

Part II: Analysis and Recommendations

C. Questions about the Governance of the Appraisal Industry

Overview of the Appraisal Regulatory System

The governance of the appraisal industry is overseen by a complex interplay of federal, state, and private entities. This structure was largely developed in response to the savings and loan crisis of the 1980s, which among other things, resulted in Congress passing the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (“FIRREA”).⁸⁵ Title XI of FIRREA set forth many aspects of the appraisal industry governance that are in effect today. Following is a description of each entity and its current role in the governance of the appraisal industry.

⁸⁵ 12 U.S.C. §§ 3331-3356 (as amended by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (“Dodd-Frank Act”), and the Economic Growth, Regulatory Relief, and Consumer Protection Act of 2018). In addition, the U.S. Department of Housing and Urban Development (“HUD”) sets appraisal requirements for FHA loans, the Federal Housing Finance Agency (“FHFA”) reviews Fannie Mae and Freddie Mac’s appraisal requirements, and the Consumer Financial Protection Bureau (“CFPB”) issues valuation independence rules.

Governance of the Appraisal Industry

ENTITY	TYPE AND DESCRIPTION	GOVERNANCE ROLE
Appraisal Subcommittee (“ASC”)	<ul style="list-style-type: none"> • Federal government agency • The ASC’s board consists of members of the Federal Financial Institutions Examination Council (“FFIEC”) • Congress created the Appraisal Subcommittee in 1989 through FIRREA 	<ul style="list-style-type: none"> • Monitor and review the practices of The Appraisal Foundation (no enforcement authority) • Supervise and enforce the states’ compliance with Title XI of FIRREA • Monitor the requirements established by the federal financial institution regulatory agencies • Maintain a national registry of appraisers and appraisal management companies
The Appraisal Foundation (“TAF”)	<ul style="list-style-type: none"> • Private entity • Established in 1987 as a non-profit organization under the laws of Illinois • Has three boards: <ul style="list-style-type: none"> ○ Board of Trustees (“BOT”) ○ Appraisal Standards Board (“ASB”) ○ Appraiser Qualifications Board (“AQB”) 	<ul style="list-style-type: none"> • The Board of Trustees is the governance body for The Appraisal Foundation. It provides funding and financial oversight for and appoints members to The Appraisal Standards Board and The Appraiser Qualifications Board • The Appraisal Standards Board promulgates the USPAP Standards, which are the minimum appraisal standards that must be adopted by the states • The Appraiser Qualifications Board promulgates the Appraiser Criteria, which are the minimum education, experience, and examination requirements that must be adopted by the states
Federal Financial Institution Regulatory Agencies	<ul style="list-style-type: none"> • Federal government agencies: Federal Deposit Insurance Corporation (“FDIC”); Federal Reserve Board; National Credit Union Administration (“NCUA”); Office of the Comptroller of the Currency (“OCC”); and formerly the Office of Thrift Supervision (“OTS,” now defunct) 	<ul style="list-style-type: none"> • Each agency issues rules for federally related transactions, which require, among other things, that real estate appraisals must: <ul style="list-style-type: none"> ○ Be performed in accordance with the USPAP Standards, and ○ Must be subject to review for compliance with the USPAP Standards
State Government	<ul style="list-style-type: none"> • State government agencies 	<ul style="list-style-type: none"> • License and certify appraisers • Ensure compliance with state and USPAP Standards • Register appraisal management companies and enforce requirements

The Appraisal Foundation’s Legal Authority Is Not Clear

Although the appraisal governance structure has been in place for over 30 years, The Appraisal Foundation’s legal authority is not clear and raises several complex legal questions. In order to build the public’s trust in the valuation of critical assets, these questions merit further in-depth review.

Does the FIRREA statute provide The Appraisal Foundation with clear legal authority to promulgate the USPAP Standards and the Appraiser Criteria?

