

## COMPLAINT TO THE FEDERAL TRADE COMMISSION

SUBJECT: Violations of Gramm- Leach-Bliley Act, Pub. L. 106-102 (the G-L-B Act or Act); Unfair Trade Practices; Copyright Infringement by lenders, brokers, and Automated Valuation Model Companies (AVM). Allege that mortgage lenders, mortgage brokers ship appraisal reports to data collection companies (the “AVM’s”) who strip data from the appraisal reports for use in their own product. Consequently violating G-L-B Act, engage in unfair trade practices, and violate copyright law.

BACKGROUND: The Federal Trade Commission (FTC) issued the FTC final rule regarding the Privacy of Consumer Financial Information as required by section 504(a) of the G-L-B Act. The rule was published in the Federal Register in Volume 65, No. 101 on Wednesday, May 24, 2000/Rules and Regulations Federal Trade Commission 16 CFR Part 313 Privacy of Consumer Financial Information.

Under 16 CFR Part 313.3(k)(2) *Examples of Financial Institutions* (ii) states **A personal property or real estate appraiser is a financial institution** (emphasis mine) because real and personal property appraisal is a financial activity listed in 12CFR 225.28(b)(2)(i) and referenced in section 4(k)(4)(f) of the Bank Holding Company Act. Appraisers rely on non-public personal information as defined in (313.3(n)(1)(i)(ii) in processing and reporting a real estate appraisal. Personally Identifiable Financial Information is defined in 313.3(o)(1) as *Personally identifiable financial information* means any information: (i) A consumer provides to you to obtain a financial product or service from you;

Based on the G-L-B Act and as set forth in the FTC Final Rule, the information set forth in an appraisal report (document) is protected under the Act and FTC Final Rule

The G-L-B Act at 15USC 6827 Sec 527 Definitions defines the following Customer, Customer Information of a Financial Institution, Document, and Financial Institution.

1. CUSTOMER – The term “customer” means, with respect to a financial institution, any person (or authorized representative of a person) to whom the financial institution provides a product or service, including that of acting as a fiduciary.
2. CUSTOMER INFORMATION OF A FINANCIAL INSTITUTION—The term “customer information of a financial institution” means any information maintained by or for a financial institution which is derived from the relationship between the financial institutions and is identified with the customer.
3. DOCUMENT—The term “document” means any information in any form.
4. FINANCIAL INSTITUTION—

(A) IN GENERAL – The term “financial institution” means any institution engaged in the business of providing financial services to customers who maintain a credit, deposit, trust, or other financial account or relationship with the institution.

(B) CERTAIN FINANCIAL INSTITUTIONS SPECIFICALLY INCLUDED.—The term “financial institution” includes any depository institution (as defined in section 19(b)(1)(A) of the Federal Reserve Act), any broker or dealer, any investment advisor or investment company, any insurance company, any loan or finance company, any credit card issuer, or operator of a credit card system, and any consumer reporting agency that compiles and maintains files on consumers on a nationwide basis (as defined in section 603(p) of the Consumer Credit Protection Act).

**The linkage** based on the G-L-B Act the real estate appraiser (a financial institution) is retained by a Customer (most typically a financial institution) that has a potential borrower (customer) for a mortgage loan. The real estate appraiser gathers *Personally identifiable financial information* as part of the appraisal process. Thus a real estate appraiser has two customers, the lender and the borrower. The real estate appraiser and the lender have the legal responsibility to protect the *Personally identifiable financial information*. It is our position the real estate appraisal report is a document as defined in G-L-B Act and as such is entirely confidential.

### **What is an appraisal and why is an appraisal important**

The appraiser provides the client with an opinion of real property value that reflects all pertinent market evidence. An appraiser must have and continue to develop body of knowledge on a wide variety of topics such as economics, real estate law, and construction. Furthermore an appraiser must be in touch with market participants to understand local conditions, motivations of buyers and sellers, and nuances not readily ascertainable that have a bearing on real estate value. The appraisal must be communicated in a clear and understandable manner. Thus, an appraisal and appraisal report that supports a reliable opinion of value is labor intensive.

Real estate is one of the basic sources of wealth in the global economy. Therefore, homeowners, business entities, governments, individuals, and others who own, manage, sell, purchase, invest in, or lend money on the security of real estate must have ready access to *unbiased opinions of value*, as well as sound information, analysis, and advice on a wide range of issues concerning real estate. Appraisal involves selective research into appropriate market areas, the assemblage of pertinent data, the use of appropriate analytical techniques, and the application of knowledge, experience, and professional judgment to develop an appropriate solution to an appraisal problem.

