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September 11, 2019
OPINION 19-0078

Arlene C. Edwards
Louisiana Real Estate
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63-B LICENSING

La. R.S. 37:3392

La. R.S. 37:3393

The Financial Institutions Reform, Recovery and Enforcement Act does not preempt state regulation of non-federally related transactions. An evaluation is an appraisal pursuant to La. R.S. 37:3392 and the provisions of La. R.S. 37:3391, *et seq.* are applicable.

Dear Ms. Edwards:

Our office received your request for an opinion regarding whether Louisiana law allows persons who are not state-licensed appraisers to perform "evaluations." The use of evaluations is provided for in the Interagency Appraisal and Evaluation Guidelines issued by federal financial institution regulatory agencies.¹ Your request seeks clarification on whether this type of evaluation falls within the definition of an appraisal as that term is defined by state law.

Congress passed the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA) in response to the savings and loan crisis of the 1980s and sought to promote a safe and stable system of affordable housing finance through regulatory reform.² 12 Code of Federal Regulation §34 governs real estate lending and appraisals, identifies real estate-related financial transactions that require appraisals, and sets forth minimum appraisal standards for federally related transactions. 12 C.F.R. § 34.43-44. Federal appraisal regulations require certain financial institutions to "obtain an appraisal completed by a competent and qualified state-licensed or state-certified appraiser that complies with Uniform Standards of Professional Appraisal Practice (USPAP) for any real estate-related financial transaction, unless an exception applies."³ The following *non-federally related transactions* do not require an appraisal but do require an evaluation: transactions with a value of \$250,000 or less; commercial real estate transactions with a value of \$500,000 or less; certain renewals, refinances, or other

¹ "Interagency Appraisal and Evaluation Guidelines" 12/2/10, <https://www.federalreserve.gov/boarddocs/srletters/2010/sr1016a1.pdf> (accessed 7/23/2019). The guidelines were issued pursuant to the Financial Institutions Reform, Recovery and Enforcement Act of 1989 and set forth appropriate standards for the performance of real estate appraisals in connection with "federally related transactions."

² H.R. 1278, 101st Cong. (1989-1990), §101.

³ "Interagency Advisory on Use of Evaluations in Real Estate-Related Financial Transactions." 3/4/2016 <https://www.federalreserve.gov/supervisionreg/srletters/sr1605a1.pdf> (accessed 7/23/2019).

transactions involving existing extensions of credit; and certain real estate-secured business loans.⁴

The Interagency Appraisal and Evaluation Guidelines set forth the following minimum standards for evaluations used in non-federally related transactions:⁵

- Identify the location of the property.
- Provide a description of the property and its current and projected use.
- Provide an estimate of the property's market value in its actual physical condition and use and zoning designation as of the effective date of the evaluation with any limiting conditions.
- Describe the method(s) the institution used to confirm the property's actual physical condition and the extent to which an inspection was performed.
- Describe the analysis that was performed and the supporting information that was used in valuing the property.
- Describe the supplemental information that was considered when using an analytical method or technological tool.
- Indicate all source(s) of information used in the analysis to value the property, including: external data sources (such as market sales databases and public tax and land records); property-specific data (such as previous sales data for the subject property, tax assessment data, and comparable sales information); evidence of a property inspection; photos of the property; description of the neighborhood; or local market conditions.
- Include the name, contact information, and signature of the preparer.

12 Code of Federal Regulations §34.43 does not require that an evaluation comply with USPAP or be completed by a state-licensed or state-certified appraiser.⁶ Considering these federal regulations, you ask whether an evaluation would be considered an appraisal as that term is defined in Louisiana law and, if so, whether the federal regulations allowing evaluations to be completed by a person who is not a state-licensed or state-certified appraiser preempts state law.

Louisiana Revised Statute 37:3392 defines the term appraisal as follows:

(1) "Appraisal" or "real estate appraisal" means an analysis, opinion, or conclusion relating to the nature, quality, value, or utility of specified

⁴ 12 C.F.R. §34.43 Interagency Advisory on Use of Evaluations in Real Estate-Related Financial Transactions." 3/4/2016 <https://www.federalreserve.gov/supervisionreg/srletters/sr1605a1.pdf> (accessed 7/23/2019).

⁵ A "federally related transaction" is "any real estate-related financial transaction which—(A) a federal financial institutions regulatory agency or Resolution Trust Corporation engages in, contracts for, or regulates; and (B) that requires the services of an appraiser. 12 U.S.C. § 3350(4).

⁶ "Interagency Advisory on Use of Evaluations in Real Estate-Related Financial Transactions." 3/4/2016 <https://www.federalreserve.gov/supervisionreg/srletters/sr1605a1.pdf> (accessed 7/23/2019).

interests in, or aspects, including energy efficiency, of, identified real estate, for or in expectation of compensation.

The minimum standards for evaluations set forth in Interagency Appraisal and Evaluation Guidelines entails an analysis, opinion, or conclusion relating to the nature, value, or utility of identified real estate and falls within the state definition of appraisal. Thus, it is the opinion of this office that an evaluation as defined in the above federal regulations constitutes an appraisal under Louisiana law.