Although many assume that The Appraisal Foundation’s authority is derived from FIRREA, the text of the statute is not clear. On its website, The Appraisal Foundation states: “In 1989, the U.S. Congress enacted the Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA), which authorized The Appraisal Foundation (Foundation) as the source of appraisal

standards and appraiser qualifications.” However, FIRREA only states that the federal financial institution regulatory agencies must require certain minimum criteria, including that appraisals for federally related transactions comply with standards set by the Appraisal Standards Board of The Appraisal Foundation. FIRREA also states that these appraisals be performed by appraisers who meet the requirements set by the Appraiser Qualifications Board of The Appraisal Foundation. There is no direct express grant in FIRREA of power to these boards. To illustrate the point, below is a chart showing the Dodd-Frank Act’s clear delegation of rulemaking authority to the CFPB as compared to FIRREA’s references to The Appraisal Foundation.

Example: Dodd-Frank Act Authority v. FIRREA

STATUTE	TEXT
Dodd-Frank Act 12 USC § 5512	“(b)Rulemaking, orders, and guidance. (1) General authority. The Director [of the CFPB] may prescribe rules and issue orders and guidance, as may be necessary or appropriate to enable the Bureau to administer and carry out the purposes and objectives of the Federal consumer financial laws, and to prevent evasions thereof.”
FIRREA 12 USC § 3339	“Functions of Federal financial institutions regulatory agencies relating to appraisal standards...These rules [prescribed by the Federal financial institution regulatory agencies and the Resolution Trust Corporation] shall require, at a minimum-- <ol style="list-style-type: none"> (1) 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; (2) That such appraisals shall be written appraisals; and (3) That such appraisals shall be subject to appropriate review for compliance with the Uniform Standards of Professional Appraisal Practice....”
FIRREA 12 USC § 3345	“Certification and licensing requirements... <p>(b) Restriction. No individual shall be a State certified real estate appraiser under this section unless such individual has achieved a passing grade upon a suitable examination administered by a State or territory that is consistent with and equivalent to the Uniform State Certification Examination issued or endorsed by the Appraiser Qualification Board of the Appraisal Foundation.</p> <p>(c) “State licensed appraiser” defined. As used in this section, the term “State licensed appraiser” means an individual who has satisfied the requirements for State licensing in a State or territory whose criteria for the licensing of a real estate appraiser currently meet or exceed the minimum criteria issued by the Appraisal Qualifications Board of The Appraisal Foundation for the licensing of real estate appraisers...</p> <p>(e) Minimum qualification requirements. Any requirements established for individuals in the position of ‘Trainee Appraiser’ and ‘Supervisory Appraiser’ shall meet or exceed the minimum qualification requirements of the Appraiser Qualifications Board of The Appraisal Foundation....”</p>

If The Appraisal Foundation has the legal authority to promulgate the USPAP Standards and the Appraiser Criteria based on FIRREA, is that legal authority limited to “federally related transactions”?

If The Appraisal Foundation’s authority is based on FIRREA, then that authority may need to be read in the context of FIRREA, which is limited to “federally-related transactions.” From the outset, Title XI of FIRREA states that its purpose “is to provide that Federal financial and public policy interests in real estate related transactions will be protected by requiring that real estate appraisals utilized in connection with **federally related transactions** 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.”⁸⁶ (emphasis added) Although the definition of a “federally related transaction” is fairly complex, the key takeaway is that it covers only a small portion of residential mortgage transactions because the definition exempts several types of transactions, including any transaction that qualifies for sale to a U.S. government agency or U.S. government-sponsored agency.⁸⁷ Given that the vast majority of residential mortgage transactions qualify for sale to Fannie Mae or Freddie Mac, federally related transactions are only a small part of the mortgage market. According to the Appraisal Institute: “a significant percentage of the transactions engaged in by financial institutions do not require appraisals and are not federally related transactions.”⁸⁸ The narrow coverage of the term “federally related transactions” raises questions about the extent of The Appraisal Foundation’s authority if that authority is based on FIRREA.

Is The Appraisal Foundation an “agency” with notice and comment obligations under the Administrative Procedures Act?

