

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

NATIONAL ASSOCIATION OF  
MORTGAGE BROKERS, INC.,  
7900 Westpark Drive,  
Suite T-309,  
McLean, VA 22102,

Plaintiff,

v.

JAMES B. LOCKHART III, DIRECTOR  
OF THE FEDERAL HOUSING  
FINANCE AGENCY  
1700 G Street, N.W.  
4<sup>th</sup> Floor  
Washington, D.C. 20552,

Defendant.

*Man L. Savitt*  
*Filed 2/23/09*

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Summary of Complaint

1. This action challenges a final rule promulgated by the Federal Housing Finance Agency ("FHFA") when it entered into agreements with the New York State Attorney General ("NY AG"), the Federal National Mortgage Association ("Fannie Mae") and the Federal Home Loan Mortgage Corporation ("Freddie Mac") that implement a Home Valuation Code of Conduct (collectively, the "Valuation Rule"). The Valuation Rule prohibits mortgage brokers from ordering home value appraisals on behalf of their customers, yet does not impose such restrictions on lenders, their employees, or their affiliates. The Valuation Rule will force mortgage brokers to rely on lenders and their affiliates to obtain appraisals for their customers, drastically reducing the ability of brokers to provide consumers with an efficient and cost-

effective means of obtaining a mortgage. By disfavoring mortgage brokers in an attempt to remedy a perceived industry problem with appraisals, FHFA will place mortgage brokers at a significant and permanent competitive disadvantage that will impede competition in the mortgage lending industry to the detriment of consumers.

2. FHFA, formerly the Office of Federal Housing Enterprise Financial Oversight (“OFHEO”), promulgated the Valuation Rule in violation of the Administrative Procedure Act and FHFA’s organic act, the Federal Housing Enterprises Financial Safety and Soundness Act of 1992, as amended. FHFA adopted the Valuation Rule, which *de facto* regulates the entire mortgage lending industry, without providing notice or the opportunity for public comment as required by the rulemaking procedures of the Administrative Procedure Act.

3. The Valuation Rule goes beyond the authority of the Director of the FHFA to regulate Fannie Mae and Freddie Mac (collectively, the “GSEs”). Moreover, the Valuation Rule constitutes an improper delegation to NY AG of federal regulatory authority delegated to the Director of FHFA.

4. The Valuation Rule is arbitrary and capricious. It is contrary to the intent of Congress, is in direct conflict with regulations, policies, and guidelines regarding appraisal standards issued by coordinate federal agencies, and does not comport with governing judicial precedents. The Valuation Rule is not reasonably supported by a satisfactory explanation or justification, is inconsistent with relevant data regarding the impact of mortgage brokers on the marketplace, and fails to offer a rational basis for rejecting reasonable alternative approaches.

5. Enforcement of the Valuation Rule will cause irreparable harm to plaintiff and its members and is contrary to the public interest. The Valuation Rule’s abolition of broker-ordered appraisals will force mortgage brokers and their customers to rely on lenders and their affiliates

for home value appraisals, disrupting the established business practices of mortgage brokers, decreasing the efficiency of the marketplace, and increasing the cost to consumers. The Valuation Rule's disparate treatment of competitors will place mortgage brokers at a permanent disadvantage in the marketplace and consequently reduce healthy competition to the detriment of consumers.

#### Jurisdiction and Venue

6. The Court has jurisdiction of this matter pursuant to 28 U.S.C. § 1331. This action arises under the Federal Housing Enterprises Financial Safety and Soundness Act of 1992, as amended, 12 U.S.C. §§ 4501 et seq. ("FHFA's Organic Act"), the Administrative Procedure Act, 5 U.S.C. §§ 551 et seq. ("APA"), and the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202.

7. Plaintiff National Association of Mortgage Brokers, Inc. ("NAMB") is a not-for-profit corporation organized under the laws of Florida, with its principal place of business in McLean, Virginia. NAMB is suing in its individual capacity and as a representative on behalf of its members.