AVM's do not provide a reliable opinion of value as may be claimed. Instead these companies obtain their data from appraisal reports prepared by qualified individuals through fraudulent means. This practice is patently unfair.

Furthermore the practice has the potential to seriously undermine the security of real estate.

### **Confidentiality and Uniform Standards of Professional Appraisal Practice**

Real estate appraisers must comply with the Uniform Standards of Professional Appraisal Practice (USPAP). USPAP is published by the Appraisal Standards Board of the Appraisal Foundation. The Appraisal Foundation is authorized by Congress as the Source of Appraisal Standards and Appraisal Qualifications. Confidential Information is defined in the Definition Section as:

Information that is either:

- Identified by the client as confidential when providing it to an appraiser and that is not available from any other source; or
- Classified as confidential or private by applicable law or regulation\*.

\*NOTICE: For example, pursuant to the passage of the Gramm-Leach-Bliley Act in November of 1999, some public agencies have adopted privacy regulations that affect appraisers. As a result, the Federal Trade Commission issued a rule focused on the protection of “non-public personal information” provided by consumers to those involved in financial activities “found to be closely related to banking or usual in the connection with the transaction of banking.” These activities have been deemed to include “appraising real or personal property.” (Quotations are from the Federal Trade Commission, Privacy of Consumer Financial Information; Final Rule, 16 CFR Part 313.)

Thus, for some time the appraisal community has been on notice concerning confidentiality and the privacy status afforded appraisals under G-L-B Act.

USPAP Ethics Rule is divided into four sections one of which is Confidentiality which is stated in its entirety:

### **Confidentiality**

- **An appraiser must protect the confidential nature of the appraiser-client relationship.**
- **An appraiser must act in good faith with regard to the legitimate interests of the client in the use of confidential information and in the communication of assignment results.**
- **An appraiser must be aware of, and comply with, all confidentiality and privacy laws and regulations applicable in an assignment.\***
- **An appraiser must not disclose confidential information or assignment results prepared for a client to anyone other than the client and persons specifically authorized by the client; state enforcement agencies and such third parties as may be authorized by due process of law; and a duly authorized professional peer review committee except when such disclosure to a committee would violate applicable law or regulation. It is unethical for a**

**member of a duly authorized professional peer review committee to disclose confidential information to the committee.**

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*Thus, appraisers are well aware of confidentiality and work hard to adhere to the confidentiality requirements of USPAP, as well as for personal ethical and moral conduct.*

*Appraisers clearly understand their legal requirements with respect to privacy and protection of non-public personal information.*

#### **ALLEGATION:**

The majority of real estate appraisal reports are completed for mortgage loan purposes and the greatest volume are residential appraisal reports. The Residential Appraisal Reports are prepared on a universal form and are transferred electronically to the lender. Routinely the appraisals are re-bundled to data companies (AVM Companies) that mine confidential information and re-bundle the information and sell to unidentified third parties This directly violates CFR 313.13 (a)(ii) that states “Enter into a contractual agreement with the third party that prohibits the third party from disclosing or using the information other than to carry out the purposes for which you disclosed the information...” . This practice is pervasive and is conducted openly (Exhibit A – Appraisal Buzz interview with Bill Reyburn of FNC Corp.) This practice has the potential of harming consumers (borrowers) as their non-public information is disseminated to mass marketers and others. In addition the product of the AVM Companies is oftentimes inaccurate. To cite a recent example; the City of New Orleans deciding that real estate appraisals are to be conducted by real estate appraisers as the AVM Companies information was not accurate or reliable. (Exhibit B)

Mortgage fraud has grown to the extent that the Federal Bureau of Investigation (FBI) has taken an active interest. Mortgage fraud has become so lucrative that it has attracted organized crime. (Exhibit C – Excerpt from VIP Magazine published by the Appraisal Institute). John Reich, the FBI Supervisory Special Agent in the article cites “innovative mortgage loan products” as a contributor to fraud. Some of the components are identified as “increased reliance on automated underwriting processes, automated valuation processes, relaxed underwriting standards, and heavy reliance on unaffiliated third parties

AVM Companies and other similar companies engage in “pretexting” by obtaining consumer information from the appraisal report forwarded to them by lenders. This information is being obtained under false pretenses as set forth in G-L-B Act at 15 USC, Subchapter II, Sec. 6821-6827 Fraudulent Access to Financial Information.” In addition the AVM Companies are obtaining copyrighted information and making a derivative product without the permission of the appraiser (author).

