American Bankers Association
American Financial Services Association
Consumer Bankers Association
Consumer Mortgage Coalition
Housing Policy Council, The Financial Services Roundtable
Independent Community Bankers of America
Mortgage Bankers Association
Real Estate Services Providers Council, Inc. (RESPRO®)

April 30, 2008

The Honorable James B. Lockhart III
Director
Office of Federal Housing Enterprise Oversight
1700 G Street, N.W.
Fourth Floor
Washington, DC 20552

Dear Director Lockhart:

The undersigned are writing to register our concern with the serious legal and policy questions that are raised by the proposed Home Valuation Code ("Code"), which Fannie Mae and Freddie Mac (the "GSEs") have agreed to adopt, pursuant to a written agreement ("Agreement") with the Office of Federal Housing Enterprise Oversight ("OFHEO") and the New York Attorney General (NYAG). We agree that accurate appraisals are a critically important component of sound mortgage lending and that appraisal fraud is a factor in many cases of mortgage fraud.

We have very serious concerns with both the manner in which the Agreement and the Code have been mandated by OFHEO and the NYAG as well as the substance of the documents. (For simplicity purposes, reference herein to the "Agreement" shall include the Code.) We believe that OFHEO should withdraw its assent to the Agreement, should not permit the GSEs to implement the Agreement, and should take steps to assure that this type of rulemaking by settlement does not occur in the future. The Agreement is in violation of Title XI of FIRREA and permits the NYAG to unlawfully exercise authority that resides exclusively with the Federal Government. The method of imposition of the agreement is in violation of the Administrative Procedure Act and constitutes an unlawful delegation of authority by OFHEO to a third party. For a variety of reasons, the Agreement is not consistent with the best interests of the GSEs, the housing finance markets, and other aspects of public policy.

Background to the Agreement

In order to understand the full ramifications of the Agreement between the NYAG and the GSEs, it is necessary to discuss the relationship between the states and federally chartered depository institutions, including recent attempts by state Attorneys General to assert their jurisdiction on these Federal instrumentalities.

Beginning in the late 1990s, a number of states started to enhance their efforts to regulate the business practices of depository institutions, including national banks and federally chartered savings associations. Among other things, these laws attempted to regulate fees that banks could charge to use ATM machines,[1] minimum payment requirements on credit card debt,[2] the amortization schedule that could be applied to a loan,[3] and additional disclosure requirements.[4] Both the Office of the Comptroller of the Currency (OCC) and the Office of Thrift Supervision (OTS) determined that Federal law preempted the application of such state laws with respect to federally chartered banks and thrifts,[5] and, in 2004, the OCC issued a regulation codifying these principles as applied to national banks and their operating subsidiaries. The OTS had previously issued a similar regulation. These positions were challenged in a number of judicial proceedings, and in every case the Federal agencies prevailed.[6] Most recently, the U.S. Court of Appeals for the Second Circuit held on December 4, 2007, that the NYAG did not have the authority to investigate the mortgage lending practices of national banks or national bank operating subsidiaries.[7] That decision clearly established that the NYAG did not have authority to investigate or regulate national banks and their subsidiaries and, by logical extension, Federal saving associations and their subsidiaries.

As a result of these and other judicial precedents limiting state authority over federally chartered depository institutions, the NYAG took a different course of action. Realizing that the banking industry relies on the GSEs to a large extent to fund mortgage loans, the NYAG issued subpoenas to Fannie Mae and Freddie Mac, demanding the production of documents relating to mortgage loans purchased from depository

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[1] *Bank of America v. San Francisco*, 309 F.3d 551 (9th Cir. 2002) (ATM fee restrictions preempted for national banks and Federal thrifts).

[2] *American Bankers Association v. Lockyer*, 239 F.2d 1000 (E.D.Cal. 2002) (State minimum payment provision preempted).

[3] *Id*. (mandatory amortization schedule preempted).

[4] *Rose v. Chase Bank USA, N.A.*, 513 F.3d 1032 (9th Cir. 2008) (State mandated disclosures preempted).

[5] *See, e.g.*, OTS, Opinion of Chief Counsel Re: Georgia Fair Lending Act, P-2003-1, January 21, 2003; OCC, Determination and Order Re: Georgia Fair Lending Act, 68 Fed. Reg. 46264 (August 5, 2003).

