact patterns that represent illegal discrimination and avoiding harm to consumers.

Recommendation for the Background Section

Excerpt from the Training

Background

The first Advisory Opinions (AOs) appeared in the 1992 edition of the USPAP publication. AO-16 was not added, however, until the 1997 edition. Since that time, the AO has undergone some minor changes, although the overall content has remained largely unchanged. And, while most of the information in the 2020-2022 version of AO-16 remains the same as when it was originally written, it is as relevant today as it was then.

Recommendation

The background section should be revised to focus on the history of appraisal discrimination and its impact on borrowers and communities of color.

Excerpt from the Training

The main types of bias claims made against appraisers fall into two categories:

- Intentional bias (an appraiser is accused of deliberately acting with bias)
- Unintentional bias (the appraiser has no awareness of acting with bias)

Intentional Bias

Our research shows that of the number of verifiable complaints filed with regulatory agencies, those that comprise intentional bias have been extremely rare in appraisal work. However, that does not mean intentional bias is nonexistent.

Unintentional Bias

Unintentional bias comes in many forms. Not all bias in appraisals is based on racial, ethnic, or other discrimination. Appraising to meet the sale price is an example of a bias. All bias is prohibited by USPAP, whether or not it is based on illegal discriminatory factors. An example of a built-in unintentional bias an appraiser could have (which is one we are unaware we have until it is called to our attention) includes the following:

You personally do not like bi-level (or "split-level") homes. And you have heard from two real estate agents that split-level style homes are "always" less marketable than two-story style homes.

Could these built-in biases affect the adjustments that an appraiser makes to split-level style houses when compared to similar utility two-story style homes in the area? It might. Thus, regardless of how you personally feel about split-levels, you need to ensure you are deriving your adjustments using factual, market supported evidence. This might help to eliminate a built-in unintentional bias.

Recommendation

The legal discussion should be revised to accurately state the law. Currently, the module inaccurately focuses on intentional bias and unintentional bias rather than disparate treatment and disparate impact. The definitions and commentary also require revision to explain what constitutes disparate treatment and disparate impact and how appraisers can comply with legal requirements and follow best practices.

Recommendation for the Illustrations and Case Studies

Excerpt from the Training

Illustrations

There are four illustrations presented in AO-16. These illustrations have been posed as questions for discussion purposes here. However, each of them should be read in its entirety. Any experiences you have had regarding any of the illustrations may prove helpful to you and to the class as a whole.

Recommendation

The illustrations and case studies should be revised to clearly identify fact patterns that represent illegal discrimination. The fact patterns should focus on situations that are common and clearly covered by the Fair Housing Act.

Recommendation for the Instructor's Manual

Excerpt from the Training

Relevant Definitions

As you can imagine these topics may get some passionate responses from your class members, so a discussion of the relevant definitions that are used in the section may help bring the focus back to USPAP.

Recommendation

The instructor's manual should be revised to provide more explicit guidance. Also, in connection with fair housing topics, the instructor's focus should be on the law first and USPAP and other guidelines second.

E. Barriers to Entry into the Appraisal Profession

The appraisal profession lacks diversity and does not reflect the population of the United States.¹³² Remedying this gap is not only likely to reduce the number of biased valuations, but also reduce the acute shortage of appraisers, which is impacting transactions across the nation.¹³³ The Appraiser Qualifications Board sets the minimum criteria that individuals must meet to obtain each type of appraiser credential. States must adopt the minimum criteria and can add additional criteria. Although The Appraisal Foundation and other appraisal professionals are actively engaged in reviewing this problem and conducting extensive outreach to people of color, it seems that the criteria would still benefit from a review of the impact of each requirement. Below is a discussion of the following barriers to entry into the appraisal profession:

- Multiple levels of licensing and certification
- College degree requirements
- Appraisal education hours
- Experience hours
- Standardized tests

In addition, the report addresses concerns about the pipeline of trainees and the future of the profession.

Recommendation

It is recommended that each of the barriers to entry to the appraisal profession be reviewed for disparate impact by analyzing the burden on potential appraisers of color, the business justification for the requirement, and whether there is a less discriminatory alternative that can achieve the business interest. Below is a description of each barrier and a more detailed recommendation.

Barrier: Multiple Levels of Licensing and Certification

The appraiser profession requires several levels of licensing and certification, unlike other professions – such as real estate brokers, accountants, and lawyers – where the individuals are full-fledged members of the profession once they pass the certification examination. Moreover, each level of licensing and certification represents additional barriers in the form of college degree requirements, appraiser education hours, experience hours, and standardized tests, each of which is an additional barrier. Below is a chart summarizing the various credentials and requirements.

¹³² According to the U.S. Bureau of Labor Statistics, the category of “Property appraisers and assessors” is 96.5% White, 2.3% Black, and 1.2% Asian. Six percent are classified as Hispanic and 29.7% were classified as female. See U.S. Bureau of Labor Statistics, *Labor Force Statistics from the Current Population Survey*, (Jan. 22, 2021), <https://www.bls.gov/cps/cpsaat11.htm>.

¹³³ See, e.g., Jeff Ostrowski, *How Big Mortgage Lenders Hope to Clear the Appraisal Logjam*, Bankrate.com (Oct. 27, 2021), <https://www.bankrate.com/mortgages/fannie-freddie-expand-desktop-appraisals/>.

Appraiser Licensing and Certification (subject to individual state laws)

CREDENTIAL	COLLEGE DEGREE REQUIREMENT	EDUCATION HOURS	EXPERIENCE REQUIREMENT*	EXAM	PERMITTED TO APPRAISE
Trainee Appraiser	None	-75 hours -Supervisory Appraiser/ Trainee Appraiser Course	None	No exam	-Properties that the Supervisory Appraiser is permitted to appraise
Licensed Residential Appraiser	None	-150 hours	1,000 hours in a minimum of 6 months (requires a Supervisory Appraiser)	Licensed Residential Exam	-Non-complex 1-4 residential units with a transaction value of less than \$1 million -Complex 1-4 residential units with a transaction value of less than \$400,000
Certified Residential Appraiser	-Bachelor's degree, OR -Associate's degree in a focused field of study, OR -30 college semester credit hours in specified topics, OR -CLEP exam	-200 hours	1,500 hours in a minimum 12 months (requires a Supervisory Appraiser)	Certified Residential Exam	-Any 1-4 residential units, regardless of complexity or transaction value
Certified General Appraiser	-Bachelor's degree	-300 hours	3,000 hours in a minimum of 18 months; 1,500 hours must be in non-residential work (requires a Supervisory Appraiser)	-Certified General Exam	-All real estate types, including commercial real estate

*Can complete the experience requirements while completing the appraisal education hours; hours are cumulative across credentials.

