

The following is the post as submitted by Neil Olson from FNC:

Commenter: Neil Olson, Chief Legal Officer, FNC, Inc. *

Response to petition regarding “Regulation to Limit the Use of Electronic Portals”

In reading the comments from appraisers related to this petition for proposed rulemaking, one can certainly sense their frustrations with the way that appraisals may be managed in the electronic age.

Some of that frustration has to do with how their clients handle their appraisals after the appraisal has been delivered, which is not related to the delivery process at all, but is certainly a source of concern. Some of it has to do with appraiser independence, certainly one of the top issues today for appraisers.

Still, even when the Board recognizes the concerns of the appraisal community, rulemaking is not something to be engaged casually. It is not something that should arise simply because something might be “common knowledge”. Rulemaking is a serious and important function that exists for the purpose of fostering the legislative charge of the regulatory agency, without creating an undue burden on the community it regulates or unleashing unintended consequences.

Let’s look at the different challenges presented by the petition.

What is an “electronic portal”?

Setting aside the question whether the Virginia Real Estate Appraiser Board has jurisdiction over any “electronic portal”, the first question is what is an electronic portal? There is no common agreement regarding what an electronic portal is. While no definition for electronic portal comes up in a routine Google search, the phrase “web portal” has an entry in Wikipedia.

A web portal is a site that provides a single function via a web page or site... Portals present information from diverse sources in an unified way. Aside from the search engine standard, web portals offer other services such as e-mail, news, stock prices, infotainment and various other features... An example of a web portal is Yahoo!

Thus, the notion of an electronic portal encompasses a large range of activities, including e-mail. Taken on its face, the petitioner is asking to regulate e-mail providers since e-mail is one common method for the electronic transmission of appraisals to clients. It is not clear how such an undertaking might be possible.

Obligation of the “portal” or of the appraiser?

It is important to recognize that the activity that appears to be under discussion really amounts to two different and quite distinct activities: 1) the preparation of the appraisal; and 2) the transmission of the appraisal.

Let’s start by describing the typical process an appraiser follows with respect to an appraisal in electronic form. (For simplicity, we will concentrate on residential appraisals and ignore appraisals delivered by fax or mail.)

- Appraiser completes and signs the appraisal using the means provided by the software package.**
- This version is not the actual appraisal, since it is not the one delivered to the client.**
- Since few clients accept appraisals in electronic form in the original appraisal software package format, the appraiser then converts the final appraisal file into one of the most commonly accepted formats: typically PDF, AI Ready or Lighthouse.**
- The “converted” version is the actual appraisal, since it is the one that the appraiser delivers to his or her client.**
- Appraiser then transmits the appraisal in its converted form to the client using one of the means designated by the client, either e-mail or one of the electronic networks.**
- At this stage, the appraiser’s obligation is complete, and the appraisal is now in the client’s hand.**

It should be clear that there are really two stages to this process

- the process by which the appraiser prepares the appraisal in a form acceptable to his or her client, and**
- the process of transmission itself.**

The process by which appraisers prepare appraisals according to the requirements of their clients (and of course in compliance with USPAP) is entirely within the appraiser’s control. The appraiser decides which format to use (one acceptable to the client) and performs the conversion.

It is only when the appraiser has completed the conversion that the appraiser engages the delivery means, which involves a third party.

Is this petition a request to regulate appraiser-client conduct instead?

The appraisal that the appraiser delivers to his or her client is the one converted into the acceptable format, not the near final draft version he or she prepared using the appraisal software package. This process is in the control of the appraiser, not in the “electronic portal”.

Many of the published comments to this petition have to do with the appraiser’s discomfort or frustration with what their clients are asking of them, which is unrelated to the transmission of the appraisal (and any of the means the appraiser uses to transmit appraisals).

But what about the “signature”?

The commenters make an important point about the signature. There is a lot of confusion about signatures, some of it fostered by those who have their own technology to sell.

First, remember the distinction between the final draft version of the appraisal that the appraiser prepared using an appraisal software package, and the final version of the appraisal delivered

Second, remember that the appraisal file transmitted to the client is not the same thing as what is presented on the screen (or what is printed) when that appraisal file (in whichever format) is opened. What is presented on the screen is the result of re-assembling the various elements of the appraisal stored in the appraisal file, the text (data), fonts, graphics and images (including the signature— which is just another image), into something that we all recognize as an appraisal form report.

When the appraiser signs the appraisal in his or her appraisal software package, using whatever protections the software requires (including passwords), what is happening is that the image (yes, image) of that signature is then placed in the correct spot on the appraisal when the appraisal is viewed through the appraisal software package. The signature is still an image, and is the signature image that the appraiser most likely scanned as a JPG, BMP or TIFF file and uploaded to the appraisal software package.