If The Appraisal Foundation’s powers are based on a delegation of authority from Congress under FIRREA, then this raises questions about whether The Appraisal Foundation is an “agency” with notice and comment obligations under the Administrative Procedures Act. Congress provides agencies with considerable power when it delegates to them the authority to implement statutes through rules that have the force of law and that often have important implications for industry and consumers. As a check on these powers, Congress has passed the Administrative Procedures Act⁸⁹ and other laws to impose certain procedural protections and to ensure the opportunity for public participation and review.

It is not clear whether The Appraisal Foundation would qualify as an “agency” for purposes of the Administrative Procedures Act. The act defines “agency” as “**each authority of the Government of the United States**, whether or not it is within or subject to review by another agency....”⁹⁰ (emphasis added) The question of whether The Appraisal Foundation is an “authority of the Government of the United States” is a complex question as the courts have not established a definitive test. For example, an entity with purely advisory functions would probably not qualify as an “authority.”⁹¹ On the other hand, an entity that performs important governmental functions and exercises powers entrusted to it by the U.S. government may qualify as an “agency.”⁹² Thus, there may be an argument that The Appraisal Foundation is an

⁸⁶ 12 U.S.C. § 3331 (emphasis added). See also GAO, *Regulatory Programs: Opportunities to Enhance Oversight of the Real Estate Appraisal Industry*, GAO-03-404, at 11 (May 2003), <https://www.gao.gov/assets/gao-03-404.pdf> (stating that “[u]nder Title XI, these minimum standards apply to all federally related transactions”). The GAO’s report also states that FIRREA only requires the states to adhere to the Appraiser Criteria for certified residential and certified general appraisers.

⁸⁷ 12 U.S.C. § 3350(4); See, e.g., FDIC Regulation, 12 C.F.R. § 323.2(g) and 323.3(a)(10)(i).

⁸⁸ Appraisal Institute, *Federally Related Transactions* (July 17, 2018), <http://appraisalinstitutedc.org/pdf/AI-FederallyRelatedTransactions.pdf>.

⁸⁹ 5 U.S.C. §§ 551-559.

⁹⁰ 5 U.S.C. § 551(1) (emphasis added).

⁹¹ See, e.g., *Washington Research Project, Inc. v. Dep’t of Health, Ed. & Welfare*, 504 F.2d 238, 248 (D.C. Cir. 1974). See generally, Jared P. Cole and Daniel T. Shedd, *Statutory Definitions of “Agency” and Characteristics of Agency Independence*, Congressional Research Services, R43562 (May 22, 2014), <https://sgp.fas.org/crs/misc/R43562.pdf>.

⁹² See, e.g., *Flight Int’l Group v. Fed. Reserve Bank*, 583 F. Supp. 674, 678 (N.D. Ga. 1984).

“agency” because its functions are not purely advisory and it does appear to exercise the important governmental functions of setting minimum standards for appraisals and appraisers.

Even if The Appraisal Foundation does not have notice and comment obligations under the Administrative Procedures Act because it is not an “agency,” FIRREA may still impose those responsibilities. FIRREA states:

*Procedures for establishing appraisal standards and requiring use of certified and licensed appraisers. **Appraisal standards** and requirements for using State certified and licensed appraisers in federally related transactions pursuant to this chapter **shall be prescribed in accordance with procedures set forth in section 553 of title 5 [of the Administrative Procedures 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.⁹³ (emphasis added)*

That is, the statute does not limit the Administrative Procedures Act requirements to the federal financial institution regulatory agencies, but rather simply states that “[a]ppraisal standards...shall be prescribed in accordance with” the Administrative Procedures Act. Accordingly, there is an argument that the promulgation of the Appraisal Standards should follow the procedures set forth in the Administrative Procedures Act, which would include:

- Placing a notice of the proposed rulemaking in the Federal Register, which includes:
 - A statement of the time, place, and nature of the public rulemaking;
 - Reference to the legal authority under which the rule is proposed; and
 - Either the terms or the substance of the proposed rule or a description of the subjects and issues involved;
- Giving interested persons an opportunity to participate in the rulemaking through submission of written data, views, or arguments;
- Considering the relevant matter presented;
- Publishing the rule 30 days before its effective date; and
- Providing interested persons the right to petition for the issuance, amendment, or repeal of a rule.⁹⁴

At this time, while The Appraisal Foundation does make its standard-setting process public, the USPAP Standards themselves cost a member of the public \$80 (at the time of this report’s production) to access, making it more challenging to comment on a standard or to consider a petition for a change. The Appraisal Foundation recently decided, however, that it would make the Real Property Development, Real Property Reporting and Appraisal Review Standards (USPAP Standards 1-4) available online for no charge, but without the Advisory Opinions relating to those standards.⁹⁵ Notably, the Appraisal Standards Board’s explanation of an appraiser’s obligations under fair housing and fair lending laws currently resides in an Advisory Opinion.