Source: Appraiser Criteria

Recommendation

The credentialing criteria should be reviewed to consider streamlining the credentials to just two certifications: 1) certified residential appraiser and 2) certified general appraiser. This approach would:

- Follow the model of other professions where the individual is fully licensed or certified after passing the exam (e.g., real estate broker, accountant, lawyer);
- Follow the model of many large lenders and appraisal management companies, which already require appraisals to be conducted by a certified appraiser; and
- Provide a more realistic way for new entrants to earn a living in the profession.

Barrier: College Degree Requirements

Although real estate brokers are not required to have a college degree, certified residential appraisers must have a college degree or equivalent, and certified general appraisers (who can appraise both residential and commercial properties) must have a college degree. This poses an obvious barrier for potential appraisers of color who are underrepresented in the college degree population. In addition, the cost and time associated with completion of a college course of study create an additional burden. Finally, people of color, who disproportionately do not have access to inter-generational wealth, bear the brunt of student loan debt which can cripple their ability to earn an effective living wage once they graduate.¹³⁴

Recommendation

The criteria should be reviewed to consider whether the college degree is necessary for the profession, including whether this requirement has appreciably improved the quality of appraisals.

Barrier: Appraiser Education Hours

In addition to any college degree requirement, each level of appraiser credential requires education hours. To be a trainee, the individual must complete 75 hours; the licensed residential appraiser credential requires an additional 75 hours (for a total of 150 hours); the certified residential appraiser credential requires an additional 50 hours (for a total of 200 hours); and the certified general appraiser requires an additional 100 hours (for a total of 300 hours). Of course, each of these education requirements represents additional time and money for the potential appraiser. In addition, concerns have been raised about the content of this education. Several appraisers we interviewed stated that the education does not offer practical guidance on how to complete an appraisal.

Recommendation

The appraiser education hours criteria should be reviewed to consider whether the extensive hours are necessary and whether the content of the courses should be revised to better prepare the student to conduct the work of an appraiser.

Barrier: Experience Hours

The experience hours requirement was cited in almost every interview we conducted as by far the biggest challenge to entering the profession. More specifically, to be a licensed residential appraiser, the individual must complete 1,000 hours of experience in a minimum of six months, under the direction of a Supervisory Appraiser; the certified residential appraiser requires an

¹³⁴ See, e.g., Andre Perry, Marshall Steinbaum, and Carl Romer, *Student Loans, the Racial Wealth Divide, and Why We Need Full Student Debt Cancellation*, Brookings Institution (June 23, 2021) <https://www.brookings.edu/research/student-loans-the-racial-wealth-divide-and-why-we-need-full-student-debt-cancellation/>.

additional 500 hours (for a total of 1,500 hours) in a minimum of 12 months, under the direction of a Supervisory Appraiser; and the certified general appraiser requires an additional 1,500 hours (for a total of 3,000 hours) in a minimum of 18 months, under the direction of a Supervisory Appraiser.

While the hours themselves are a significant barrier, the biggest challenge is finding a Supervisory Appraiser. There are several disincentives to acting as a Supervisory Appraiser, including the time, cost, and competition. First, the Supervisory Appraiser must commit to the hours, which sometimes even include attending a training course. In many instances, the commitment includes being on site while the trainee conducts the appraisal. Second, the Supervisory Appraiser is essentially agreeing to reduce their pay. Typically, the appraiser is already splitting part of the appraisal fee with the appraisal management company, so the appraiser would have to further reduce their percentage of the fee to share with the trainee. Finally, the Supervisory Appraiser is in effect training their competition as once the trainee has received his or her license or certification, the newly-minted appraiser will very likely begin working independently in the same market for the same clients as his or her former supervisor. For this reason, many appraisers report that it is almost impossible to find a Supervisory Appraiser unless they are a friend or family member willing to do this as a favor. Many appraisers say, "To be an appraiser, you have to know an appraiser." Accordingly, because most current appraisers are older, White males, the lack of social and professional connections in communities of color may perpetuate the pattern of new appraisers being mostly White males. This significantly impacts the ability of people of color to enter the profession.

The experience requirement also raises other related concerns. First, the experience hours requirement is essentially an extended apprenticeship, which significantly impacts the individual's ability to earn a living due to the fee split and/or the reliance on the supervisor to provide clients and work assignments. In addition, several appraisers reported that the experience hours and minimum months requirement seemed to be an artificial barrier as they felt prepared to conduct appraisals independently well before the minimum experience requirement was fulfilled. It did not seem like the additional hours and waiting a certain number of months provided any additional benefit.

Several concerns were raised about the Practical Applications of Real Estate Appraisal ("PAREA"), which the Appraiser Qualifications Board recently approved as an alternative to the experience hours requirement. Through PAREA, an individual would be able to bypass the experience hours by means of a virtual course in which the student handles simulated appraisal situations and completes mock appraisal exercises and assignments, removing the need to find a Supervisory Appraiser. However, there are several roadblocks to implementing PAREA as a viable alternative. First, proposed courses are still under development and none are actually available at this time. The timeline for deploying the course and the eventual cost to potential appraisers are unknown. Second, each state must adopt these new criteria, which may take years in some cases. Some states who have adopted the criteria have retained some of the experience hours requirements, meaning that the individual would still need to find a Supervisory Appraiser.

Recommendation

Given the clear racial disparate impact of the experience hours and Supervisory Appraiser criteria, this requirement should be thoroughly reviewed to consider less discriminatory alternatives, including:

- Improving the content of the education courses so that the student is better prepared to conduct appraisals after passing the exam;
- Improving the content of the exam by including a practice-based component that ensures a prospective appraiser has a clear understanding of industry practices; and
- Replacing the current experience requirement with an exam that, once passed, makes the individual a certified appraiser.