8. Defendant James B. Lockhart III is the Director of FHFA ("Director"). He also was the director of OFHEO at the time that the agency initiated the challenged Valuation Rule. OFHEO became FHFA in July 2008 with the passage of the Housing and Economic Recovery Act of 2008, Pub. L. 110-289, 122 Stat. 2654 (2008). The Director is responsible for the operation of FHFA and the promulgation of rules and regulations by FHFA. He is sued in his official capacity only.

9. Venue in this Court is proper pursuant to 28 U.S.C. § 1391(b) and (e).

### Standing

10. At least one of NAMB's members has standing to sue in his, her or its own right.
11. The interests NAMB seeks to protect are germane to its purpose.
12. Neither the claim nor the relief requested requires the participation of an individual NAMB member in this action.

### Background

#### *NAMB and Its Members*

13. NAMB is the only national trade association that represents the mortgage broker industry. NAMB represents the interests of more than 70,000 mortgage broker professionals located in all 50 states and the District of Columbia. NAMB also represents the interests of homebuyers and advocates for public policies that serve the mortgage consumer by promoting competition, facilitating homeownership and ensuring quality service.

14. NAMB is committed to promoting the highest degree of professionalism and ethical standards for its members. NAMB requires that its members adhere to a professional code of ethics and best lending practices that foster integrity, professionalism, and confidentiality when working with consumers.

15. In 2006, NAMB amended its Code of Ethics and Best Lending Practices to address concerns over undue pressure being placed on appraisers and other settlement service providers. The revisions specifically prohibit any NAMB member from engaging in or responding to any pressure or influence from any party seeking to circumvent professional industry standards, guidelines, rules, or regulations in a mortgage transaction.

16. NAMB provides its members with access to professional education opportunities and offers rigorous certification programs to recognize members with the highest levels of professional knowledge and education.

17. NAMB serves the public directly by sponsoring consumer education programs for current or aspiring homebuyers seeking mortgage loans. To help ensure that the public is well-served by brokers, NAMB and others in the lending industry sponsor a fraud reporting program with information and links available on the NAMB website.

18. Parties acting as mortgage brokers defy simple characterization, but in today's market, it can generally be said that a real estate financing professional or entity acts in a mortgage broker capacity when the professional or entity works with both borrowers and lenders, though representing neither, to obtain a mortgage loan. Mortgage brokers add value by providing goods with quantifiable value, such as a customer base and goodwill, as well as facilities and services.

19. Mortgage brokers work with consumers to help them through the complex mortgage origination process. In addition to ordering appraisals, a broker's services may include taking the application; performing a financial and credit evaluation; collecting and completing documents; working with realtors; ordering title searches and pay-off letters; assisting in remedying faulty credit reports or title problems; and facilitating loan closings.

20. Mortgage brokers have helped tens of millions of consumers, including many low- to moderate-income borrowers, enjoy the benefits of homeownership and provide consumers with a highly efficient and cost-effective means of obtaining a mortgage that fits the consumer's financial goals and circumstances. Mortgage brokers have been a key catalyst in

invigorating competition in the mortgage lending industry, expanding product choice, reducing marginal prices and serving new customers.

21. Independent studies have shown that mortgage brokers facilitate competition in the mortgage marketplace. In 2005, a study conducted by economists at three major universities concluded that “broker-originated mortgages are less costly to the borrower than lender-originated mortgages after holding other loan terms and borrower characteristics constant.”

22. A December 2007 study by Professor Morris Kleiner of the University of Minnesota and Richard Todd of the Federal Reserve Board concluded that “brokers have helped to shorten the loan process and make it cheaper.” The study also found that when certain state regulatory burdens were imposed on brokers that impeded brokers’ entry into mortgage markets, the number of brokers declined, leading to “higher foreclosure rates, and a greater percentage of high interest-rate mortgages.”

#### *Residential Mortgage Industry*

23. Mortgage markets have evolved rapidly in recent years, as have the roles of mortgage professionals and entities, who may work in multiple capacities. As noted in the 2007 study by Kleiner and Todd, with the emergence of the “originate to distribute” model of mortgage financing, under which loans, regardless of originator, are often promptly repackaged, sold, and securitized, “[T]he actual roles of brokers, loan officers, lenders, and others are not as rigidly bound and often blur.”