⁹³ 12 U.S.C. § 3336 (emphasis added).

⁹⁴ 5 U.S.C. § 553.

⁹⁵ See *USPAP Standards 1-4*, available at:

https://www.appraisalfoundation.org/iMIS/TAF/USPAP_Standards_1-4.aspx. Advisory Opinion 16, which will be discussed below, is the key material offered by the Appraisal Standards Board in relation to appraisers’ responsibilities under fair housing laws and remains behind the paywall.

If The Appraisal Foundation is not an “agency,” then did Congress violate the nondelegation doctrine of the Constitution when it delegated the appraisal standard-setting functions to a private entity?

If The Appraisal Foundation is not an “agency,” then this raises the question of whether Congress impermissibly delegated its authority to a private entity. Under FIRREA, the terms “Appraisal Foundation” and “Foundation” are defined to mean “the Appraisal Foundation established on November 30, 1987, as a not for profit corporation under the laws of Illinois.”⁹⁶ This suggests that Congress recognized that The Appraisal Foundation is a private, nonprofit organization.

Under Article I of the Constitution, “[a]ll legislative Powers herein granted shall be vested in a Congress of the United States.”⁹⁷ Accordingly, the courts have limited the types of authority and functions that Congress can delegate to a purely private entity.⁹⁸ Over 80 years ago, in the seminal case of *Carter v. Carter Coal Co.*, the Supreme Court struck down a statute that allowed one group of coal producers to set binding regulations applicable to the entire industry.⁹⁹ The Court stated that the regulation of coal production was “necessarily a government function.”¹⁰⁰ However, other courts have upheld limited delegation of authority to private entities so long as the government retained “pervasive surveillance and authority” over the entity in question.¹⁰¹

Regardless of whether The Appraisal Foundation is required to follow Administrative Procedures Act requirements, both fair housing advocacy organizations and appraisal organizations echoed a common theme in interviews for this report that it would be beneficial to see more rigor in the revision process of USPAP Standards (and Advisory Opinions) and the Appraiser Criteria. The organizations raised concerns about changes being introduced without careful calculation of the unintended and negative consequences and about changes being made without the input of expertise outside the field of appraising (such as legal expertise or consumer protection/civil rights expertise).

Moreover, concerns were raised about the frequency of changes¹⁰² to the USPAP Standards and Appraiser Criteria. In some cases, states can take years to adopt the changes through the state’s legislative or regulatory process. In other cases, the state merely incorporates the standards and criteria by reference, placing the burden on the appraisers to educate themselves on the various changes. This is consistent with a 2003 GAO report by in which states reported that the frequency of changes in the USPAP Standards was an administrative burden and created challenges in investigating and enforcing complaints of violations of the USPAP Standards.¹⁰³ Finally, concerns were raised that because of the insular nature of the Appraisal Standards Board and Appraiser Qualifications Board and their processes, the changes often

⁹⁶ 12 U.S.C. § 3350(9).

⁹⁷ U.S. Const. art. I, § 1.

⁹⁸ See generally, Linda Tsang and Jared P. Cole, *Privatization and the Constitution: Selected Legal Issues*, Congressional Research Service, R44965 (Sept. 25, 2017), <https://sgp.fas.org/crs/misc/R44965.pdf>.

⁹⁹ 298 U.S. 238, 311 (1936).

¹⁰⁰ *Id.*

¹⁰¹ See, e.g., *United States v. Frame*, 885 F.2d 1119, 1128-29 (3d Cir. 1989).