Barrier: Standardized Tests

Questions have long been raised about the validity of certain standardized tests and the potential disparate impact on the basis of race or ethnicity.¹³⁵ In the appraisal profession, the individual has to pass a standardized test to become a licensed residential appraiser, a certified residential appraiser, or a certified general appraiser.¹³⁶ Typically, the examination consists of about 125 questions and takes about 4-6 hours. According to data from The Appraisal Foundation (see below), the pass rate is only about 55%-65% for first-time test takers. The Appraisal Foundation does not retain data on the basis of race, ethnicity, or gender, so the numbers may be higher or lower for these individuals. This means that even after spending the time and money on the appraisal education courses, any college degree requirements, and experience hours, there is a good chance that the individual will not receive the credential. These results raise concerns about the education and experience requirements as well as the validity of the test if individuals cannot pass the exam after all that training.

¹³⁵ See, e.g., John Rosales and Tim Walker, *The Racist Beginnings of Standardized Testing*, National Education Association News (March 20, 2021) <https://www.nea.org/advocating-for-change/new-from-nea/racist-beginnings-standardized-testing>; U.S. Equal Employment Opportunity Commission, *Employment Tests and Selection Procedures* (Dec. 1, 2007), <https://www.eeoc.gov/laws/guidance/employment-tests-and-selection-procedures>.

¹³⁶ State appraiser regulatory agencies and examination developers may use the *National Uniform Licensing and Certification Examination* developed by the Appraiser Qualifications Board or develop “equivalent examinations,” which must be reviewed and approved by the Appraiser Qualifications Board.

2015-2020												
National Uniform Licensing and Certification Examination Pass Rates												
	2015		2016		2017		2018		2019		2020	
	# Passed	Pass Rate	# Passed	Pass Rate	# Passed	Pass Rate	# Passed	Pass Rate	# Passed	Pass Rate	# Passed	Pass Rate
LR	169	53%	175	62%	260	67%	325	62%	371	60%	383	57%
	89		108		173		203		224		220	
CR	411	64%	402	66%	465	73%	735	68%	846	63%	849	65%
	262		267		338		498		529		548	
CG	393	66%	407	71%	447	71%	399	71%	433	54%	368	55%
	259		287		319		250		234		203	
TOTAL	973	63%	984	67%	1172	71%	1459	65%	1650	60%	1600	61%
	610		662		830		951		987		971	

*Data is for first time test takers.

Source: The Appraisal Foundation, https://www.appraisalfoundation.org/imis/TAF/Standards/Qualification_Criteria/National_Uniform_Licensing_and_Certification_Exam_for_Real_Property_Appraisers_/TAF/AQB_National_Exam.aspx?hkey=50cf1d9e-6430-4e5d-ac6e-2fe92352cbdf.

Recommendation

The Appraisal Foundation should collect data on race, ethnicity, and gender to measure the impact of the examinations. Also, the examinations should be reviewed for validity and consistency with federal anti-discrimination laws.

Concern: Pipeline of Trainees and the Future of the Profession

The Appraisal Foundation and other appraisal organizations have been actively working to create a pipeline of new trainees and appraisers of color. For example, The Appraisal Foundation has been working with the National Urban League, Fannie Mae, and Freddie Mac on the “Appraiser Diversity Initiative” as well as creating scholarships for women and people of color.¹³⁷ That said, the lack of diversity in the financial services space is not new and civil rights groups have used a variety of methods for increasing diversity in the insurance, financial services, and real estate industries. Some of the following methods might also be useful for bolstering the efforts to increase diversity in the appraisal space.

- Creating affinity relationships and programs with Historically Black Colleges and Universities as well as Latino-serving, Asian-serving, and Native American-serving institutions;¹³⁸
- Sponsoring internship opportunities for students of color;
- Partnering with civil and human rights organizations like the National Urban League, UnidosUS, and OneTen to develop apprenticeship and employment opportunities for students and people of color;

¹³⁷ Appraiser Diversity Initiative, <https://www.appraisalinstitute.org/the-appraisal-profession/appraiser-diversity-initiative/>.

¹³⁸ The Appraisal Foundation has begun an initiative to conduct outreach to Historically Black Colleges and Universities as well as Latino-serving institutions. See The Appraisal Foundation, *Promoting Diversity in the Appraisal Profession*, <https://appraisalfoundation.sharefile.com/share/view/s07b3d65a193d47e6a626af02a7aad265>.

- Implementing accountability measures that match diversity goals with compensation outcomes; and
- Establishing partnerships with real estate affinity groups such as the National Association of Real Estate Brokers, National Association of Hispanic Real Estate Professionals, Asian Real Estate Association of America, and the National Association of Minority Mortgage Bankers of America.

As various groups marshal their resources to encourage women and people of color to enter the appraisal profession, it is worth discussing how the industry can ensure that new entrants are joining a profession that is viable, sustainable, and focused on the future. A disappointing result would be to create a robust pipeline of women and appraisers of color who are not prepared for tomorrow's challenges, particularly in the areas of technology, automation, and artificial intelligence. At one PAVE Listening Session, a participant remarked that "it's difficult to convince people to enter a costly profession that seems to be becoming more automated." A review of the appraisal materials and public meetings found little to no discussion of the role of technology or any committees set up to inform and prepare appraisers for this future. At this time, the GSEs' policies mainly focus on full appraisals by human appraisers, but that could change at any time. Indeed, the GSEs are experimenting more and more with appraisal waivers, automated valuation models, and artificial intelligence. Just recently, the Acting Director of FHFA announced that the GSEs will incorporate desktop appraisals into their guides for many new purchase loans starting in early 2022.¹³⁹

Recommendation

The Appraisal Foundation and other appraiser organizations should continue and expand their outreach to women and people of color. In addition, The Appraisal Foundation and other appraisal organizations should monitor the demographics of individuals entering the profession or renewing their credentials and share this information publicly to ensure that the demographics of the profession are more transparent. Finally, appraiser organizations should ensure that new professionals are prepared for the future with respect to the use of technology, automation, and artificial intelligence.