24. With the prevalence of the “originate to distribute” model of mortgage financing, originators who in the past may have been distinguishable from mortgage brokers increasingly function as brokers. Lenders often know at the time of closing that they will quickly sell the loan. They can calculate how much they will make from the sale of the loan and are less

sensitive to the financial risk traditionally assumed when financing a loan. Lenders also often receive underwriting approval from another funding source prior to funding mortgage loans and enter into multiple contracts with various banks and other lenders to offer an array of products and services.

25. Fannie Mae and Freddie Mac are dominant in the secondary mortgage market. According to the FHFA, the GSEs held 75 percent of mortgage-backed securities in the United States at the end of 2007, and purchased or guaranteed nearly 87 percent of new mortgages for the second quarter of 2008. Thus, whether a lender sells to directly to the GSEs or to other participants in the secondary market who may later sell to the GSEs, or wishes to retain the important option of selling to either at a future date, the lender must originate loans that meet requirements imposed by the GSEs.

26. The Valuation Rule will change, and is already changing, the regulatory and operational framework that has been in existence for 20 years.

#### *Current Appraisal Standards and Industry Practices*

27. Whether a consumer works with a retail mortgage lender, correspondent lender, or mortgage broker to obtain a residential mortgage, at some point in the mortgage shopping process the party originating the mortgage will seek a home value appraisal. Lenders use appraisals in their underwriting process to evaluate the value of the property that will secure a mortgage. Mortgage brokers use appraisals to shop complete loan packages to multiple lenders, seeking a mortgage that will best fit a consumer's financial goals and circumstances.

28. Many consumers who apply for a mortgage loan elect not to lock-in an interest rate at the time of application. This allows consumers to have their interest rate move with the market and affords them an opportunity to continue shopping for a more competitive rate from

another lender. Even those consumers who elect to lock-in an interest rate with a particular lender may choose or be forced by circumstances to break that lock-in agreement and obtain mortgage financing from another source.

29. When a consumer applies for a loan through a mortgage broker, the broker's professional relationships with various banks, lenders, and investors gives the consumer the freedom to float their interest rate, shop around, and change loan programs as circumstances dictate without incurring the additional expense of multiple appraisal or application fees.

30. When a consumer applies for a loan through a direct lender, the consumer is financially tied to that lender because when a lender orders an appraisal, the lender owns the appraisal and cannot transfer the appraisal to another lender without acting contrary to current federal law and guidelines. A new appraisal must be ordered each time a consumer wishes to apply to a different direct lender for a mortgage loan, which increases the number and cost of loan origination for consumers and decreases the ability of consumers to comparison shop and obtain the most competitive interest rate available.

31. In 1989, following the savings and loan crisis, Congress passed the Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA"), which established a real estate appraisal regulatory system that involves the federal government, the states, and an organization called The Appraisal Foundation. Various aspects of this federal regulatory scheme prohibit improper influence on appraisers and work to ensure appraisal independence.

32. Pursuant to authority under FIRREA, federal agencies responsible for regulating financial institutions have promulgated regulations and issued guidance regarding real estate appraisals made in connection with federally-related transactions. The agencies' guidance



includes the Interagency Appraisal and Evaluation Guidelines (“1994 Appraisal Guidelines”), which, among other things, set forth standards for selecting qualified appraisers.

33. The Appraisal Foundation develops and promotes the Uniform Standards of Professional Appraisal Practice (“USPAP”), which are the generally accepted industry standards for professional appraisal practice. The states are responsible for holding appraisers to the standards set forth in the USPAP.

34. FIRREA also created the Appraisal Subcommittee of the Federal Financial Institutions Examination Council. The Appraisal Subcommittee ensures that real estate appraisers who perform appraisals in transactions that could expose the United States government to financial loss are sufficiently competent and exercise independent judgment. The Appraisal Subcommittee monitors state licensing and certification of real estate appraisers and oversees those activities of The Appraisal Foundation that relate to real property appraisal.