¹⁰² See Walitt Solutions LLC, *USPAP Historical Review and Discussion* (Sept. 2021).

¹⁰³ See GAO, *Regulatory Programs: Opportunities to Enhance Oversight of the Real Estate Appraisal Industry*, GAO-03-404, at 20 (May 2003), <https://www.gao.gov/assets/gao-03-404.pdf>.

center on small details, rather than significant issues such as fair housing or the impact of the standards and criteria on consumers of color.

Recommendation

The appraisal governance structure is unique and complex with a private entity setting the minimum appraisal standards and professional entrance criteria that must be adopted by the states. Given the importance of appraisals to the residential housing market and individual consumers' finances, it is recommended that the complex questions regarding the extent of The Appraisal Foundation's legal authority be considered for further review, including questions about the extent of the legal authority under FIRREA, any potential obligations under the Administrative Procedures Act, and any potential issues under the Constitution's nondelegation doctrine.

The Appointments and Elections Processes Would Benefit from Inclusion of Viewpoints that Represent Consumers, Including Consumers of Color

The Appraisal Foundation's current processes tend to favor a closed-loop system of industry viewpoints rather than a governance structure that is open to diverse viewpoints, including those of civil rights and consumer advocates. Although The Appraisal Foundation recently received favorable feedback from a Diversity, Equity, and Inclusion consultant who reviewed their Board processes with respect to recruiting more people of color,¹⁰⁴ the consultant did not review whether the processes would yield candidates who would be ready to address the challenge of appraisal bias and lack of appraiser diversity and seek solutions that would benefit the whole of the housing market, including consumers of color. Given the far-reaching impacts of The Appraisal Foundation's standards and minimum licensing criteria across the 50 states, it seems prudent to include the voices of affected consumers.

The Appraisal Foundation has three boards: the Board of Trustees, the Appraisal Standards Board, and the Appraiser Qualifications Board. Following is a discussion of each board, with an analysis of how each board may favor well-connected appraisers and exclude voices of consumers affected by appraisal practices, particularly consumers of color.

The Appraisal Foundation's bylaws require that a majority of the Board of Trustees must be appraisers

The Appraisal Foundation is directed by a Board of Trustees that is responsible for the governance of the organization. In addition, the Board of Trustees appoints members and provides financial support and oversight to two independent boards: the Appraisal Standards Board, which promulgates the USPAP Standards; and the Appraiser Qualifications Board, which promulgates the Appraiser Criteria.

The challenge in the structure of the Board of Trustees can be summed up in this sentence from The Appraisal Foundation's bylaws:

¹⁰⁴ See The Appraisal Foundation, *Task Force to Promote Board Diversity: Fall 2021 Report*.

The Trustees appointed by the Appraisal Sponsors and those elected At-Large who are **appraisers together must constitute a majority** of the Trustees on the Board of Trustees.¹⁰⁵ (emphasis added)

That is, The Appraisal Foundation has intentionally designed its governing board to always favor the industry viewpoint. Although appraisers actively engaged in the business will certainly provide helpful expertise, it may be difficult for The Appraisal Foundation to develop solutions to the problems of appraisal bias and lack of appraiser diversity while mainly relying on a closed-loop system of appraiser input, especially because the appraisal industry tends to consist of mostly White, older males.¹⁰⁶ It is helpful to review the details of how the trustees are appointed and elected to understand precisely how the process heavily favors the appraisal industry, especially organizations with financial resources to cover the application and donation prerequisites. The chart below details who is allowed to appoint or elect trustees and the credentials and financial resources they must possess to participate in the process.

¹⁰⁵ The Appraisal Foundation, Restated Bylaws, § 6.02(b)(viii) (Nov. 16, 2019) (emphasis added) , <https://appraisalfoundation.sharefile.com/share/view/s11d4d879051545738887fa0015cad511> (“Bylaws”).