¹³⁹ Sandra L. Thompson, FHFA Acting Director, 2021 Mortgage Bankers Association Annual Convention, <https://www.fhfa.gov/Media/PublicAffairs/Pages/Prepared-Remarks-of-Sandra-L-Thompson-Acting-Director-FHFA-at-the-2021-MBA-Annual-Convention-and-Expo.aspx>.

F. Compliance and Enforcement

The appraisal industry's byzantine regulation structure has created gaps, resulting in the appraisal industry being far behind other areas of the mortgage market in understanding fair housing risk, developing robust compliance programs, and creating useful accountability and enforcement systems. Below is a discussion of the following areas that could be improved to ensure that the appraisal industry is part of a fair and equitable housing market:

- Need for data
- Development of robust compliance programs
- Duty of care: appraiser accountability
- Reconsideration of value process

Need for Data

We received almost universal feedback from industry organizations, researchers, and fair housing advocates calling on FHFA and the GSEs to dedicate the necessary resources for the development of a strategy and process for public release of appropriate elements of the extensive property valuation dataset that is now maintained by the GSEs. Since the 2010 launch of the Uniform Mortgage Data Program, which included the Uniform Collateral Data Portal, industry stakeholders have served as critical business partners supporting the success of this work. This dataset could be further enhanced by coordinating with the Federal Housing Administration and the Veterans Administration to include the information on appraisals for properties financed by these agencies.

The accumulation of such a vast amount of data on properties across the United States— data that is verified by repeat sales and that provides insight on changes in the characteristics or condition of properties over time— is extremely valuable for a variety of stakeholders, including appraisers and appraisal management companies, lenders and servicers, mortgage and title insurance companies, investors and rating agencies, civil rights and advocacy groups, data analytics providers, and academics and researchers.

Providing access to this dataset could revolutionize the appraisal industry and the housing market. In particular, such information could shed light on whether any aspect of the appraisal process or other factors may produce valuation disparities and/or contribute to discrimination against borrowers of color. Moreover, the data has the potential to enhance transparency and risk management practices, and also to allow industry partners to more effectively evaluate whether their appraisals include identifiable sources of bias. Currently, the analytic capabilities of various types of industry stakeholders are considerable but limited by the quantity and scope of the data available to them. Releasing this data would create the opportunity to contribute to a housing finance ecosystem that has collateral models that are more reliable, predictable, and equitable. It may also lead to improvements in the data reported and utilized by appraisers themselves, making appraisals more accurate and thereby reducing fair housing risk and credit risk.

We also received feedback from several sources that it is currently impossible to track complaint trends and to identify appraisers (or appraisal management companies) who are

consistently providing deficient or potentially discriminatory appraisals. There is currently no universal or national public database that provides access to such complaint information.¹⁴⁰ Therefore, lenders, appraisal management companies, and consumers cannot determine if complaints have been lodged against a particular appraiser. For example, a lender may have had one problem valuation from a particular appraiser but may not realize that the appraiser has had complaints in connection with appraisals for other lenders. This makes it difficult for lenders or appraisal management companies to identify potential problem appraisers and take appropriate compliance management measures.

Recommendation

Government, the GSEs, lenders, appraisers, researchers, and civil rights/consumer advocates should strategize and work together for the release of appropriate elements of the appraisal data sets to reduce bias and develop more robust compliance and monitoring systems. In addition, after public input and collaboration, a public repository and accessible database of complaints involving appraisals for mortgage lending should be developed to identify trends in the filing of complaints, including instances of alleged discrimination, and to identify appraisers and appraisal management companies that may be engaging in repeatedly deficient or discriminatory appraisal activity.

Development of Robust Compliance Management Systems

Those we interviewed that worked outside of the appraisal industry expressed surprise and concern to learn that there are virtually no fair housing compliance management systems for appraisals. Fair housing and fair lending reviews are routine features of the compliance management system for most entities that operate in the mortgage market, and are key components of the federal financial regulators' risk assessments.¹⁴¹ Moreover, we learned that lenders that have to compensate the GSEs for repurchases based on faulty appraisals, rarely hold the appraisers accountable. Thus, some appraisers may be under the misimpression that their appraisals are without error or bias when in fact their appraisals have had serious consequences for the GSEs, lenders, or borrowers. Given the broad discretion that an appraiser has to determine the value of an individual homeowner's largest financial asset and the importance of protecting the lender's collateral, it was surprising to learn that fair housing compliance management systems are not routine for appraisers, appraisal management companies, lenders, or the GSEs.

Fortunately, the work that began decades ago to control for fair housing and fair lending risk in mortgage underwriting and pricing as well as homeowners' insurance may provide a useful

¹⁴⁰ Pursuant to the requirements of FIRREA (12 U.S.C. § 3332), the Appraisal Subcommittee maintains a national registry of certified and licensed appraisers who are eligible to perform appraisals for federally related transactions, which indicates whether an appraiser's credential is currently suspended, revoked, or surrendered in lieu of a state disciplinary action. The repository described here would be more detailed in content and would include complaints not resulting in such specific actions. It would more likely resemble the database maintained by the Consumer Financial Protection Bureau of complaints about consumer financial products and services.