35. Under the USPAP, appraisers “must perform assignments with impartiality, objectivity, and independence, and without accommodation of personal interests” and “must not use or communicate a misleading or fraudulent report or knowingly permit an employee or other person to communicate a misleading or fraudulent report.” It is “unethical for an appraiser to accept an assignment, or to have a compensation arrangement for an assignment, that is contingent on” the appraiser valuing the property at a predetermined or favorable amount.

36. Each appraisal report must be accompanied by a certification by the appraiser that, among other things, the appraiser’s engagement “was not contingent upon developing or reporting predetermined results” and that the appraiser’s compensation “is not contingent upon the development or reporting of a predetermined value or direction in value that favors the cause of the client, the amount of the value opinion, the attainment of a stipulated result, or the

occurrence of a subsequent event directly related to the intended use of [the] appraisal.”

Appraisers must certify that their reports have been prepared in conformance with the USPAP.

37. An appraisal report must identify the appraiser’s client and the intended users of the report. Identification of the client is important because the appraiser assumes certain rights, obligations, and liabilities with respect to the client. An appraiser’s client is the individual or entity that engages the appraiser to complete a specific appraisal assignment. Intended users of an appraisal report are individuals or entities identified at the time of the engagement as users of the appraisal.

38. The USPAP does not allow appraisers to “readdress,” *i.e.*, transfer, appraisals to a party other than the client or the intended user(s). In order to transfer an appraisal in compliance with the USPAP, an appraiser must consider any request for a transfer as a new assignment and be engaged by the second lender to conduct an appraisal.

39. The prohibition on readdressing, or transferring, appraisals also applies where an appraisal is ordered by an appraisal management company (“AMC”) affiliated with a lender. AMCs provide services related to locating, engaging, and coordinating home value appraisals. Lenders that are not affiliated with an AMC utilize their own employees to perform the services an AMC might otherwise provide, such as the ordering of appraisals and preparation of appraisals by in-house appraisers.

40. A number of lenders affiliate themselves with AMCs, usually to reduce overhead costs. The nature of affiliation varies. In some cases, it is structural, established by virtue of a joint venture agreement, a common corporate parent, or by the lender having an ownership interest in the AMC. In other cases, it is contractual and grounded in a continuing business relationship.

41. Upon an AMC engaging the services of an appraiser, the appraiser may consider the AMC to be the client or, if the AMC is acting as an authorized agent of the lender, may consider the lender to be the client. In either case, the appraiser is prohibited from readdressing an appraisal ordered by the AMC to an entity that is not the client or an intended user identified at the time that the client engaged the appraiser's services.

42. Because neither lender-ordered nor AMC-ordered appraisals can be readdressed under the USPAP, such appraisals ensure customer retention for lenders and strip the consumer of leverage to negotiate for a better product or service, or for lower costs. This, coupled with the additional cost of paying an appraisal fee for each application submitted to a different lender, creates a disincentive for consumers to shop around.

43. Consumers who work with a direct lender affiliated with an AMC may be paying inflated prices. The home value appraisals completed by AMCs typically are actually performed by independently contracted third-party appraisers. The AMCs contract with an appraiser to prepare an appraisal at below-market rates and then mark up the cost of the appraisal before the appraisal is provided to the lender. Because consumers typically reimburse lenders for the cost of an appraisal, the increase in cost is borne by the consumer who does not receive any benefit from the initial savings on the appraisal fee.

44. By contrast, mortgage brokers are able to offer consumers the advantage of freedom and flexibility in terms of product selection and price, along with efficient and cost-effective customer service. By presenting customers with a variety of loan products and service options offered by competing mortgage providers, brokers give borrowers leverage to negotiate for a lower cost loan product that meets their financial goals and circumstances. Moreover, because of the professional relationships mortgage brokers maintain with banks, other lenders,

investors, appraisers, and settlement service providers, mortgage brokers are often better able to serve consumers who experience difficulty obtaining approval.

*Impetus for the Valuation Rule*

45. Sometime in early 2007, NY AG initiated an investigation of the mortgage lending industry, including the

. The NY AG's office asserts the investigation has “

46.