[6] *See, e.g., Watters v. Wachovia Bank*, 550 U.S. __ (2007), upholding the OCC's preemption regulation and exclusive visitorial authority as applied to operating subsidiaries of national banks.

[7] *The Clearing House Association v. Cuomo*, 05-5996-cv, and *Office of the Comptroller of the Currency v. Cuomo*, 05-6001-cv. (2nd Cir. Dec. 4, 2007).

institutions. The subpoenas also sought information on the due diligence practices of these GSEs and their valuations of appraisals.

The day after the subpoenas were issued, OFHEO Director James Lockhart wrote to the NYAG noting the role of OFHEO in ensuring the safety and soundness of the GSEs, and explaining that the GSEs already have programs in place to prevent accepting loans contaminated by fraud.[8] Director Lockhart asked for a meeting with the NYAG to discuss the GSE's existing efforts to monitor and prevent appraisal fraud.

On March 3, 2008, the NYAG and OFHEO announced that an agreement had been reached with the GSEs pursuant to which these companies would immediately establish a new code governing appraisals. The Agreement specifies that, effective January 1, 2009; all lenders will be required to adhere to the code in order to sell loans to the GSEs. The Agreement states nothing about the request for documents or the subpoenas that were at the heart of the dispute with the GSEs. Rather, as the NYAG announced in a press release, the purpose of the Agreement was to regulate the business practices of the GSEs and federally chartered depository institutions:[9]

> With this agreement, Fannie Mae and Freddie Mac have become leaders in transforming the mortgage industry...*Now 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. [Emphasis added]

OFHEO, by signing the Agreement, made an administrative determination to apply these new requirements and to enforce GSE compliance with the Code. The Agreement states that the NYAG and OFHEO share concerns for a reliable valuation and appraisal process and believe it is in the public interest to act in a coordinated fashion. The Agreement goes on to explain that the NYAG and OFHEO believe that the "forward looking agreement" will provide "appropriate and necessary reforms and stability to the market."[10] In addition, the Agreement notes that the NYAG and OFHEO jointly drafted the Code.[11] Finally, violation of the Agreement would be grounds for an OFHEO enforcement action, such as a cease-and-desist order or a civil money penalty.[12]

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[8] Letter from OFHEO Director James B. Lockhart, III to the New York Attorney General Andrew Cuomo, dated November 8, 2007.

[9] Press Release dated March 3, 2008.

[10] Preamble to the agreement with the GSEs dated March 3, 2008.

[11] Id. at I.1.

[12] 12 U.S.C. §§ 4631 *et. seq.*

The Adoption of the Agreement is Bad Policy

For myriad reasons, the adoption of the Agreement is bad policy, both substantively and procedurally. As to the substance of the Code, it would force massive and highly disruptive changes in loan underwriting procedures at a critical time for mortgage borrowers and the mortgage industry. Without implying that we endorse other parts of the Code, we are particularly concerned about its prohibition on the use of in-house employee appraisers and its severe restrictions on the use of existing appraisal management company arrangements, including their ownership and employment structure. These restrictions, made at the instigation of a single state, seriously undercut important channels for obtaining appraisals in a manner that have shown to be fully consistent with safe and sound practices. They would undo years of progress and wipe out hundreds of millions of dollars of investments that mortgage lenders and service providers have made in improving the accuracy and efficiency of real-estate valuations.

Appraisals by in-house appraisers and appraisers employed by or engaged by appraisal management companies can enhance the reliability of residential real estate valuations. Both in-house appraisal staffs and outside appraisal management companies (regardless of their ownership structure) have an exemplary record of producing appraisals that are highly accurate – at least as accurate as those produced by independent appraisers who are directly engaged by the lender. There is no evidence that using either in-house appraisers or outside appraisal management companies, regardless of their ownership structure, leads to inflated appraisals or pressure on appraisers to produce an inaccurate appraisal. The use of in-house appraisal staffs and appraisal management companies also benefits both lenders and consumers by making the appraisal process more efficient and predictable and less costly.

