



# nerej

## **The law of appraisal: A common definite objective - by Roger Durkin**

July 14, 2017 - Appraisal & Consulting

Roger Durkin, Durkin Law

Appraisers and appraisal organizations must unify with a common definite objective to reform and reduce the growing quagmire of the appraisal regulatory system?

Appraiser Regulatory Quagmire: Appraisal law is made up of orders directed to appraisers issued by a sovereign backed by threats and subject to penalty if the appraiser does not comply. The principal laws are federal and state statutes. The secondary laws are Codes of Federal Regulations and Codes of State Regulations. The statutes delegate to the executive (Governor or President) or executive agencies the power to implement the statutes by creating regulations as in Code of Federal Regulations or Code of State Regulations. If you are an appraiser, you should know of the law and regulation.

Lender Appraisals: Federal statutes includes those that apply to real estate appraisals performed for federally regulated financial institutions and include Title XI of FIRREA(1), Dodd Frank (2), Truth in Lending Act.(3) Housing and Economic Recovery Act (HERA) of 2008 (4), Fair FHA Appraisals Act of 2007. The Code of Federal Regulations (CFR) published in the Federal Register by departments and agencies of the executive is divided into 50 titles. Many apply to appraisers. The regulations that flow from these statutes include: Banking regulators issued FIL-82-2010, "Interagency Appraisal and Evaluation Guidelines," in 2010. The FIL applies to lenders regulated by members of FFIEC. FILs do not apply to nonbank lenders. The Appraisal Subcommittee (ASC) issues Federal Regulations.(5) Fannie Mae Guidelines are neither a statute nor regulation. Each state has a real estate licensing statute from which state professional licensure regulations evolve.

USPAP is Problematic: USPAP needs clarity. USPAP Rules are vague, ambiguous, equivocal, and open to subjective interpretation. More often than not, a state regulatory agency will misinterpret a USPAP Rule. The regulatory process favors the prosecutors whose burden of proof in alleging a violation of USPAP is 51% more likely true. Prosecutors, hearing officers, and often the board itself will subjectively misinterpret regulatory process. Dodd Frank has a mandatory whistle blower requirement that mandates that a material violation of USPAP be referred to the license board. The concept of materiality tightens the requirement of relevancy and is intended to exclude insignificant non-material matters that are too remote to be worthy of consideration. Evidence must be relevant to

the issues, but if the relevancy is not direct and immediate, then the evidence is not material. If it is not material, it is not relevant and should be discarded because it is not material. Because USPAP is ambiguous, (having more than one possible meaning or interpretation), the prosecutor and his or her named expert witness are free to misinterpret the rule. A finding by the real estate license board of a USPAP transgression can be admissible and relevant evidence of negligence in a civil law suit. USPAP Rules are statutory-like because USPAP is referenced in the enabling statute, but USPAP is neither a statute nor a regulation. USPAP is like a statute in that a finding by the license board can be viewed as a statutory violation. FIRREA requires appraisers to adhere to the USPAP for all federally related transactions. USPAP is not a federal statute, but USPAP is the standards guiding industry professionals. USPAP is accepted by the IRS as generally accepted appraisal standards but it is not an IRS Regulation. USPAP needs to be clear and unambiguous.

IRS Appraisal Regulations: Appraiser law, business valuation, real and personal property regulations applies under the Federal tax laws which begin with the Internal Revenue Code (IRC), enacted by Congress in Title 26 of the United States Code (26 U.S.C.). The 50 subject matter titles include Circular 230, Notice 2006-96, Revenue Rule 59-60, Conservation Easements, Gift Tax, Decedent Estate, and Charitable Donation Codes, all of which carry appraiser fines and penalties for transgressions.

Eminent Domain Regulation: Fifth Amendment to the U.S. Constitution stipulates “nor shall private property be taken for public use, without just compensation.” The laws governing eminent domain are contained in case law. The federal government’s power of eminent domain has long been used in the United States to acquire property for public use. Eminent domain “appertains to every independent government. It requires no constitutional recognition; it is an attribute of sovereignty. *Boom Co. v. Patterson*, 98 U.S. 403, 406 (1879). Yellow Book is the appraisal standard rather than USPAP.

Environmental Regulations: Real Estate Appraisers have to know about building codes, zoning laws, Town Ordinances, state environmental laws and regulations. Massachusetts examples include Hazardous Material, Endangered Species, Wetlands Protection Act, (MGL Ch. 131 §40); Archeological Survey Act, the Rivers Protection Act, Land use MGL Ch. 61A, 61B, Oil Spill Act, Ch. 21E, etc.

Conclusion: The number of people employed in the appraisal profession is unknown. We do know that there are thousands of business valuation appraisers and thousands of appraisers exclusively appraising jewelry, antiques, fine arts, residential contents, decorative arts, machinery, equipment, inventories, wine, artifacts, trademarks, copyrights, patents, brands, oriental rugs, numismatics, horses, philatelic, aircraft, ships, yachts, trains, firearms, sports memorabilia, musical instruments, and everything in between. Each of the appraisal disciplines have to abide in compounded sets of statutes and regulations in addition the majority agree to practice in compliance with USPAP. The problem is USPAP’s ambiguity is too often misinterpreted.

Roger Durkin, JD, MS, FASFA is an attorney and appraiser with Durkin Law PC, Boston, Mass.

1. XI of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989.
2. Dodd-Frank Wall Street Reform and Consumer Protection Act 124 Statute. 2186 Public Law 111–203 (2010).
3. Truth in Lending Act (15 U.S.C. 1631 et seq.).
4. Required that appraisers for FHA loans be certified at the state level, not merely licensed. Only an appraiser listed on HUD's FHA Appraiser Roster may perform the appraisal. FHA power over appraisers is contractual. Fannie Mae Guidelines are neither law nor regulation and have no power of enforcement.
5. The ASC is a "subcommittee" of the Federal Financial Institutions Examination Council's (FFIEC).

New England Real Estate Journal - 17 Accord Park Drive #207, Norwell MA 02061 - (781) 878-4540