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## **Durkin's last hurrah! Ways to improve appraisal profession - by Roger Durkin**

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One last blast about what appraisal associations and individual appraisers should be doing to improve the appraisal profession. Here is a partial list: Lobby for a rule of lenity for appraisal regulations requiring that vague and ambiguous rules be resolved in favor of the defendant appraiser. Lobby for the right to due process wherein alleged transgressions by the license board are matched to a specific statutory or regulatory cite. Lobby for rules of discovery that include the use of interrogatories and depositions of the board's undisclosed USPAP immune subcontractor expert hired to critique appraisal reports. Lobby for a statute of limitations of three-years like other professionals. Lobby for changing the burden of proof standard to Clear and convincing evidence and replace the current 51%-more-likely burden of proof. Lobby to restrict the license board's subject matter jurisdiction to the intent of the enabling statute. Lobby to stop judicial deference to agency interpretations of ambiguous statutory terms. Judicial deference is a judge-created doctrine used to determine whether agency regulations follow the statutes that authorize them. Under the Massachusetts Constitution, only the legislature can make laws, not the governor and certainly not an agency of the executive. Article XXX of the Massachusetts Constitution states, "In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men." That is enough to keep everyone very busy helping improve the real estate appraisal regulatory law.

Durkin Law provides defense for licensed appraisers charged by the Real Estate Appraisal License Board with an array of violations. An observer might think Durkin Law would profit by extending licensing to all real estate appraisal assignment. Durkin Law is not of that mind set. The lobbying effort to repeal §174C would repeal federal regulatory law. The state legislature changing federal regulatory law is an impossibility. Chapter 112, § 174C states: "The certification and licensing provisions of this chapter shall not apply to transactions exempted from the requirements of Title XI." Did anyone, including the legislature, bother to research what was meant by "transactions exempted

from Title XI”? Title XI is a section of the Financial Institutions Reform, Recovery & Enforcement Act of 1989 (FIRREA). FIRREA Appendix A lists 12 transactions exempt for Title XI. Here is a sample: (1) Federally related transactions with a transaction value equal to or less than \$250,000, (As of May 2018 the exemption is now \$500,000). (2) An institution is not required to obtain an appraisal on a loan not secured by real estate, even if the proceeds of the loan are used to acquire real property. (3) Lenders are exempt from requiring an appraisal where the loan is for renewals, refinancing, and other subsequent transactions. (4) Loan workouts or debt restructurings, loan assumptions, and similar transactions may qualify for the exemption. (5) An institution acting as a fiduciary is not required to obtain appraisals.

Durkin Law provides defense for CPAs charged by the Board of Accountancy with various violations of AICPA and state regulations. The real estate regulatory scheme, in many ways, copied the regulatory scheme of CPAs. The CPAs are state licensed profession. CPAs have an Accounting Foundation, a Qualifications Board, an Accounting Standards Board (FASB). AICPA standards of practice, a continuing education requirement, and a state license. Generally accepted accounting principles (GAAP) are managed by the Financial Accounting Standards Board (FASB). FASB is a non-governmental entity like the Appraisal Foundations and Appraisal Standards Board (ASB). Real estate appraisers are federally regulated by the Appraisal Subcommittee (ASC.gov) and to some extent by the IRS (see Notice 2006-96). CPAs who audit public companies are federally regulated by The Public Company Accounting Oversight Board (PCAOB). The PCAOB is a private-sector, nonprofit corporation created by the Sarbanes–Oxley Act of 2002. Under IRS §6695A, enacted by the Pension Protection Act of 2006, P.L. 109-280, CPAs who provide business appraisals may incur monetary penalties for appraisals that lead to substantial and gross valuation misstatements on tax returns. The AICPA rules are similar to USPAP rules in real estate appraisal state regulations. The AICPA rules enforced by the Board of Accountancy is Statement on Standards for Valuation Services No. 1 (SSVS1), Valuation of a Business.

Massachusetts Administrative law, the law of agencies, is vast, often complex, and forever expanding. Every state administrative agency has its own regulatory scheme. The investigator, prosecutor, hearing officer are housed in the same office. The Massachusetts Division of Professional Licensure has 33 separate licensing boards, including, engineers, psychologists, public accountants, real estate appraisers, real estate brokers, social workers, audiologists, veterinary medicine, sheet metal workers, massage therapists, optometry, plumbers, podiatry, architects, home inspectors, funeral directors, electricians, cosmetologists, dietitians, dispensing opticians, chiropractors, cannabis establishments, barbers, mental health providers, dentistry, genetic counselors, nursing, nursing home administrators, perfusionists, pharmacists, physician assistants, respiratory care, and community health workers. The Division of Professional Licensure is overwhelmed with enforcing the different license regulations. This burden of the Board of Registration of Real Estate Appraisers could be reduced if we all worked together to make the legislative changes described earlier, all of which would help clarify and improve the prosecution and defense process.

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