The Agreement would deprive the most dynamic sector of the appraisal services market of a vital source of capital. Investments by lenders and by diversified service providers have facilitated the development of new valuation products and technology that allows real estate to be valued more accurately and efficiently. They also allow appraisal service companies to guarantee – with real capital – the integrity of the appraisal, which is not feasible for an individual appraiser. Thus, prohibiting such investments does not advance OFHEO's goal of enhancing the safety and soundness of the GSEs.

Forcing the dismissal of thousands of highly-skilled appraisal professionals because they are employed by lenders or appraisal management companies would be irresponsible at a time when there is a critical need for their services. These and other provisions of the Code would impose a structural solution when there is little or no evidence of a structural problem, while failing to address real problems in the industry such as the lack of effective state regulation of appraisals in loans that are not purchased by the GSEs and are not subject to the FIRREA provisions on federally related transactions.

The Agreement Violates the Administrative Procedure Act

Federal agencies, including OFHEO, are required to comply with the Administrative Procedure Act[13] (APA) when promulgating rules and regulations. A rule is defined as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy."[14] In order for an agency to issue a rule, it must publish a notice of proposed rulemaking, solicit and consider public comments, and publish a final regulation that explains the basis and purpose of the regulation, and the agency's consideration of public comments.[15] All interested members of the public are entitled to have their comments considered, not just the regulated entities.

In addition, under the Regulatory Flexibility Act, the agency must publish initial and final analyses addressing, among other things, the recordkeeping and compliance burden imposed by the regulation, the impact of the regulation on small businesses and the steps taken to mitigate significant adverse impact.[16] The final analysis must summarize and respond to significant issues raised after the initial analysis.

The Agreement entered into by OFHEO is an agency statement of general applicability and future effect designed to implement, interpret, or prescribe law or policy. The fact that it takes the form of an "agreement" does not change the need for the agency to conform to statutory requirements.

The Agreement is of general applicability because it applies to both GSEs regulated by OFHEO and also affects all lenders seeking to do business with these GSEs, including all federally regulated depository institutions. It also affects entities and individuals that do business with lenders, such as appraisers, appraisal management companies, and mortgage brokers.

The Agreements are of future effect, since they will apply prospectively. OFHEO and the NYAG have stated that the purpose of the Agreement is to implement new policies regarding appraisals, and that the Agreement will result in "appropriate and necessary reforms" to the markets. It is also quite clear that one purpose of the Agreement is to regulate the practices of national banks and federally chartered thrifts, institutions that are beyond the direct regulatory reach of the NYAG and OFHEO. The practicalities of the mortgage markets require most institutions to have access to the GSEs, and by requiring the GSEs to restrict their relationships to depository institutions that conform to the Code, the Agreement will have a regulatory impact on almost all

[13] 5 U.S.C. §§ 551 et. seq. See also 12 U.S.C. § 4526 (b) (OFHEO regulations subject to 5 U.S.C. § 553).

[14] 5 U.S.C. § 551(4).

[15] 5 U.S.C. §553.

[16] 5 U.S.C. § 604.

federally chartered depository institutions. The statement of the NYAG boasts that national banks will be forced to comply with Code or stop doing business with the GSEs.

The fact that the action is in the form of an agreement does not change the fact that it is in actuality a regulation. In *National Association of Psychiatric Treatment Centers for Children v. Weinberger*,[17] the court held that an agency determination to modify contractual terms used in agreements with participating health providers was a "regulation" that had to be promulgated under the APA. The fact that no party was forced to enter into the contract was no defense, and that a provision in the APA excepting "contracts" from the rulemaking requirements was not applicable, since that exception relates to individual contracts, not to the implementation of public policy.

Likewise, in *Chem Service, Inc. v. EPA*,[18] the Court of Appeals for the Third Circuit determined that a Memorandum of Understanding ("MOU") entered into between the EPA and a private laboratory to develop joint certification standards was a rulemaking under the APA. The MOU provided that the EPA and two private laboratories would "work together to develop equivalent technical specifications and requirements for reference materials." Products would have to meet these jointly developed standards in order to be "certified." The court found that this agreement was a rule because it was a "statement of general applicability and future effect designed to implement" policy. The joint Agreements entered into by OFHEO, the NYAG, and the GSEs likewise are statements of general applicability and future effect designed to implement policy.