47. Focusing on a perceived root cause of the subprime mortgage crisis, NY AG investigated fraudulent appraisals associated with Washington Mutual (“WaMu”). Prior to its collapse and takeover by JPMorgan Chase & Co. in September 2008, WaMu was the largest savings and loan in the United States and was heavily involved in the subprime mortgage industry. In 2006, WaMu began having financial problems that started with its subprime lending business and soon spread to its entire housing business. WaMu exited the subprime lending business in December 2007, but was unable to mitigate its significant and increasing losses.

48. On November 1, 2007, NY AG announced a lawsuit against WaMu and its AMC, eAppraiseIT, as well as eAppraiseIT's parent company, First American Corporation, for conspiring to inflate real estate appraisals. The WaMu lawsuit was filed in New York state court.

49. The WaMu lawsuit alleges that eAppraiseIT and WaMu colluded to inflate the appraisal value of homes, with WaMu pressuring eAppraiseIT to use a list of preferred "Proven Appraisers" who provided inflated home value appraisals. According to a press release issued by NY AG on November 1, 2007, the AMC knew that its behavior was illegal, but intentionally broke the law in order to secure continued business from WaMu.

50. On November 7, 2007, in connection with the WaMu lawsuit, NY AG sent a letter to Fannie Mae and Freddie Mac demanding that each GSE retain an Independent Examiner approved by NY AG to review all appraisals related to WaMu mortgages purchased by the GSEs. NY AG also demanded that the GSEs stop doing business with WaMu in the interim.

51. The letter to the GSEs further stated that NY AG was "expanding its investigation to determining the extent of Fannie Mae's and Freddie Mac's knowledge of, and actions regarding, [appraisal] problems as they relate to past mortgage purchases and securitizations" by the GSEs.

52. Also in connection with the WaMu lawsuit, NY AG issued subpoenas to Fannie Mae and Freddie Mac, citing authority under the New York General Business Law § 352 and the New York Executive Law § 63(12). The subpoenas included requests for information regarding mortgage loans purchased by the GSEs from any bank, the due diligence practices of the GSEs, and their policies and procedures regarding valuations and appraisals by both originating lenders and the GSEs.

53. On November 8, 2007, following receipt by the GSEs of the letter and accompanying subpoenas, the Director met with NY AG to discuss the demand for an independent examiner and a cessation of business with WaMu, as well as the expansion of NY AG's investigation to mortgages purchased from other financial institutions.

54. On January 9, 2008, prior to the announcement by NY AG and FHFA of the Valuation Rule, the Federal Reserve Board (the "Board") published a proposed rule amending the Board's Regulation Z that comprehensively addressed concerns regarding coercion of appraisers and appraisal fraud. The anti-coercion amendment to Regulation Z prohibited lenders, mortgage brokers and their affiliates "from coercing, influencing, or otherwise encouraging appraisers to misstate or misrepresent the value of a consumer's principal dwelling."

55. NAMB supported the Board's anti-coercion amendment.

*FHFA's Promulgation of the Valuation Rule*

56. On March 3, 2008, FHFA announced that it had entered into agreements with NY AG and Fannie Mae and Freddie Mac (the "Agreements"). The Agreements required the GSEs to adopt a new policy regarding home value appraisals, called the "Home Valuation Code of Conduct," and, as of January 1, 2009, to stop purchasing loans originated by lenders that have not adopted the Home Valuation Code of Conduct. The Agreements also required the GSEs to fund the establishment of an Independent Valuation Protection Institute ("Institute") that will monitor and study the valuation process and, from time to time, propose amendments to the Home Valuation Code of Conduct. NY AG agreed to terminate its investigation of Fannie Mae and Freddie Mac, and the GSEs agreed to cooperate with NY AG's continued investigation of the mortgage industry.

57. Although the WaMu lawsuit ostensibly related to how WaMu's relationship with its AMC generated fraudulent appraisals and contributed to WaMu's financial demise, the resulting Agreements focused on mortgage brokers, which had nothing to do with the claims alleged in the WaMu lawsuit.

58. According to the Agreements, the Home Valuation Code of Conduct was drafted by FHFA and NY AG in consultation with the GSEs and "other market entities."