**Unfair Trade Practice:** AVM Companies then turn-around and offer an opinion of value based on a statistical model from data obtained from appraisal reports. The AVM's sell this data for very little on a large volume basis. Thus, appraisers are competing with their own information that has been re-bundled at a price which appraisers cannot compete.

**Copyright Infringement:** AVM Companies that strip data from appraisal reports and re-bundle the data are creating a derivative from protected works. This practice is a clear violation of copyright law. As an aside, Copyright notice and registration are not a legal requirement for Copyright Protection.

## **THE PARADOX OF REGULATORY ENFORCEMENT**

What is not understood is the lack of enforcement by the Federal Functional Regulators identified in Sec 505 of G-L-B Act, specifically the:

- Office of the Comptroller of the Currency
- Board of Governors of the Federal Reserve System
- Board of Directors of the Federal Deposit Insurance Corporation
- Office of Thrift Supervision
- Board of the National Credit Union Administration
- Federal Trade Commission Act, by the Federal Trade Commission for any other financial institution (*real estate appraisers*) or other person that is not subject to the jurisdiction of the above agencies or authority.

Through the appraisal process non-public financial information as defined by 16CFR 313 is gathered and reported. The appraisal is then transmitted to the client, typically an entity as set forth on Section 505 of G-L-B (1) (A – D). It is this client who routinely transfers the appraisal to an AVM Company who then strips the data from the appraisal report. The AVM Companies do not have any relationship to the loan origination process. They are given this non-public personal financial information with no restriction on dissemination. Where are the regulators that have the obligation to enforce G-L-B Act on those entities? These AVM Companies appear to be violating G-L-B Act by disseminating non-public personal financial information; engage in unfair trade practice, violate copyright law.

## EXHIBIT B

### New Orleans Scraps AVMs in Favor of Actual Appraisals

A small group of concerned New Orleans citizens, known as the Citizens Road Home Action Team, has been instrumental in getting the state to accept post-storm appraisals performed by Louisiana certified appraisers provided by homeowners, rather than rely on automated appraisal methods. Officials now will use a combination of pre-storm appraisals obtained from private assessors or government agencies. On December 20, Louisiana Gov. Kathleen Babineaux Blanco announced policy changes aimed at speeding up and simplifying the Road Home program, including discontinuance of the use of AVMs.

AVMs have been used extensively up till now to come up with estimates of pre-storm values for thousands of New Orleans homeowners who had no qualified pre-storm appraisal. State officials concede that AVMs didn't always take into account the specific square footage of a home and did a poor job of pegging values for homes that don't fit the average for their neighborhood. Officials also have reduced the role of the broker price opinion, a method widely used in parishes outside Orleans in place of pre-storm appraisals.

In another key policy shift, state officials have dropped their opposition to homeowners' post-storm hiring of certified appraisers to estimate pre-storm values for purposes of assembling evidence for Road Home, which provides rebuilding grants of as much as \$150,000.

According to the New Orleans Times-Picayune, the moves came as some citizens say they think the Road Home program has low-balled them in estimating pre-storm property value, a figure critical to the ultimate size of grant awards because it sets a ceiling from which deductions for insurance and FEMA real estate grants are made. The problems seem most acute in Orleans Parish, where neighborhoods with checkerboard demographics and home values aren't well suited to "average" calculations of value used in the automated assessments.

The Road Home Program will now:

- Accept post-storm appraisals for pre-storm value.
- Incorporate file data from Louisiana licensed appraisers in the storm zone who have the most up-to-date information on home values.
- Obtain appraisals performed in the storm areas from Fannie Mae, Freddie Mac, the Federal Housing Administration, and other agencies that have up-to-date home values on file.

"The changes make sense when you consider how diverse the New Orleans housing market is. We have an entire team of local professionals dedicated to the real estate and housing industry, and they will now play a vital role in making the

Road Home program work better for our people," Sen. Ann Duplessis said.

In a separate policy shift, Road Home officials expect to finalize details of a new policy that will allow homeowners to accept an approved grant and still retain the right to seek a higher amount on appeal.

[ANO TABLE OF CONTENTS](#)

[BACK TO HOME](#)