¹⁰⁶ See U.S. Bureau of Labor Statistics, *Labor Force Statistics from the Current Population Survey*, (Jan. 22, 2021), <https://www.bls.gov/cps/cpsaat11.htm>. . See also, Cherelle L. Parker, Ira Goldstein, and Gregory D. Squires, *Home Appraisals Drive America’s Racial Wealth Gap - 95% of Philly’s Appraisers Are White*, PBS WHYY (Feb. 25, 2021), <https://whyy.org/articles/home-appraisals-drive-americas-racial-wealth-gap-95-of-phillys-appraisers-are-white/>.

Appointment and Election of the Board of Trustees

APPOINTING/ELECTING ENTITY	POWERS	CURRENT MEMBERSHIP
<p>Appraisal Sponsor -Must be an appraiser organization that meets the Appraisal Sponsor Criteria -Must be elected by $\frac{2}{3}$ of the Board of Trustees -Must pay an application fee of \$2,500 -Must make a financial donation (currently \$3,000)</p>	<ul style="list-style-type: none"> • Each Appointing Appraisal Sponsor has the right to appoint one trustee • Each Nominating Appraisal Sponsor has the right to nominate one trustee for election at-large to the Board of Trustees 	Appointing Appraisal Sponsors (no more than 6): <ul style="list-style-type: none"> • American Society of Appraisers • American Society of Farm Managers and Rural Appraisers • International Association of Assessing Officers • International Right of Way Association • Massachusetts Board of Real Estate Appraisers
<p>Affiliate Sponsor -Non-profit with a demonstrable interest in the appraisal profession --Must be elected by $\frac{2}{3}$ of the Board of Trustees -Must pay an application fee of \$2,500 -Must make a financial donation (currently \$7,500)</p>	<ul style="list-style-type: none"> • Each Appointing Affiliate Sponsor has the right to appoint one trustee • Each Nominating Affiliate Sponsor has the right to nominate one trustee for election at-large to the Board of Trustees 	Appointing Affiliate Sponsors (no more than 3): <ul style="list-style-type: none"> • American Bankers Association • Farm Credit Council • National Association of Realtors
<p>International Sponsor -Organization that meets the International Sponsor Criteria --Must be elected by $\frac{2}{3}$ of the Board of Trustees -Must pay an application fee of \$2,500 -Must make a financial donation (currently \$7,500)</p>	<ul style="list-style-type: none"> • Has the right to nominate one trustee for election at-large to the Board of Trustees 	Not available
<p>Industry Advisory Council ("IAC") -Recommended by vote of current IAC members, approved by Board of Trustees -For-profit organizations with a demonstrated interest in the practical use of appraisals -Annual membership fee (\$2,500)</p>	<ul style="list-style-type: none"> • Has the right to appoint one trustee 	There are currently 38 for-profit organizations on the IAC.
<p>The Appraisal Foundation Advisory Council ("TAFAC") -Selected by Board of Trustees -Not less than 20 organizations with a demonstrated concern regarding sound appraisal practices</p>	<ul style="list-style-type: none"> • Has the right to appoint one trustee 	There are currently 60 non-profit and governmental organizations on the TAFAC. The non-profits are industry trade associations; there do not appear to be any consumer advocates.
<p>Board of Trustees</p>	<ul style="list-style-type: none"> • Not more than 10 trustees may be elected at-large by the Board of Trustees • Of the at-large trustees, at least one must be from each of these categories: academia; consumer interest group; state-certified or licensed appraiser not affiliated with an Appraiser Sponsor 	Board of Trustees

Source: The Appraisal Foundation, Restated Bylaws (Nov. 16, 2019), <https://appraisalfoundation.sharefile.com/share/view/s11d4d879051545738887fa0015cad511>.

As detailed in The Appraisal Foundation's bylaws and the chart above, there are up to 11 appointed trustees and 10 elected trustees. Notably, each Appraisal Sponsor and Affiliate Sponsor has the right to appoint a trustee, but only if it pays an application fee of \$2,500; makes a donation of \$3,000 (for an Appraisal Sponsor) or \$7,500 (for an Affiliate Sponsor); and is elected by $\frac{2}{3}$ of the current Board of Trustees. Thus, the sponsor itself must have the financial resources to cover the application and donation prerequisites and be well-connected to participate in the process. Moreover, although the nonprofits on The Appraisal Foundation Advisory Council can participate in the appointment process without making a donation, they are comprised of 60 organizations with the right to appoint only one trustee. Also, none of the current nonprofits are civil rights or consumer advocates; they are all government entities or industry trade associations. But even if a few civil rights and consumer advocates were to join the advisory council, their voices would be easily outnumbered.