59. Neither NAMB nor any of its members had notice of the Agreements or the Home Valuation Code of Conduct prior to the March 3, 2008 announcement of the Agreements.

60. As originally introduced, the Home Valuation Code of Conduct prohibited lenders and entities affiliated with and/or acting on behalf of lenders from exerting improper influence on appraisers; prohibited lenders from accepting an appraisal report completed by an appraiser "selected, retained, or compensated in any manner" a third party—such as mortgage brokers and real estate agents—other than the lender or a third party specifically authorized by the lender to act on its behalf; and prohibited lenders from utilizing appraisal reports prepared by appraisers employed by any of the following: the lender, an affiliate of the lender, an entity owned by the lender, an entity that owns the lender, a real estate settlement services provider, or an entity owned by a settlement services provider. Lenders also were prohibited from using any appraisal report obtained by or through an AMC owned by the lender or an affiliate of the lender unless the lender's ownership interest constituted 20 percent or less and the AMC independently conducted its appraisal-related operations.

61. In his press release, NY AG stated, "With this agreement, Fannie Mae and Freddie Mac have become leaders in transforming the mortgage industry" and "national banks

have a clear choice: immediately adopt the new code and clean up appraisal fraud in the mortgage industry or stop doing business with Fannie Mae and Freddie Mac – it is that simple.”

62. After the March 3, 2008 announcement of the Agreements and the impending implementation of new appraisal standards, Fannie Mae and Freddie Mac asked for comments regarding the implementation of the Home Valuation Code of Conduct that the GSEs were already bound to adopt. The comment period ran from March 14, 2008 to April 30, 2008. The GSEs forwarded the comments to FHFA and NY AG.

63. In an undated press release posted on FHFA’s website, entitled “Comments on Enterprise Appraisal Code,” FHFA states that the GSEs established a 45-day comment period during which comments could be submitted directly to Fannie Mae and Freddie Mac, and that FHFA would be reviewing the comments submitted.

64. On September 25, 2008, during a hearing before the House Committee on Financial Services, Director Lockhart testified that the Valuation Rule would take effect later than the original January 1, 2009 deadline because FHFA was still working with NY AG to develop the final appraisal standards.

65. Following the close of the comment period, FHFA and NY AG engaged in negotiations with mortgage lenders regarding various prohibitions in the original Home Valuation Code of Conduct that concerned lenders. Mortgage brokers and other interested parties were excluded from these negotiations.

66. Representatives of NAMB met with employees of NY AG and with FHFA personnel regarding the unfairness of the Valuation Rule to mortgage brokers. FHFA representatives acknowledged that the position of the mortgage brokers, but would not do



anything to address brokers' concerns because FHFA desired to bring an end to the investigation by NY AG.

67. On July 30, 2008, prior to the announcement of the final Valuation Rule, the Board published the final rule amending Regulation Z. The final rule substantially adopted the proposed anti-coercion amendment. Accordingly, pursuant to Regulation Z, all lenders, mortgage brokers and their affiliates are prohibited "from coercing, influencing, or otherwise encouraging appraisers to misstate or misrepresent the value of a consumer's principal dwelling."

68. When addressing comments submitted regarding the anti-coercion amendment to Regulation Z, the Board noted that a "few large banks and a financial services trade association suggested that the Board prohibit mortgage brokers from ordering appraisals, as the GSE Appraisal Agreements do." In response, the Board declined to find that "any particular procedure for ordering an appraisal necessarily promotes" fraudulent appraisals. Rather, the Board found that "coercion of appraisers," whether by lenders or mortgage brokers, "is an unfair practice" and determined that the anti-coercion provisions should apply to lenders and mortgage brokers alike.

69. On September 7, 2008, FHFA announced that FHFA was placing Fannie Mae and Freddie Mac into conservatorship. FHFA appointed itself conservator.

