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 **AMC Fined Over C&R Fees**

By Isaac Peck, Editor

Here The Louisiana Real Estate Appraisal Board (LREAB) has again taken action to ensure that Customary and Reasonable (C&R) Fees are being paid by AMCs and Lenders in the state.

On December 8, 2015, after a hearing that lasted over 12 hours and was closely watched and attended by appraisers, AMCs, and lenders alike, the Board ruled against iMortgage Services, LLC and issued a [Final Order](http://www.workingre.com/wp-content/uploads/2016/01/4-Findings-of-Fact-Conclusions-of-Law-and-Order-2014-1500.pdf) that included a fine of $10,000 and a six-month license suspension. The suspension was stayed, provided that iMortgage provides a C&R compliance plan to the Board no later than March 21, 2016.

In contrast to Louisiana’s previous C&R enforcement action involving Coester VMS, where there was no admission of guilt by Coester, this is the first judgement against an AMC that leaves no question on the determination of guilt. The Board’s final order establishes that iMortgage failed to comply with Louisiana law and violated the C&R fee requirements set in place by the Board.

**Initial Investigation**

Demonstrating the glacial speed at which many state board investigations operate, the initial complaint against iMortgage was filed two years ago in January 2014 after iMortgage sent out an appraisal order for a full 1004MC FHA appraisal with a fee of $200. The investigation was not opened until May 2014, with the hearing taking place in December 2015.

In its written response to the initial investigation letter, iMortgage’s Chief Risk and Compliance Officer, Dean Kelker, explains that iMortgage’s fees were based, in part, on a fee survey that iMortgage was given by one of its large origination clients (later revealed to be Flagstar Bank), and that he “can’t speak to the details of the survey because it was conducted without our involvement.”

Kelker writes that iMortgage works on a cost-plus basis, having been provided a minimum fee for each geographic market by Flagstar.  iMortgage then adds a “service fee” to the appraiser’s fee in order to develop a final borrower cost for the assignment.

In addition to the Flagstar fee survey, Kelker says that iMortgage also determines fees based on its “experience in the market” and the fees that appraisers quote and accept within particular local markets.  Kelker argues that iMortgage complies with both C&R presumptions of compliance, as it relies on what he says is an independent third party fee study (Flagstar’s study), as well as iMortgage’s internal market data regarding what it has been paying appraisers and what appraisers have been accepting.

It is worth noting that that the language of the C&R fee provision of Dodd Frank states unequivocally that “Fee studies shall exclude assignments ordered by known appraisal management companies.” However, because iMortgage did not know the details of the fee survey, it is unknown whether the Flagstar survey, which served as iMortgage’s first line of defense, used AMCs fees in its determination that $200 is C&R for a 1004MC FHA appraisal order.

In his letter to the Board, Kelker raises his objections with Dodd-Frank, writing that iMortgage’s problem with “broad fee studies,” possibly referencing the Louisiana Board’s fee study, is that they are “general in nature and do not specifically encompass the scope of work associated with an individual mortgage assignment.” Furthermore, Kelker writes that any fee studies that “specifically exclude appraisal management companies in their composition create a potential bias due to the significant participation share of AMCs in the mortgage market.” While contrary to the wording of the Dodd-Frank C&R fee provision, this sentiment echoes many other AMCs that insist that the fees they pay should be included in fee surveys and that fees consistently paid by AMCs constitute C&R fees because appraisers are accepting them.

After submitting the documentation requested by the Board, including appraisals ordered by iMortgage in Louisiana from December 1, 2013 to July 1, 2014, iMortgage was served with a preliminary notice of

adjudication in November 2014. It cited iMortgage with 150 violations of failure to pay C&R fees. After discussions with the staff of the Louisiana Board, 141 of the alleged violations were dismissed- with only nine violations remaining by the time the hearing took place in December 2015. The reason why may be news to appraisers.

**Federal Covered Transactions**
One nuanced point that will be of interest to appraisers is that the initial order of the 1004MC FHA appraisal, that began the investigation, was not one of the nine violations that iMortgage was ultimately charged with. According to the testimony of Robert Rieger and Kellen Mathews, iMortgage’s attorneys, the 1004MC FHA appraisal did not meet the definition of a *federal covered transaction*, and therefore, the Dodd-Frank C&R fee provision did not apply.  Based on the hearing transcript, dozens of the originally noted 150 C&R violations against iMortgage were dismissed because they were deemed to be transactions “not covered” or having no C&R fee protection under Dodd Frank.