But that is not the appraisal that the appraiser delivers. The appraisal the appraiser delivers is the one he or she converted. What happened to the signature during the conversion process?

If the file is converted into a PDF, the program that creates the PDF (the "PDF writer") gathers all of the text (data), fonts, graphics and images (including the signature— another image) into an organized collection of information along with a "map" of where everything goes and stores it. When the PDF is opened, the PDF viewer re-assembles all that for viewing or printing with all of the text, fonts, graphics and images—including the signature—in the right place, and we see

something that we all recognize as an appraisal form report. Even though one appraisal may look like another when printed, a PDF file created from one forms software package will not be identical to one created by another (because, among other things, different appraisal software packages organize their files in different ways).

While appraisers appear to be quite comfortable with the PDF format, since it is very much a “visual” format, the underlying elements in a PDF are no different than any other file an appraiser may use to deliver to his or her client. The PDF is not a photograph, but a very nicely organized process for storing and re-assembling the underlying elements in an appraisal.

(As a special note, there is nothing uniquely secure about a PDF. See, for example,

<http://www.cs.cmu.edu/~dst/Adobe/Gallery/PDFsecurity.pdf>)

Similar processes occur when an original format appraisal file is converted into Lighthouse or AI Ready. What is different with an AI Ready file is that the AI Ready standard is a data standard, so it does not preserve custom fonts or formatting (which does not affect USPAP compliance) and it uses XML.

In an AI Ready file, the text (data) and images are gathered into an organized XML file that identifies each of the elements, writing them down in a standard, organized manner—which allows them to be reassembled into something that we all recognize as an appraisal form report with the signature in place (much the same as the PDF process). It is the same signature that the appraiser “affixed”, and it still acts as “authentication of the work performed by the appraiser and the acceptance of the responsibility for content, analyses, and the conclusions in the report”.

Is Virginia REAB being asked to regulate the technology used?

In being asked to evaluate “evidence and documentation”, the regulator is suddenly jumping out of its role as a regulator concerned with “all things required or expected of a state appraiser certifying and licensing agency under Title 11 of the Financial Institutions Reform, Recovery and Enforcement Act of 1989” [Code of Virginia §54.1-2013] and into the role of the appraisers’ “Geek Squad”.

The Virginia REAB should very carefully consider whether it should take on this role due to its complexity. For example

- Who decides? Does the Virginia REAB make a finding? (What are the Virginia statutory requirements for this?)
- Who has the expertise to be able to evaluate?
- Who pays for the evaluation?

- How often would the evaluation need to occur? What if there is a change in the technology?
- How do the parties involved maintain confidentiality?
 - o Proprietary information, technology and processes
- Confidential appraisal information

- o How would anyone obtain permission from all of the different parties (esp. lender clients and their affiliated appraisers) for any demonstration of any live data?

How does a web-based service “cease doing business in Virginia”?

How does a web-based service know whether its users are in or from Virginia? For example, how could Yahoo or Google cease doing business in Virginia? If a Virginia licensed or certified appraiser is connected to a web-based service while in Washington DC, is that considered doing business in Virginia?

Regulating the appraisal after it is delivered

Several of the commenters indicated circumstances that are clearly out of the control of the appraiser, and beyond the scope of USPAP, that is, what happens after the appraisal is delivered to the client? Several commenters complained about having their appraisals altered after delivery. This is certainly a frustrating experience and can be the source of misunderstanding and worse (where the appraiser may become the victim of fraud).

In those cases, however, that is beyond the control of the appraiser, and the Appraisal Standards Board has consistently held that the appraiser is only responsible up to the moment of delivery to the client (e.g., see USPAP FAQ, October 2007 http://www.appraisalfoundation.org/s_appraisal/sec.asp?CID=12&DID=12). After that, the client is free to deal with the appraisal as it sees fit. Of course no “portal”, from FedEx to e-mail to web-based, has control over the appraisal after the moment of delivery.

Unintended consequences

Every day, appraisers deliver tens of thousands of electronic appraisal reports to their clients.

Since nearly all of the appraisals in electronic form are delivered through some “portal” or other, then any interruption in service would have the effect of putting Virginia appraisers out of business until their “portal” of choice was certified. It is curious that someone would propose a regulation that would have that effect.

Summary

The original petition is based on “common knowledge” of certain facts. As we have discussed, some of the common knowledge about appraisals in the electronic age is based on some misconceptions about the role of the appraiser in the process of preparing and delivering appraisals in electronic form to their clients.

While appraisers are rightfully frustrated about many of the challenges they face in the marketplace for appraising, especially assaults on their independence, this petition for rulemaking and the proposed rule does not address those very real issues.

What the petition asks for does not address what appears to be the real issue, the discomfort that appraisers may feel with the choices that their clients have made regarding the form and format of the appraisals they expect to receive.

Thank you for your consideration.