The industry-heavy Board of Trustees appoints the Appraisal Standards Board and the Appraiser Qualifications Board, which tends to further amplify the industry viewpoint

The Board of Trustees, which must mainly consist of appraisers, appoints the Appraisal Standards Board¹⁰⁷ and the Appraiser Qualifications Board.¹⁰⁸ Although the bylaws do not require that these board members be appraisers,¹⁰⁹ they have exclusively been active appraisers until recently.¹¹⁰ Moreover, there is no conflict-of-interest rule that would require the member to step down from their current employment as an appraiser in order to serve as a member.

An analogy may be useful here to understand the implications of The Appraisal Foundation's appointments and election processes. As an example, Congress has delegated to the CFPB the authority to promulgate rules to implement the Equal Credit Opportunity Act, which prohibits a creditor from discriminating on a prohibited basis. If the process for selecting the CFPB staff to write the rule were analogous to the process used by The Appraisal Foundation, the process might look something like the following:

Hypothetical Analogy if the CFPB Were Structured Like The Appraisal Foundation:

- Financial industry sponsors that made donations to the CFPB of up to \$7,500 would have the right to appoint the CFPB's Board of Trustees.
- The majority of the CFPB's Board of Trustees would have to be industry creditors.
- The CFPB's Board of Trustees, which would be almost exclusively industry creditors, would appoint the rulewriting staff, which would also be industry creditors.
- The staff would not be required to step down from their current industry positions while they write the rules.
- Industry creditors would write the minimum standards for the regulation of the industry as well as the minimum criteria for entering the industry; the standards and criteria would have to be adopted by all 50 states.

¹⁰⁷ The Appraisal Standards Board must consist of 5-9 members. See Bylaws §§ 12.01, 12.02.

¹⁰⁸ The Appraiser Qualifications Board must consist of 5-9 members. See Bylaws at §§ 13.01, 13.02.

¹⁰⁹ For the Appraisal Standards Board and the Appraiser Qualifications Board, the member must only "have extensive knowledge of appraising and sound appraisal practice and a concern for the public interest in matters involving appraisals." Bylaws at §§ 12.02, 13.02.

¹¹⁰ The only current non-appraiser serving on either board is Roberta Ouellette, who formerly served as legal counsel to the North Carolina Appraiser Board.

This analogy as well as the description above show how The Appraisal Foundation's current processes tend to favor and replicate the appraisal industry point of view rather than a wider range of viewpoints that might favor the public interest, including the interests of homeowners of color. This approach may pose a structural challenge to solving the complex problems of appraisal bias and lack of appraiser diversity. Moreover, it may be challenging to make changes in the public interest if those changes would contradict the interests of the industry to whom the board members are beholden for their position and livelihood.

With near uniformity, both fair housing organizations and appraisal organizations interviewed for this report agreed that the work of The Appraisal Foundation's boards would benefit from including more voices from outside the field of appraising and financial institutions.

Recommendation

The Appraisal Foundation should consider the following steps to enhance inclusiveness, to provide a more intentional and meaningful way to incorporate the voices of civil rights and consumer advocates, and to improve the ability to issue USPAP Standards and Appraiser Criteria that benefit the whole of the housing market, including homeowners and neighborhoods of color:

- **Repeal the requirement that a majority of the Board of Trustees must be appraisers.**
- **Repeal the requirement of financial donations to appoint board members.**
- **Provide a mechanism allowing industry groups and civil rights/consumer advocates to appoint an equal number of trustees. (For purposes of this report, the term "civil rights/consumer advocates" means organizations that have as their primary purpose the promotion of civil rights and/or consumer protection.)**
- **Provide a mechanism allowing industry groups and civil rights/consumer advocates to nominate an equal number of trustees to at-large elections.**
- **Require that at least four of the at-large trustees must be civil rights/consumer advocates.**
- **Form an advisory council consisting only of nonprofit civil rights and consumer advocates.**
- **Require that at least a third of the members of the Appraisal Standards Board and Appraiser Qualifications Board be civil rights/consumer advocates.**