Another example may be found in the case of *Home Builders Association v. Pennsylvania*.[19] In this proceeding, a state court reviewed a challenge by the Home Builders to a settlement agreement entered into by the state's Department of Environmental Protection and a group of environmental organizations. After reviewing relevant Federal precedents interpreting the Federal APA, the court held that the settlement agreement was in fact a regulation that had to be promulgated under the applicable procedures. Again, the analogy between the settlement agreement in this case and the OFHEO Agreement seems clear.

More recently, in *Association of Irritated Residents v. EPA*, the Court of Appeals for the D.C. Circuit held that an EPA settlement agreement that granted an exception from compliance with certain environmental laws was not a "rule."[20] The court based its determination on the fact that the agreement did not change policy, but only delayed the *enforcement* of existing policy subject to conditions that would ultimately result in full

[17] 658 F.Supp. 48 (D. Co. 1987).

[18] 12 F.3d 1256 (3rd Cir. 1993).

[19] 828 A.2d 446 (Pa. 2003); aff'd 844 A.2d 1227 (2004).

[20] 494 F.3d 1027 (D.C. Cir. 2007).

compliance. The court cited with approval its prior holding in *National Association of Home Builders* (discussed above), explaining that in the prior case the agency agreement had established new policies, and, therefore, the agreement in question was a regulation that had to comply with the APA.

On the other hand, there are several court decisions holding that judicially sanctioned consent decrees entered into by Federal agencies do not generally trigger APA rulemaking requirements.[21] In contrast to a consent decree, there is no judicial-approval process with respect to the Agreement in this instance. Also, unlike the typical consent decree that relates to the subject matter involved in a legal dispute, in this case the Agreement is being used to establish regulatory policy over the GSEs and depository institutions, as well as servicer providers, and *does not relate* to the disposition of the NYAG's subpoenas. The Agreement is simply a legal device to assert authority by the NYAG over institutions that he cannot regulate, and should not be considered equivalent to a consent agreement, or even to a settlement agreement that relates to particular issues in dispute between two parties. The NYAG makes no assertion that he can directly regulate the appraisal practices of the GSEs or of national banks, and therefore the Agreement is designed to achieve an unauthorized regulatory goal.

The notice and comment procedure set out in the Agreement does not "cure" the failure to follow the rulemaking statute. The APA requirements go far beyond simply publishing a regulation that has already been adopted in principle and soliciting comments on its implementation. The failure to follow these procedures cannot be overcome by a simple request for public input. Failing to allow full comment on the Agreement and Code is unfair to the many stakeholders in the appraisal process, including mortgage lenders and appraisers, but also consumers, other mortgage service providers, mortgage investors, and other state regulators.

The Agreement Would Supersede the FIRREA Appraisal Provisions

The Code operates as a de facto replacement for the comprehensive regulatory regime created by Congress in Title XI of the Financial Institutions Reform, Recovery and Enforcement Act of 1989.[22] Although the Code would technically apply only to loans eligible for purchase by the GSEs, it would impact the way all federally regulated institutions and their holding companies do business. The clear intention of the NYAG in adopting the Agreement is to create a new national standard for home valuation that differs significantly from the appraisal standards instituted by Congress in FIRREA. As noted previously, New York Attorney General Cuomo stated that the Code would "be the model for the rest of the industry." Due to the market influence of the GSEs, if the Code

[21] *See*, e.g. *Save the Manatee v. Ballard*, 215 F.Supp.2d 88 (D.D.C. 2002), appeal dismissed, NO. 02-5318 (D.C. Cir. April 11, 2003); *Conservation Law Federation of New England v. Franklin*, 989 F.2d 54 (1st Cir. 1993).

[22] Pub. L. No. 101-73; 103 Stat. 498.

is adopted as proposed, it will, as a practical matter, supersede the FIRREA appraisal regulations, because loans that do not comply with the Code will not be marketable.

Title XI of FIRREA Legal Structure

Title XI of FIRREA requires the use of state licensed or state certified appraisers for "Federally-related" mortgage loans that are in amounts above regulatory determined thresholds. Federally related mortgages are mortgage loans that are subject to regulation by the Agencies, which includes all loans made by insured depository institutions.