70. On November 19, 2008, the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Office of Thrift Supervision, and the National Credit Union Administration published in the Federal Register their Proposed Interagency Appraisal and Evaluation Guidelines ("Proposed Appraisal Guidelines"). The Proposed Appraisal Guidelines would supersede the 1994

Appraisal Guidelines. Among other things, the Proposed Appraisal Guidelines address recent revisions to the USPAP and “clarify the Agencies’ real estate appraisal regulations and promote a safe and sound real estate collateral valuation program.” The comment period closed on January 20, 2009.

### *The Valuation Rule*

71. On December 23, 2008, FHFA announced the final version of the Home Valuation Code of Conduct. The final version differs in several respects from the original version and the amendments overwhelmingly favor lending institutions to the detriment of mortgage brokers, appraisers, and consumers.

72. The final version of the Valuation Rule prohibits mortgage brokers from submitting broker-ordered appraisals to lenders, effectively precluding mortgage brokers from serving their customers by shopping complete loan application packages. And since mortgage brokers are effectively prohibited from ordering appraisals, brokers and their customers must rely on lenders and their AMC’s to obtain home value appraisals. The Valuation Rule permits lenders and their affiliated AMC’s to order appraisals and permits lenders to use appraisals prepared by in-house appraisers, as well as appraisals prepared by appraisers employed or engaged by a lender’s affiliated AMC.

73. The Valuation Rule wholly exempts from the appraisal independence standards small financial institutions that would suffer hardship as a result of compliance. Small financial institutions are those that, like many brokers, have assets totaling \$250,000 or less.

74. The final Valuation Rule permits lenders to transfer appraisals from one lender to another if the transferor lender certifies that the appraisal was procured in conformance with the

Home Valuation Code of Conduct and the transferee lender determines that the appraisal conforms with its internal appraisal requirements.

75. Portable appraisals are beneficial to consumers—as is evidenced by the established business practices of mortgage brokers—but the Valuation Rule’s transfer provision is not likely to increase portability of lender-ordered appraisals and will instead increase loan origination costs for consumers. The provision does not address conformance with the USPAP, which generally prohibits appraisers from transferring appraisal reports to third parties. The USPAP aside, the provision allows a lender to refuse a transferred appraisal on the ground that the appraisal does not conform with the lender’s internal appraisal standards, allowing the lender to require that the consumer pay for a second appraisal. The lender may also charge the consumer an additional fee to cover the lender’s completion of certifications and determinations necessary to effectuate a transfer under the Valuation Rule. Second appraisals and additional fees both increase loan origination costs for consumers.

76. With the exception of the provisions of the Agreements relating to the Institute, the requirements of the Agreements, including adoption of the Home Valuation Code of Conduct, terminate 28 months after the date the Agreements were executed.

77. Because the Valuation Rule requires sweeping changes to the business practices of the mortgage industry, it is unlikely that conforming policies and procedures will be undone once adopted and implemented throughout the mortgage lending industry.

78. The Agreements provide NY AG with continuing oversight authority. NY AG was entitled to receive and consider public comments submitted regarding the Valuation Rule, which implies a right to be involved in all subsequent decision making regarding the final version of the Valuation Rule. In addition, the Institute’s Board of Directors is to be approved of

by both FHFA and NY AG, and the Institute is required to provide semi-annual reports to both FHFA and NY AG.

79. When FHFA announced the final Valuation Rule, the agency also announced a delay in the effective date of the Valuation Rule, from January 1, 2009 to May 1, 2009. The practical effect will be far sooner given market realities and the time that is required to process loan applications.

80. A number of lenders, including J.P. Morgan Chase, Wells Fargo, and U.S. Bank Home Mortgage are already requiring mortgage brokers to obtain appraisals through their AMCs. SunTrust Mortgage has indicated that it will begin implementing its new appraisal process on March 1, 2009.

#### *Harm to Mortgage Brokers and Consumers*

81. The Valuation Rule will adversely and irreparably harm NAMB and its members, as well as mortgage consumers, in numerous ways, including but not limited to the following:

(a) By forcing mortgage brokers to rely on lenders and their affiliates to obtain appraisals for customers, the Valuation Rule will drastically reduce the ability of mortgage brokers to provide flexible, highly efficient and cost-effective service to consumers, placing brokers at a significant and permanent competitive disadvantage.