¹⁴¹ See, e.g., FFIEC, *Interagency Fair Lending Examination Procedures* (2009), <https://www.ffiec.gov/PDF/fairlend.pdf>.

roadmap for the appraisal industry. While these mortgage and insurance compliance management systems are not perfect, they have advanced significantly to provide workable solutions based on data science. At this time, the appraisal process is not standardized and data-driven in a manner that facilitates a review for fair housing compliance. Much like the mortgage and insurance industries of decades ago, it is likely that lenders and the appraisal industry will need to expend significant effort in understanding and isolating the steps in the valuation process as well as determining the risks of discrimination and appropriate controls to mitigate those risks.¹⁴² Following is a list of some of the areas to explore to develop the much-needed robust fair housing compliance management systems for appraisal processes:

- Of the various valuation approaches (e.g., the sales comparison approach and the cost approach), which is the most predictive in terms of accurately valuing the home to protect the lender's collateral and to protect the financial value for the borrower, including borrowers of color?
 - For example, in the lending context, it is routine for lenders to evaluate whether the underwriting model is accurate in predicting default. Responsible lenders will also determine whether there are less discriminatory alternative models that reach more borrowers of color while still achieving similar accuracy.¹⁴³
- For the valuation approach selected, which variables are used to determine value? How can each variable be analyzed for disparate treatment or disparate impact? Are there consistent policies and procedures for determining each variable (such as distance from the subject property, selection of comparables, the determination of square footage, the valuation of improvements)?
 - For example, in the lending context, it is routine for lenders to determine which variables go into the underwriting decision, whether the variable explicitly uses a prohibited basis, whether the variable serves as a proxy for a prohibited basis,

¹⁴² See, e.g., Jonathan Rothwell and Andre M. Perry, *Biased Appraisals and The Devaluation of Housing in Black Neighborhoods*, The Brookings Institution Metropolitan Policy Program (Nov. 17, 2021), https://www.brookings.edu/research/biased-appraisals-and-the-devaluation-of-housing-in-black-neighborhoods/?utm_campaign=Brookings%20Brief&utm_medium=email&utm_content=184613964&utm_source=hs_email (stating that there is “a need for comprehensive reforms to the appraisal industry, which, even setting aside potential racial bias, relies upon ad hoc valuation methods that fail to incorporate advances in data science”); Faith Schwartz, *Three Keys to the Future of Appraisals*, MBA Newslink (Nov. 18, 2021), https://newslink.mba.org/mba-newslinks/2021/november/mba-newslink-thursday-nov-18-2021/faith-schwartz-of-housing-finance-strategies-three-keys-to-the-future-of-appraisal/?utm_campaign=MBA%20NewsLink%20Thursday%20Nov.%2018%202021&utm_medium=email&utm_source=Eloqua (stating that “[i]t goes without saying that many industry stakeholders will resist automation and technology enhancements to the appraisal process. That same reticence existed for underwriters when automated scoring systems were deployed.”); Austin Brown, Isabelle Ord, and Noah Schottenstein, *Interagency Initiative Spotlights Fair Lending Compliance in Home Appraisals*, DLA Piper Financial Services Regulatory Alert (June 28, 2021), <https://www.dlapiper.com/en/us/insights/publications/2021/06/interagency-initiative-fair-lending-compliance-in-home-appraisals/> (advising lenders to assess the adequacy of their fair lending compliance management systems with respect to appraisals).

¹⁴³ See, e.g., Relman Colfax PLLC, *Fair Lending Monitorship of Upstart Network's Lending Model*, Initial Report of the Independent Monitor at 9 (Apr. 14, 2021), https://www.reلمانlaw.com/media/cases/1088_Upstart%20Initial%20Report%20-%20Final.pdf.

- whether the variable has a disparate impact, and, if so, whether there is a less discriminatory alternative.¹⁴⁴
- Similarly, it is routine to determine whether loan underwriters are using variables consistently, and not using different methods for different populations on a prohibited basis.¹⁴⁵
 - For each variable, what data is used and does that data reflect historical discrimination? If so, is there a less discriminatory data set that can be used?
 - For example, in the lending context, the GSEs have recently recognized that allowing rental payment history to be used during the underwriting process may result in less discriminatory results.¹⁴⁶
 - Given FHFA's recent findings of thousands of potential race-related flags in the free-form text sections of appraisal reports,¹⁴⁷ are these sections necessary? If not, should they be eliminated to reduce discretion and fair lending risk? If so, how can lenders and appraisers develop systems to flag and disqualify appraisal reports that include inappropriate references (and possibly valuations) based on prohibited factors?
 - To what extent can technology be used to facilitate a fairer, more objective process, including more reliable inputs for the variables?
 - For example, in the appraisal context, it has been suggested that 3D imaging may lead to more accurate and reliable measurements.¹⁴⁸
 - For the valuation method used, what are the risk factors that increase the risk that there is a discriminatory appraisal?
 - For example, in the mortgage underwriting and pricing context, the presence of discretion plus gross disparities would signal elevated risk requiring additional analysis to determine if there is a legitimate, non-discriminatory reason to explain the disparity.¹⁴⁹
 - As another example, the Freddie Mac Research Note indicates that one indicator of risk may be the extent to which appraisals fall below the contract price in

¹⁴⁴ See *id* at 8-10.

¹⁴⁵ See FFIEC, *Interagency Fair Lending Examination Procedures* at 19 (2009), <https://www.ffiec.gov/PDF/fairlend.pdf>.

¹⁴⁶ See Fannie Mae, *Fannie Mae Introduces New Underwriting Innovation to Help More Renters Become Homeowners* (Aug. 11, 2021), <https://www.fanniemae.com/newsroom/fannie-mae-news/fannie-mae-introduces-new-underwriting-innovation-help-more-renters-become-homeowners>.

¹⁴⁷ FHFA, *Reducing Valuation Bias by Addressing Appraiser and Property Valuation Commentary*, FHFA Insights Blog (Dec. 14, 2021), <https://www.fhfa.gov/Media/Blog/Pages/Reducing-Valuation-Bias-by-Addressing-Appraiser-and-Property-Valuation-Commentary.aspx>.

¹⁴⁸ Faith Schwartz, *Three Keys to the Future of Appraisals*, MBA Newslink (Nov. 18, 2021), https://newslink.mba.org/mba-newslinks/2021/november/mba-newslink-thursday-nov-18-2021/faith-schwartz-of-housing-finance-strategies-three-keys-to-the-future-of-appraisal/?utm_campaign=MBA%20NewsLink%20Thursday%20Nov.%2018%202021&utm_medium=email&utm_source=Eloqua.

¹⁴⁹ See FFIEC, *Interagency Fair Lending Examination Procedures* at 19 (2009), <https://www.ffiec.gov/PDF/fairlend.pdf>.

census tracts of color versus majority White census tracts.¹⁵⁰ This risk factor could be monitored for individual appraisers as well as across appraisers.