According to the statute, one of the primary purposes of Title XI is to require that appraisals used in connection with these loans are "performed in writing, *in accordance with uniform standards*, by individuals whose competency has been demonstrated and whose professional conduct will be subject to effective supervision."[23]

Under FIRREA, an "Appraisal Subcommittee" of the FFIEC is established to monitor state certification and licensing of appraisers.[24] The Act provides that the Appraisal Foundation is to establish minimum standards for state licensing and certification. The Appraisal Subcommittee is required to monitor the requirements that each of the Federal banking agencies and the NCUA may develop.

Title XI provides that "appraisal standards … shall be prescribed in accordance with the [Administrative Procedure Act] including the publication of notice and receipt of written comments or the holding of public hearings with respect to any standards or requirements proposed to be established."[25] At a minimum, the appraisal standards must provide that "real estate appraisals be performed in accordance with generally accepted appraisal standards as evidenced by the appraisal standards promulgated by the Appraisal Standards Board of the Appraisal Foundation" and that they be in writing.[26]

Each of the Agencies may "require compliance with additional standards if it makes a determination in writing that such additional standards are required in order to properly carry out its statutory responsibilities."[27] The Agencies have the discretion to determine which appraisals must be conducted by a certified appraiser as opposed to a licensed appraiser, except that certified appraisers must be used with respect to transactions of $1 million or more. [28] The Agencies have issued comprehensive rules and

[23] 12 U.S.C. § 3331.

[24] 12 U.S.C. § 3310.

[25] 12 U.S.C. § 3336.

[26] Id.

[27] Id.

[28] Id. at § 3334.

guidelines to implement these FIRREA provisions.[29] According to the expert opinion of all of the Agencies, the appraisal guidance and regulations provide institutions "with a reasonable degree of assurance that real estate appraisals used in connection with federally related transactions will be reliable."[30]

Finally, Title XI states that "a corporation, partnership or other business entity may provide appraisal services in connection with a Federally related transaction if such appraisal is prepared by individuals certified or licensed in accordance with the requirements of this title."[31] Pursuant to the plain meaning of this provision, a GSE could not legally disqualify any corporation, including an appraisal management company, from providing appraisal services through licensed or certified appraisers.

As shown above, FIRREA established a comprehensive framework regulating appraisals used in connection with covered mortgages, a framework that carefully delineated Federal and state roles. The Congressional preference for uniform national standards was clearly articulated in the statute, as well as the desire for any necessary changes in the standards to be promulgated through APA rulemaking procedures. The statute clearly states that any corporation should be able to provide appraisal services through the use of licensed or certified appraisers. Moreover, the Agencies have fulfilled their role in implementing detailed, comprehensive appraisal regulations. The Agreement violates this carefully tuned balance of state and Federal responsibilities and regulations, and should be withdrawn.

An example of how the Agreement conflicts with this existing regulatory framework is the Code's specific employee and ownership restrictions. The banking regulations implementing FIRREA recognize that it is not incompatible with an unbiased and accurate appraisal for a lender to employ a staff appraiser, provided that the appraiser is insulated from the loan-production process. For example, Federal Reserve Board Regulation Y provides:

> If an appraisal is prepared by a staff appraiser, that appraiser must be independent of the lending, investment, and collection functions and not involved, except as an appraiser, in the federally related transaction, and have no direct or indirect interest, financial or otherwise, in the property. . . .[32]

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[29] *See* 12 C.F.R. §§ 225.61-.67; Interagency Appraisal and Evaluation Guidelines, FRSS 3-1577 (Oct. 27, 1994); Interagency Statement on Independent Appraisal and Evaluation Functions, FRRS 3-1577.1 (Oct. 27, 2003).

[30] 55 Fed. Reg. 27762, 27762 (July 5, 1990).

[31] 12 U.S.C. § 3351.

[32] 12 C.F.R. § 225.65(a).