Persons performing appraisals of property within the state of Louisiana are subject to La. R.S. 37:3393(C)(1) which prohibits an individual for a fee or other valuable consideration (or with the intent or expectation of receiving a fee or other valuable consideration) to be employed to perform an appraisal unless the individual is licensed pursuant to the Louisiana Real Estate Appraisers Law.⁷ Because federal regulations allow an evaluation to be completed by a person who is not a state-licensed or state-certified appraiser you ask if Louisiana law is preempted.

The Supremacy Clause in Article VI of the United States Constitution provides Congress with the power to preempt state law.⁸ There are three types of preemption recognized by the courts: express, field, and conflict preemption. When determining whether a state statute is preempted by federal law, the courts “start with the assumption that the historic police powers of the state were not superseded by the Federal Act unless that was the clear and manifest purpose of Congress.” *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996). Whether FIRREA preempts state law regulation of real estate appraisals was considered at length in *Fidelity National Information Solutions, Inc. v. Sinclair*, No. 02-6928, 2004 WL 764834 (E.D. Pa. 2004) and *Bolden v. KB Home*, 618 F. Supp. 2d 1196 (C.D. Cal. 2008). Both courts conducted an extensive analysis of whether FIRREA preempts state appraisal regulations which is pertinent to your opinion request.

Express preemption occurs when Congress expresses a clear intent to displace state law on a particular subject. *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992). The *Fidelity* court found FIRREA did not expressly preempt Pennsylvania’s act regulating appraisals. *Fidelity*, 2004 WL 764834 at *6. Similarly, *Bolden*, 618 F. Supp.2d at 1203 and *People v. First Am. Corp.*, 24 Misc. 3d 672, 878 N.Y.S.2d 860 (Sup. Ct. 2009), *aff’d*, 76 A.D.3d 68, 902 N.Y.S.2d 521 (2010), *aff’d*, 18 N.Y.3d 173, 960 N.E.2d 927 (2011) also found that there was no language in FIRREA that expressly preempts state law.

Field preemption occurs when federal law occupies a legislative field to such an extent that it is reasonable to conclude that Congress left no room for state regulation in that field or subject matter. *Cipollone v. Liggett Group, Inc.* 505 U.S. 504, 516 (1992). “In

⁷ We note that certain persons are excepted from the Louisiana Real Estate Appraisers Law as provided by La. R.S. 37:3393 (H). These persons would not be prohibited by Louisiana law from performing an evaluation as defined in the Interagency Appraisal and Evaluation Guidelines.

⁸ U.S. CONST. art. VI, cl. 2.

areas that the states have traditionally regulated, professional licensing being one, there is a strong presumption "that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Bolden*, 618 F. Supp. 2d at 1203 (quoting *Medtronic* 518 U.S. at 485). Professional licensing has long been recognized as part of the states' police power. *Fidelity*, 2004 WL 764834 at *6. *Fidelity* and *Bolden* found FIRREA does not preempt the entire field, noting that FIRREA creates a regulatory framework for real estate appraisals that recognizes the states' role in licensing and certifying real estate appraisers. *Fidelity*, 2004 WL 764834 at *6; *Bolden*, 618 F. Supp. 2d at 1203. See also *People v. First Am. Corp.*, 24 Misc. 3d at 680. "Congress envisioned a regulatory system for real estate appraisals with roles for both the federal government and the states." *Bolden*, 618 F. Supp.2d at 1203. Here, there is no field preemption as FIRREA does not occupy the entire field of appraisals and recognizes a role for states in licensing and certifying real estate appraisals. 12 U.S.C. §§ 3336, 3342-43, 3345.

Conflict preemption occurs when state law actually conflicts with federal law. In *Fidelity*, the plaintiffs argued that valuations (which were not written appraisals done by a state-licensed or state-certified appraiser) of non-federally related transactions were permitted under FIRREA. *Fidelity*, 2004 WL 764834 at *3. They argued that because non-federally related transactions are exempt from appraisals by FIRREA, they were also exempt from the state-certified appraiser requirement and thus FIRREA conflicted with the state law requiring a certified appraiser. *Id.* at 7. The *Fidelity* court rejected this argument noting that these transactions are by definition "non-federally related" and FIRREA extends only to federally related transactions. *Id.* at *8; 12 U.S.C. § 3350. The *Bolden* court also found there was no conflict preemption between FIRREA and state appraisal regulations finding FIRREA is limited to the regulation of federally related transactions and the intent of Congress was not to control non-federally related transactions. *Bolden*, 618 F. Supp. 2d at 1203.

We believe the extensive preemption analyses conducted by these courts is correct and that FIRREA does not preempt state regulation of non-federally related transactions. Therefore, it is the opinion of this office that an evaluation is an appraisal pursuant to La. R.S. 37:3392 and the provisions of La. R.S. 37:3391 *et seq.* are applicable.

We hope that this opinion has adequately addressed the questions you have submitted. If our office can be of any further assistance, please do not hesitate to contact us.

With best regards,

JEFF LANDRY
ATTORNEY GENERAL

BY:


Emily Andrews

Assistant Attorney General

JL: EGA