A careful reading of Dodd-Frank reveals that Section 129E, which includes the Appraiser Independence and C&R fee provisions, applies specifically to “consumer credit transaction(s) secured by the principal dwelling of the consumer.” In other words, appraisals for foreclosure and REO purposes, investor purchases and refinances, and any other transaction not involving a credit transaction secured by the “principal dwelling of the consumer,” are not regulated nor covered under these important sections of Dodd-Frank. As a result, appraisers cannot rely on the protections of the appraiser independence and C&R provisions of Dodd-Frank for a large variety of appraisal transactions. Though appraiser independence in covered by other federal statutes.

This point is not widely known by appraisers, nor was it immediately clear to the Board’s investigators. Only later in the investigation process were the 150 appraisals in question examined to see if they were covered transactions, at which point a large segment of them dismissed.

**100,000 words, 500 Pages**
The Louisiana Board did not immediately release the transcript of the hearing on December 8, which lasted over 12 hours. *Working RE* requested the transcript directly following the hearing and has just recently received a copy.  The transcript is nearly 100,000 words and nearly 500 pages long in its original form. Judge Darrell White presided over the hearing, with the Board serving as the jury and maintaining responsibility for rendering a decision. Throughout the hearing, several facts were brought to light that are of concern to appraisers.

In her opening statement, the attorney representing the Louisiana Board, Arlene Edwards, clearly lays out the case against iMortgage, arguing that the AMC violated the Board’s rules and regulations requiring that appraisers be paid C&R fees. Edwards argues that iMortgage’s response to the complaint filed in May 2014 “clearly showed that they did not follow our laws. Their response indicated that they sometimes use what an appraiser would agree to accept.  They also used what they called, I believe, a fee study done by one of their own clients.” Edwards also draws a distinction between federal and state law, stating “what we are here to prove is not that they are in violation of federal law, but that they are in violation of Louisiana law and our own rules and regulations because their own response showed that they failed to follow what is required under Louisiana law and rules.”

iMortgage’s lawyers spent the better half of the day questioning the two investigators regarding the Board’s rules and procedures for an investigation, hoping to uncover and prove that the investigation was conducted sloppily and in violation of the Board’s own rules. The attorneys argued that missing or incomplete notes were made in the files regarding the investigation, that investigators improperly handled certain administrative items, and that standard investigations are supposed to be completed within 120 days, while the investigation against iMortgage dragged on for months at time with no action taken.

iMortgage’s lawyers then called a William Wade Matchneer III as a witness in the case, an attorney who served as past senior counsel for the Consumer Financial Protection Bureau. Through examination and cross-examination, Matchneer highlighted an important point regarding Dodd-Frank’s two presumptions of compliance regarding C&R fees, stating that “a presumption is just a suggestion. It’s not a requirement.” In other words, complying with one of Dodd Frank’s C&R presumptions of compliance is a way to be sure to comply with the C&R fee provision, but it is not the only way to comply with the law and an AMC may claim to have complied in a different fashion. Matchneer also revealed that his presence at the hearing was, in part, due to the Real Estate Valuation Advocacy Association (REVAA) putting him in touch with iMortgage’s attorneys. Jeff Dickstein, the Chief Compliance Officer of Pro-Teck, a member of REVAA, also appeared as a witness on iMortgage’s behalf.

**Flagstar’s Fee Schedule**

At the end of the day, the final witness called to testify was Dean Kelker, iMortgage’s Chief Risk Officer. Kelker’s testimony centered around the Flagstar fee survey that was used for the nine appraisals found in violation by the Louisiana Board. Kelker argued that iMortgage was required to use the fee schedule it was provided by Flagstar as a condition of doing business, and because the fee survey was conducted by Flagstar, it was objective and independent, and consequently iMortgage was in compliance with Louisiana and Federal laws.

However, a problem arose in that Flagstar refused to provide the fee survey to the Board, or to iMortgage for that matter. According to Kelker’s testimony, he requested the survey from Flagstar and they “elected not to produce it.”

Kelker did bring a signed affidavit from Joseph Kuzner, the Chief Residential Appraiser at Flagstar Bank, which attempts to explain how the fee survey was conducted. The affidavit reads: "To complete the study, Flagstar obtained objective third-party data regarding customary and reasonable appraisal fees from Joan Trice.  Ms. Trice conducted an objective nationwide survey of both Louisiana mortgage lenders and Louisiana licensed residential real estate appraisers to collect a diverse sample of data regarding the typical appraisal fees for each geographic market within the state.  Ms. Trice's nationwide survey reflects third-party data and obtains responses from approximately 3,400 appraisers."