The regulatory provisions were adopted in substantially their current form in 1990,[33] and, since then, in-house appraisers have been subject to repeated regulatory examinations that have not generally revealed significant problems with overvaluations or other abuses. Mortgage lenders, and particularly banks, have used in-house salaried appraisers for many years. Indeed, because of the losses the lender suffers due to faulty appraisals, salaried, in-house appraisers are more accountable to the lender than are independent appraisers.

The same principles apply to appraisals conducted or arranged by an appraisal management company, regardless of whether it is affiliated with the lender (including an affiliation through a lender investment in a joint venture) or it has affiliates engaged in providing settlement services, such as title services and credit reporting. Contracting with an appraisal-management company enhances a lender's ability to obtain accurate appraisals, because it imposes additional layers of insulation between loan-production staff and the individual appraiser.

The Federal Reserve Board and other Agency regulations do not distinguish between affiliated and unaffiliated appraisal service-providers, treating both types of entities as "fee appraisers" who must be insulated from the financial institution requesting the report:

> If an appraisal is prepared by a fee appraiser, the appraiser shall be engaged directly by the regulated institution or its agent, and have no direct or indirect interest, financial or otherwise, in the property or transaction.[34]

It is important to note that these regulations apply not only to the lender and its affiliates, but also to "institution-affiliated parties," including independent contractors such as appraisal management companies, as well as to individual staff appraisers and fee appraisers.[35] Sanctions for violations include "removal and/or prohibition orders, cease-and-desist orders, and the imposition of civil money penalties pursuant to the Federal Deposit Insurance Act."[36] Thus, appraisal-management companies that provide services to federally-regulated institutions and their affiliates are already subject to a regulatory scheme that has been in effect for almost two decades and has worked well. In practice, the federal regulations have served as a *de facto* standard even for lenders that are not directly subject to them.

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33 *See, e.g.*, Board of Governors of the Federal Reserve System, Appraisal Standards for Federally Related Transactions, 55 Fed. Reg. 27762 (July 5, 1990).

34 12 C.F.R. § 225.65(b).

35 *See* 12 U.S.C. § 1818(u)(1), (4).

36 12 C.F.R. § 225.67.

The Agreement Violates the Regulatory Authority of OCC and OTS

As acknowledged in the press releases discussed above, the Agreement is an attempt to regulate the lending activities of national banks and federally chartered thrifts. As such, it is preempted by the National Bank Act and the Home Owners' Loan Act. The fact that the Agreement's regulatory impact is effectuated through a debarment, rather than a direct requirement, does not change the substance of the action. For example, in *Wisconsin v. Gould, Inc.*,[37] the U.S. Supreme Court struck down a state law that prohibited the state from doing business with any company that violated the National Labor Relations Act (NLRA) three or more times within a 5-year period. The Court explained that a state may not regulate activity that Federal law protects or prohibits. Federal law provides sanctions for the violation of Federal labor laws, and this was an area of exclusive Federal concern. The fact that the Wisconsin law was crafted as an exercise of the state's spending power, *i.e.*, a limitation on the companies the state was willing to contract with, was not determinative because the *purpose* of the law was to punish NLRA violators. As stated by the Court:[38]

> [The state argues that] the statutory scheme . . . escapes preemption because it is an exercise of the State's spending power, rather than its regulatory power. But that seems to us a distinction without a difference . . . because, on its face, the debarment statute serves plainly as a means of enforcing the NLRA. The State concedes, as we think it must, that the point of the statute is to deter labor law violations... Wisconsin's debarment scheme is tantamount to regulation."

The Agreement in this case likewise would result, in effect, in the debarment of national banks and federally chartered savings associations that do not conform to the Code from doing business with the GSEs. As the NYAG's press statements make clear, however, the real purpose of the agreement is to regulate the business conduct of federally-chartered institutions, regulatory action that neither the NYAG nor OFHEO could take directly. Under the Supreme Court's decision, this indirect regulation of Federal depository institutions cannot be accomplished through the debarment approach.

The Restrictions in the Code Are Inconsistent with FHA Regulation of Appraisals

The National Housing Act specifically requires the Secretary of Housing and Urban Development ("HUD") to issue standards for appraisals of Federal Housing Administration ("FHA") loans.[39] The statute specifically permits a lender to "contract with an appraiser chosen at the discretion of the mortgagee for the performance of

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[37] 475 U.S. 282 (1986).