- How can the compliance management system be designed to systematically monitor for risk factors and take graduated remediation steps to prevent a violation of federal, state, or local fair housing and fair lending laws?
 - For example, in the lending context, some lenders have developed systems that detect the risk of mortgage brokers engaging in discriminatory pricing. The lenders can use graduated remediation steps to address concerns, such as through additional fair lending training, suspension, and even termination.

Recommendation

Government, the GSEs, lenders, appraisers, researchers, and civil rights/consumer advocates should use knowledge of data science and appropriate examples from the mortgage and homeowners' insurance industries to develop more robust compliance management systems to monitor, remedy, and prevent fair housing risk and/or violations in appraisals.

Duty of Care: Appraiser Accountability

Fair housing organizations providing advocacy assistance to borrowers indicated in interviews that whether valuations are incorrect as the result of discrimination or as the result of professional negligence can be difficult to determine or prove in some cases. For this reason, when legal claims are made by aggrieved borrowers, such borrowers will often assert alternative claims – that the appraiser either engaged in discriminatory conduct in violation of the Fair Housing Act and other protective laws or that the appraiser negligently performed the appraisal and should be liable for professional negligence. Given the evidence of disparate valuations of properties located in neighborhoods with greater concentrations of people of color versus predominantly White neighborhoods, it is also plausible that in addition to issues stemming from racial bias, appraisals in neighborhoods of color also suffer from more frequent instances of professional negligence.

Appraisers, however, generally have little legal accountability under applicable case law to borrowers for negligence-based claims. It is difficult for a borrower to establish a legal claim for negligence against an appraiser and to recover monetary damages – even when demonstrable errors can be shown in their appraisals. A primary reason for this is that with respect to appraisals performed for mortgage lending purposes, the borrower is not the “client” of the appraiser nor generally identified as an additional “intended user” of the appraisal, as those terms are defined in the USPAP Standards and used by appraisers in their appraisal reports. Within the USPAP Standards, a “client” is the party who engages the appraiser for an assignment – this is the lender in the context of a mortgage lending appraisal. “Intended users” are, in addition to the client, those parties whom the appraiser has identified “by name or type” as users of the appraisal report.

¹⁵⁰ Melissa Narragon, et al., *Racial and Ethnic Valuation Gaps in Home Purchase Appraisals*, Freddie Mac Economic and Housing Research Note (Sept. 2021) (“Freddie Mac Research Note”), <http://www.freddiemac.com/fmac-resources/research/pdf/202109-Note-Appraisal-Gap.pdf>.

These two terms are keys to determining whether an appraiser may have legal responsibility to a borrower for damages resulting from a negligently performed appraisal. Neither the USPAP Standards themselves nor any state or federal statutes (including FIRREA) establish any right of a private party to sue for damages over negligent appraisals or for violations of the USPAP Standards.¹⁵¹ Professional negligence claims against appraisers, as with most other areas of professional negligence, are instead generally a matter of state common law. The elements of a professional negligence under state common laws are similar in most states and typically require that the plaintiff establish three elements:

Legal duty. That the defendant appraiser owed a legal duty of care to the plaintiff.

Breach of duty. That the defendant appraiser breached that duty of care (for a mortgage appraisal, the duty of care – or standard of care – would generally include compliance with the USPAP Standards).

Resulting damage. That the plaintiff suffered damage as a proximate result of the appraiser's breach of the duty of care.

Under common law, as developed in most states, a professional such as an appraiser will only owe a duty to those parties the professional intends or knows will rely on his or her work product. The intended user language in appraisal reports is, thus, often viewed by courts deciding appraiser negligence cases as a prime factor in determining the parties to whom an appraiser owes a duty of care. A recent California appellate case¹⁵² illustrates this point: the residential appraiser engaged by a lender for a borrower's purchase loan made an error in her appraisal by misidentifying the home as one of modular construction, rather than as a manufactured home. This mistake resulted in an inflated appraisal because older manufactured homes had far less value. The borrowers claimed in their lawsuit that they had relied on the appraisal in making their purchase decision and in taking on the mortgage debt, and that they had suffered damages based on the appraiser's mistake. The California appellate court upheld the trial court's dismissal, holding that the appraiser owed no legal duty to the borrowers because they were not intended users of the appraisal.¹⁵³

Within the USPAP Standards, the commentary to Standards Rule 2-2 states that:

A party [such as a borrower] receiving a copy of an Appraisal Report . . . does not become an intended user of the appraisal unless the appraiser identifies such party as an intended user as part of the assignment.

¹⁵¹ See, e.g., *Bolden v. KB Home*, 618 F. Supp. 1196 (C.D. Cal. 2008) (holding that "there is no private right of action under the FIRREA to enforce the USPAP").

¹⁵² *Tindell v. Murphy*, 22 Cal.App.5th 1239 (2018).

¹⁵³ It is relevant to note also that mortgage lenders themselves generally have little legal responsibility to borrowers for negligently performed appraisals. As a California appellate court explained: "a financial institution acting within the scope of its conventional activities as a lender of money owes no duty of care to a borrower in preparing an appraisal of the security for a loan when the purpose of the appraisal simply is to protect the lender by satisfying it that the collateral provides adequate security for the loan." *Nymark v. Heart Fed. Savings & Loan Assn.*, 231 Cal.App.3d 1089, 1092 (1991). See also *Kelly v. Regions Bank*, No. 3:11cv252-MCR/EMT (N.D. Fla. Sep. 27, 2013) ("a lender owes no duty of care to its borrower in appraising the borrower's collateral to determine if it is adequate security for the loan").

Fair housing advocates have suggested that guidance be given to appraisers within the USPAP Standards so that mortgage borrowers would be identified as intended users of the appraisal. One of the appraisal organizations interviewed for this study also supported that notion. Instructions within the USPAP Standards with respect to this issue would increase the accountability of appraisers to borrowers who have been injured by undervaluation and other appraisal errors and omissions.