The affidavit goes on to explain that in addition to Trice’s data, Flagstar also used its own knowledge of the market to develop a proprietary fee survey. However, upon closer examination, Kelker admits that he has no knowledge of the details of how Flagstar’s survey was compiled or conducted. Kelker later clarified that he did not know how many parishes Trice surveyed or whether a formal survey was published at all. “If we are going to differentiate between the data and a survey, she did not publish a survey. Flagstar used her data as part of their data. They also used their own internal experience that may have included broader data.  I don't know.  I don't know if they had complete survey data from the state of Louisiana. I didn't see it,” says Kelker.

Kelker continued to assert that it was an independent fee study, as it had originated outside of iMortgage.  Edwards, the Board’s attorney, strongly questioned the independence of a fee survey conducted by a lender and delivered to its agent, an AMC, and pointed out that there was no way of knowing whether the survey, or data compilation (as Kelker puts it), was conducted in compliance with state and federal law (excluding AMC fees).

When contacted for comment, Joan Trice explains that the data being referenced is ClearBox data and that the fees in ClearBox are input by appraisers per county, per product. “It is not anonymous, so these are real appraisers setting their fees. The fees presented are what appraisers charge for both lender and AMC clients. ClearBox does not create a fee schedule, it merely presents the data to AMCs and lenders. Anyone can be a subscriber and get access. We are agnostic on how somebody analyzes or uses that data. We tell you what the general population is, what the appraiser ratio is in a given area, the VA fee schedule, the academic studies available in the six states that have them, and more. Our goal is to give our clients as much data as humanly possible,” says Trice. “It’s simpler to comply with the law than trying to debate or challenge whether or not people like Dodd-Frank. I think it’s pretty clear what C&R fees are, and compliance is not that difficult,” says Trice.

One point that was not closely examined is that, of the nine appraisal orders iMortgage was charged with, only five were ordered by Flagstar. The four others were ordered by other banks, including JP-Morgan Chase, and that the Flagstar fee “survey” was not used, including a 1004 FHA appraisal with Market Conditions addendum for $250. There was little discussion as to how iMortgage calculated those fees to be C&R. ([Click Here to see the nine appraisals found in violation.](http://www.workingre.com/wp-content/uploads/2016/01/ENGAGEMENT-LETTERS_Redacted.pdf))

**State Board Complaints- Beware**
While not related directly to C&R fees, Kelker also revealed a fact that some appraisers may find unsettling. During examination, Kelker testified that iMortgage does not allow any appraiser on their panel with a disciplinary action. Kelker reveals that many of iMortgage’s lender clients do not allow appraisers with disciplinary actions and states that “any appraiser that is involved anywhere in the transaction that has disciplinary action, whether it is the original appraiser, the review appraiser, whatever, whoever has disciplinary action automatically loses in that deal,” says Kelker.

Kelker’s comments confirm what State Board complaint experts such as Bob Keith, MNAA, IFA and Tim Andersen, MAI have been saying for years, that a disciplinary action, even a minor one, can have a lasting effect on an appraiser’s career and lead to the loss of both current and future clients. Appraisers who are faced with state board consent decrees or who are pressured into admitting guilt should take extra care and seek the advice of experts before signing off, as the long-term ramifications of a guilty judgement can be severe, even if the complaint is frivolous or minor.

**Guilty**
In her closing argument, Edwards argued that the hearing proved the allegations against iMortgage set forth in the written complaint, and that the Louisiana Real Estate Appraisers Board licensing laws and rules had not been followed.  “They're sound rules. They may be a little bit more strict than the federal rules. They are allowed to be as long as they're not in conflict,” Edwards says.

Shortly after closing arguments, Tommie McMorris, a member of the Board, proposed a motion: “I move the respondent, iMortgage, is guilty of the charges set forth in the written complaint. Further, after hearing all of the testimony and legal documents submitted, it is obvious that the respondent did not follow Louisiana law and rules establishing that they paid reasonable and customary fees.”

The motion was passed unanimously by the Louisiana Board.

The Board then moved to fine iMortgage $10,000 and impose a six month license suspension, which was stayed pending the Board’s review of iMortgage’s new compliance plan on March 21, 2016.

**Expert Help**For a webinar on how to effectively handle state board complaints, provided free to all appraisers by OREP for a limited time, please see [*Fighting Appraisal Board Complaints: An Expert's Advice*](http://orep.us10.list-manage.com/track/click?u=434b10419766b580d12bb4070&id=24ecc0429f&e=7b1046fd40). The presenter, Bob Keith, MNAA, IFA is the former Executive Director and Compliance Coordinator for the Oregon Appraisal Board and also provides consulting services on how to deal effectively with state board complaints. OREP members enjoy the initial consultation free. Tim Andersen, MAI, provides workfile-review consulting services to show appraisers how to avoid common workfile issues that can result in a board complaint. Anderson’s services are discounted for OREP members. For more on either of these two services, please email subscription@workingre.com.

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