[38] *Id.* at 287.

[39] 12 U.S.C. § 1708(e)(1).

appraisals in connection with such mortgages"[40] and allows the use as appraisers of otherwise qualified individuals who are employed by appraisal companies, "including any company organized as a corporation, partnership, or sole proprietorship."[41] The "person utilizing the appraiser may contract directly with the appraisal company employing the appraiser for the furnishing of the appraisal services."[42]

To implement the requirements, HUD has issued extensive regulatory guidance regarding appraiser qualifications and independence for appraisals of loans insured by the Federal Housing Administration.[43] This guidance does not prohibit the use of appraisers employed by appraisal management companies. Other guidance specifically:

> [A]llows Direct Endorsement (DE) lenders to select their own appraisers in addition to the current options of using a staff appraiser employed by the DE lender itself or a fee appraiser assigned by HUD from one of its fee panels.[44]

Thus, the Code provisions run counter to both the statute and the implementing regulatory guidance.

HUD recently issued guidance for the appraisal of the new "jumbo FHA" mortgages that exceed the normal conforming loan limit of $417,000.[45] This guidance requires a second appraisal for loans over that limit. It requires the use of a lender from HUD's lender roster and requires appraiser independence, but there is no suggestion of limits on ownership or on who may obtain a report resembling those in the Code.

OFHEO Improperly Ceded Its Regulatory Authority to the NYAG

OFHEO is the Federal agency charged with ensuring that the GSEs are operating safely.[46] It has the authority, without the review or concurrence of the Secretary of HUD, to examine these companies and issue regulations relating to their safety and soundness.[47] Congress carefully circumscribed OFHEO's authority to use outside parties to accomplish its mission. For example, the statute specifically authorizes OFHEO to use only its own examiners, or to contract with the Federal banking agencies for examination

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40 *Id.* § 1708(e)(3).

41 *Id.* § 1708(e)(4).

42 *Id.* § 17-8(e)(4)(B).

43 *See* Mortgagee Letter 96-26.

44 *See* Mortgagee Letter 94-54.

45 *See* Mortgagee Letter 2008-09.

46 12 USC § 4513.

47 *Id*.

services, or to use a Nationally Recognized Statistical Rating Organization to assist in the review of a GSE.[48] There is no authority for OFHEO to delegate its responsibilities relating to the safety and soundness of the GSEs to a third party.

The Agreement signed by OFHEO is an agency action that creates binding duties on the GSEs, for the putative purpose of enhancing the safety and soundness of these enterprises, protecting their investors and borrowers, and to provide stability to the housing markets. These goals are the responsibility of OFHEO, not the NYAG. When OFHEO engaged in a joint exercise with the NYAG, it violated its statutory directive to be the sole agency to regulate the GSEs for safety and soundness. Furthermore, by signing the Agreements, it limited its discretion to modify them without the consent of the NYAG. As noted by the U.S. Court of Appeals for the D.C. Circuit, serious questions are raised when an agency limits its regulatory discretion by contracting with a private party.[49] Those concerns are squarely present in this instance.

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Because the adoption of the Agreement has grave procedural defects, is inconsistent with the interests of the housing market and other aspects of sound public policy, we urge OFHEO to withdraw its assent to the Agreement, to not permit the GSEs to implement the Agreement, and take steps to assure that this type of rulemaking by settlement does not occur in the future.

Sincerely,

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[48] 12 U.S.C. §§ 4715(c); 4519.

[49] *National Audubon Society, Inc. v. Watt*, 678 F.2d 299, 301 (D.C. Cir. 1981).

cc: The Honorable Sheila Bair, Chairman, Federal Deposit Insurance Corporation
The Honorable Ben Bernanke, Chairman, Federal Reserve Board
The Honorable Roy Bernardi, Acting Secretary, U.S. Department of Housing and Urban Development
The Honorable Andrew M. Cuomo, Attorney General, State of New York
The Honorable John Dugan, Comptroller of the Currency
The Honorable JoAnn Johnson, Chairman, National Credit Union Administration
The Honorable Henry M. Paulson, Jr., Secretary, U.S. Department of the Treasury
The Honorable John Reich, Director, Office of Thrift Supervision