Recommendation

Fair housing advocates working on behalf of borrowers indicate that fair housing legal issues in appraisals often overlap with appraiser professional negligence. Because appraisers' legal accountability for professional negligence under applicable case law typically extends only to those parties whom the appraiser has identified as "intended users" within the meaning of USPAP Standards and because appraisers generally do not identify borrowers as such intended users, appraisers often have no legal accountability to borrowers for instances of negligence. To increase the accountability of appraisers to borrowers who have been injured by appraisal negligence, the Appraisal Standards Board should consider amending the USPAP Standards to require appraisers to identify mortgage borrowers as "intended users" of appraisals prepared in relation to residential mortgage transactions.

Reconsideration of Value Process

With near uniformity, interviews conducted for this report with fair housing organizations and appraisal organizations pointed to what is termed the Reconsideration of Value (or "ROV") process as a point of frequent breakdown in the ability of borrowers – whether persons of color or otherwise – to obtain appraisals that they believe are accurate. Reconsideration of Value is the term used by the residential appraisal industry for the process by which a party involved in a lending transaction – most often a prospective borrower – who disagrees with an appraiser's opinion of value may submit information for the appraiser to consider. The information is generally given to the lender or appraisal management company and then provided by those entities to the appraiser. The information submitted often includes other property sales that may be comparable or specific information about the characteristics of the subject property such as square footage or improvements that are different than stated in the appraiser's original report. The appraiser then determines if a change to his or her opinion of value is warranted, and the appraiser's position is communicated back to the party who submitted the ROV.

Appraisal organizations reported in interviews that the ROV process varies highly among lenders and appraisal management companies. No current federal laws or regulations prescribe the ROV process. The general subject of communicating with appraisers performing appraisals for residential lending is touched on in the Appraisal Independence Requirements enacted by the Dodd-Frank Act as changes to the Truth in Lending Act ("TILA"), 15 U.S. Code § 1639e, and in Regulation Z, which implements TILA; however, these requirements as well as similar "Appraiser Independence Requirements" adopted by Fannie Mae and Freddie Mac are limited to prohibitions against coercion and intimidation of appraisers, rather than establishing a uniform process for borrowers or other parties to seek correction of inaccurate valuations. As such, no

enforceable requirements or standards exist for how appraisers are to consider ROVs or what information appraisers, lenders, or appraisal management companies) should provide to borrowers in response to an ROV (outside of the Veterans Administration's process utilized for the veterans' loan program discussed below).

Fair housing advocates have reported that borrowers raising concerns with respect to discrimination often felt that borrowers' efforts to seek correction – or even simply to receive explanations supporting valuations – were not fairly considered and that the results seemed arbitrary and opaque, without transparency into the decision-making process. The ultimate reconsideration and the detail of any response are left to the individual discretion of the appraiser, with reported responses often being as uninformative as “the appraiser’s opinion of value stands.” The recent HUD Conciliation Agreement discussed earlier in this report in which the bank agreed to revise its ROV process and to educate its representatives¹⁵⁴ as well as other publicized instances of alleged discrimination confirm that problems with the ROV process arise frequently when borrowers perceive that racial bias is at issue in a valuation.

Several interviewees pointed to the process referred to as the “Tidewater Procedure” that has been adopted by the Veterans Administration (“VA”) in connection with its loan guaranty program as providing an effective process for handling appraisals that are expected by the appraiser, upon initial development, to result in a valuation under the sales price of a home being purchased by a veteran borrower.¹⁵⁵ Under the VA’s process, when an appraiser expects that a valuation will be below the sales price and thus may imperil the veteran borrower’s ability to obtain a VA-guaranteed loan, the appraiser is required to inform the borrower’s designated point of contact to request additional information that may support the sales price. The appraiser is then required to consider that information and, if it does not change the appraiser’s valuation, the appraiser is required to include an addendum to the appraisal report describing the information that was collected and explaining why it did not change the opinion of value.¹⁵⁶ If the veteran still believes the valuation to be incorrect, the veteran may then submit a reconsideration request that VA staff, rather than the appraiser, will review within five business days. Appraisal organizations pointed to the VA process as creating a better formalized method for receiving input from borrowers (and their points of contact, such as real estate agents and loan officers) and also increasing the reliability of appraised values.

Recommendation

A “reconsideration of value” is the term used to describe the *ad hoc* process by which borrowers challenge appraisal values. It is a process that varies highly from lender to lender and that is without any legal structure. Fair housing advocates indicate that lack of fair consideration and clear communication in the process often occurs at the beginning of fair

¹⁵⁴ HUD, *Conciliation Agreement between Complainant and JPMorgan Chase Bank, N.A.*, FHEO No. 05-21-0635-8 (HUD March 8, 2021), https://www.hud.gov/press/press_releases_media_advisories/hud_no_21_037.

¹⁵⁵ The VA refers to the procedure as “Tidewater” because it was first developed and tested in the tidewater region of coastal Virginia.

¹⁵⁶ The Tidewater process is described in VA Circular 26-03-11, https://www.benefits.va.gov/HOMELOANS/documents/circulars/26_03_11.pdf and Ch. 10, Topic 8, of the VA Lenders Handbook, https://benefits.va.gov/warms/pam26_7.asp. See also, *Reconsideration of Value*, Ch. 10, Topic 22, VA Lenders Handbook, https://benefits.va.gov/warms/pam26_7.asp.

housing claim situations. Government, the GSEs, lenders, and The Appraisal Foundation should develop standards and guidance for appraisers regarding the fair handling of and increasing the transparency and accountability in the Reconsideration of Value process.

G. Conclusion

An appraiser has the unique power to determine the value of a home, which for most Americans, is their single most important financial asset and holds the key to wealth, stability, and opportunity for their family and generations to come. In addition, home values affect the tax base, school funding, and community investments. Moreover, time and again, our nation's economy and financial markets have been significantly impacted by home valuations, with communities of color often bearing the brunt of failings in the mortgage market and the home appraisal process. Given the importance of homeownership to American families, particularly families of color, governmental and private organizations have called for reforms and a comprehensive examination of the structure and governance of the appraisal industry.

In response to these calls for reform, we have assembled the research and recommendations in this report. We urge federal and state governmental entities, The Appraisal Foundation, the GSEs, lenders, appraisers, researchers, and civil rights and consumer advocates to work together to address the concerns raised in the report, including:

- **Questions About the Governance of the Appraisal Industry**
- **Gaps in Fair Housing Requirements and Training**
- **Barriers to Entry to the Appraisal Profession**
- **Compliance and Enforcement**

We hope that this report will encourage conversations among key stakeholders in the appraisal and housing industries to seek workable, sustainable solutions that benefit the whole of the housing market, including borrowers of color.