(b) The Valuation Rule will have significant impact on NAMB and its members, many of whom are small business owners who will struggle to remain viable in the face of the rule's bias toward mortgage lenders. The Valuation Rule presents a very real danger that a number of mortgage brokers will be forced to close their doors and, ultimately, that NAMB itself will cease to have reason to exist.

(c) The Valuation Rule will channel significantly more appraisal requests to AMCs to the detriment of appraisers and consumers. Once mortgage brokers are no longer allowed to order appraisals, independent appraisers by and large will be forced to offer their services to AMCs and be subjected to the AMC model of paying appraisers below-market rates and then marking up the cost of the appraisal before the consumer reimburses the lender for the “cost” of the appraisal. For consumers, in part because they receive no benefit of cheaper appraisal services, AMCs are not a more efficient or cost-effective means of obtaining an appraisal—and will be even less so as they are flooded with requests for appraisals that ordinarily would have been made to mortgage brokers. Unless the Valuation Rule is enjoined, lenders and their affiliated AMCs will save on overhead costs and increase profits at the expense of appraisers who will be denied market rates for their services and consumers who will incur substantial additional loan origination costs.

(d) The Valuation Rule will significantly reduce healthy competition in the mortgage lending industry. Reduced competition will decrease the options available to consumers and increase the cost of mortgages to consumers.

#### Challenging the Valuation Rule

82. The Valuation Rule is a substantive rule of general or particular applicability and future effect that *de facto* regulates the entire mortgage lending industry and constitutes a “rule” under the Administrative Procedure Act. FHFA was required to promulgate the Valuation Rule through notice and comment rulemaking proceedings, U.S.C. § 553 and 12 U.S.C. § 4526(b). Because FHFA failed to engage in rulemaking proceedings, the Valuation Rule was promulgated

without observance of procedure required by law and is void, invalid, and unenforceable pursuant to 5 U.S.C. § 706(2)(D).

83. The Valuation Rule is not reasonably supported by any explanations or justifications, and FHFA has failed to offer any rational reasons for rejecting alternative approaches to ensuring appraiser independence. The Valuation Rule is arbitrary and capricious, an abuse of discretion, and otherwise not in accordance with law. As such, the Valuation Rule is invalid pursuant to 5 U.S.C. § 706(2)(A).

84. The Valuation Rule exceeds the scope of the Director's authority to interpret and promulgate regulations under sections 1313 and 1319G of the Federal Housing Enterprises Financial Safety and Soundness Act of 1992, as amended by the Housing and Economic Recovery Act of 2008. Because the Valuation Rule exceeds the Director's statutory jurisdiction, authority, and right, it is invalid pursuant to 5 U.S.C. § 706(2)(C).

85. To the extent that it may be determined the Director possesses sufficient authority to promulgate the Valuation Rule, the Director's sub-delegation of such authority to NY AG was improper and beyond the scope of the Director's delegated authority, 12 U.S.C. § 4513(e). Accordingly, the Valuation Rule was promulgated in excess of the Director's statutory jurisdiction, authority and right, and is invalid pursuant to 5 U.S.C. § 706(2)(C).

86. The Valuation Rule is void, invalid, and unenforceable because it has been promulgated in violation of the Regulatory Flexibility Act, 5 U.S.C. §§ 601 et seq.

87. NAMB and its members do not have an adequate remedy at law.

88. NAMB and its members will suffer irreparable harm if the Director and those acting in concert with the Director are not enjoined from enforcing the Valuation Rule, which is

scheduled to take effect on May 1, 2009, until this Court has had an opportunity to determine whether the Valuation Rule is valid as promulgated.

WHEREFORE, plaintiff NAMB prays that the Court issue a declaratory judgment that the Valuation Rule is contrary to law, arbitrary and capricious, unenforceable, and otherwise unlawful, and that the Court grant preliminary and permanent injunctive relief enjoining the defendant Director of the Federal Housing Finance Agency and all individuals and entities acting in concert with the defendant Director from enforcing the Valuation Rule, with costs and attorneys fees against the defendant.

BAKER & HOSTETLER LLP

By: \_\_\_\_\_

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