H. Glossary of Acronyms

Appraiser Criteria	Real Property Appraiser Qualification Criteria
Board	Board of Governors of the Federal Reserve
CLEAR	Council on Licensure, Enforcement and Regulation
CFPB	Consumer Financial Protection Bureau
DOJ	U.S. Department of Justice
DPC	White House Domestic Policy Council
ECOA	Equal Credit Opportunity Act
FDIC	Federal Deposit Insurance Corporation
FHFA	Federal Housing Finance Agency
FFIEC	Federal Financial Institutions Examination Council
FIRREA	Financial Institutions Reform, Recovery, and Enforcement Act of 1989
GAO	General Accounting Office
GSEs	Government-Sponsored Enterprises; for purposes of this report, the GSEs refer to Fannie Mae and Freddie Mac
HOLC	Home Owners Loan Corporation
HUD	U.S. Department of Housing and Urban Development
NCUA	National Credit Union Administration
NFHA	National Fair Housing Alliance
OCC	Office of the Comptroller of the Currency
OTS	Office of Thrift Supervision
PAREA	Practical Applications of Real Estate Appraisal
PAVE	Interagency Task Force on Property Appraisal and Valuation Equity
ROV	Reconsideration of Value
TILA	Truth in Lending Act
USPAP Standards	Uniform Standards of Professional Appraisal Practice
VA	Veterans Administration

Appendix I

Authors' Summary Biographies

Maureen Yap -

As Senior Counsel, Maureen Yap helps lead NFHA's Public Policy and Enforcement efforts related to fair lending, financial technology, mortgage policy, and housing finance reform. Ms. Yap, who has been in the fair housing and fair lending field since 1995, previously worked on a range of civil rights and consumer protection issues at the Federal Reserve Board, including leading the Board's Fair Lending Enforcement Section and founding the Unfair and Deceptive Acts or Practices (UDAP) Section. She was also an Associate at the law firms of Relman Colfax PLLC and Buckley LLP.

Peter Christensen -

Peter Christensen is an attorney and has been a member of the California bar since 1993. His law practice is focused on real estate valuation matters. His clients are primarily appraisal firms, management companies and valuation technology providers, as well as businesses that use appraisal services such as lenders and institutional investors. Mr. Christensen is the author of *Risk Management for Real Estate Appraisers and Appraisal Firms*, published by the Appraisal Institute.

Prior to his current legal practice, Mr. Christensen was the general counsel of the largest insurance administrator for professional liability insurance to real appraisers and valuation firms in the U.S. He earlier practiced law with the firms Latham & Watkins LLP and Irell & Manella LLP in California. Mr. Christensen earned both his B.S. in business administration and his law degree at the University of California at Berkeley.

Stephen M. Dane -

Stephen M. Dane is a nationally recognized civil rights lawyer, particularly in the areas of fair housing, fair lending, and insurance discrimination. Mr. Dane was lead counsel for the plaintiffs in the class action litigation Toledo Fair Housing Center v. Nationwide Mutual Insurance Co. (\$5.35 million settlement) and was co-counsel for the plaintiffs in HOME of Richmond v. Nationwide Mutual Insurance Co. (\$100.5 million jury verdict). He has been lead counsel in precedent-setting cases involving appraisal bias issues. Mr. Dane is the author of many articles and book chapters in the field of fair housing, most recently Fair Housing Policy Under the Trump Administration, Human Rights Magazine, Vol. 44, No. 3 (Dec. 6, 2019). Mr. Dane is listed in *The Best Lawyers in America* in the field of Civil Rights. He is also the former editor of the Civil Rights Insider, the award-winning quarterly eNewsletter of the Federal Bar Association's Civil Rights Law Section.

Morgan Williams -

Morgan Williams is responsible for leading NFHA's strategic and tactical legal initiatives and affairs. Mr. Williams leads NFHA's efforts to pursue pioneering litigation under the federal Fair Housing Act, often utilizing testing-based evidence and working in partnership with NFHA's network of local fair housing centers. He coordinates NFHA's actions to file amicus briefs to promote sound fair housing jurisprudence. Mr. Williams also provides training and technical

support to local fair housing centers across the country on investigation and enforcement strategies, as well as training to housing providers and servicers on a range of complicated and emerging topics. In addition, he assists with NFHA's federal public policy advocacy, in coordination with legislative offices and federal agencies, and helps local advocates address state and local legislative matters.

Lisa Rice -

Lisa Rice is the President and CEO of the National Fair Housing Alliance (NFHA), the trade association for over 200 member organizations throughout the country and the nation's only national civil rights agency solely dedicated to eliminating all forms of housing discrimination. Ms. Rice has over 35 years of experience in enforcing the nation's fair housing laws and has worked to establish precedents in the areas of appraisal bias, algorithmic fairness, lending and insurance redlining, and real estate issues. Ms. Rice is a published author and serves on the Board of Directors for the Leadership Conference on Civil and Human Rights, Center for Responsible Lending, and FinRegLab's, as well as the JPMorgan Chase Consumer Advisory Council, Mortgage Bankers Association's Consumer Advisory Council, Freddie Mac Affordable Housing Advisory Council, Quicken Loans Advisory Forum, Bipartisan Policy Center's Housing Advisory Council, and The Turner Center Advisory Council at Berkeley University.

Scott Chang -

Scott Chang is Senior Counsel at the National Fair Housing Alliance (NFHA) and helps lead the organization's fair housing and lending compliance, training, enforcement, and policy efforts. Prior to joining NFHA in September, Mr. Chang was Litigation Director at the Housing Rights Center of Los Angeles, California. He also previously served as Counsel at Relman Colfax LLC in Washington, D.C., and as an attorney at Brancart & Brancart, a law firm specializing in fair housing issues. Even before starting his new role at NFHA, Mr. Chang worked for years with the organization on projects and cases involving, among other issues, real estate sales discrimination.