The Rules of Procedures and Exposure Draft Process Would Benefit from Greater Transparency and Inclusion of Viewpoints that Represent Consumers, Including Consumers of Color

As with the appointments and elections process, The Appraisal Foundation's rules of procedures and exposure draft process tend to favor industry access and industry viewpoints instead of ensuring that the public – including civil rights and consumer advocates – have full access and meaningful opportunities for input. A comparison to the Administrative Procedures Act and the CFPB's standards for rulemaking may be instructive.

As explained above, the Administrative Procedures Act requires agencies to do the following with respect to rulemaking:

- Place a notice of the proposed rulemaking in the Federal Register, which includes:
 - A statement of the time, place, and nature of the public rulemaking;
 - Reference to the legal authority under which the rule is proposed; and
 - Either the terms or the substance of the proposed rule or a description of the subjects and issues involved;
- Give interested persons an opportunity to participate in the rulemaking through submission of written data, views, or arguments;
- Considering the relevant matter presented;
- Publish the rule 30 days before its effective date; and
- Provide interested persons the right to petition for the issuance, amendment, or repeal of a rule.¹¹¹

Similarly, the CFPB must consider a proposed rule’s potential benefits and costs to consumers, and potential reduction of consumer access to financial products and services.¹¹² Given the power of agency rulemaking to affect the life of consumers, the Administrative Procedures Act and the CFPB’s governing statute ensure that the public’s viewpoints and consumer interests are considered.

The Appraisal Foundation’s bylaws set forth the rules of procedure that the Appraisal Standards Board and the Appraiser Qualifications Board must use in issuing the USPAP Standards and the Appraiser Criteria. Generally, these boards use an “exposure draft process,” which provides the public with an opportunity to review and comment on drafts. However, the bylaws contain gaps in requiring a transparent and inclusive process. For example, the boards’ rules of procedures, including for the exposure draft process, are not available on The Appraisal Foundation’s website, making the process less transparent. Following is a chart summarizing the gaps by showing The Appraisal Foundation’s processes with a comparison (in the far left column) to the topics covered by the Administrative Procedure Act and the CFPB rulemaking requirements.

¹¹¹ 5 U.S.C. § 553.

¹¹² 12 U.S.C. § 5512(b).

Rules of Procedure and Exposure Draft Process

TOPIC	APPRAISAL STANDARDS BOARD	APPRAISER QUALIFICATIONS BOARD
Authority for Rules of Procedure	Two-thirds majority of Board of Trustees may overrule any change to the rules of procedure issued by the Appraisal Standards Board.	Two-thirds majority of Board of Trustees may overrule any change to the rules of procedure issued by the Appraiser Qualifications Board.
Requirement for Notice to the Public*	Rules of procedure must provide for giving notice and exposure of the proposal.	Not required.
Requirement to Specify the Legal Authority*	Not required.	Not required.
Requirement to Provide Opportunity for Public Participation*	Rules of procedure must provide for a public hearing. However, the full text of USPAP Standards with its Advisory Opinions require a payment, which makes it difficult for the public to provide robust comments.	Not required. However, the Appraiser Criteria is free to the public.
Requirement to Consider the Consumer Perspective**	Rules of procedure must provide for consultation with the advisory councils. Consultation with other interested persons and organizations is optional. No requirement to consult with civil rights or consumer advocates or to consider the consumer perspective.	Not required.
Approval of Draft	Requires approval by the majority of the board.	Requires approval by the majority of the board.
Approval of Final Standard/Criteria	Requires approval by 70% of the board.	Requires approval by 70% of the board.
Requirement to Publish the Final 30 Days before the Effective Date*	Not required.	Not required.
Requirement to Petition for the Issuance, Amendment, or Repeal*	Not required.	Not required.

Source: The Appraisal Foundation Bylaws §§ 12, 13

*Administrative Procedures Act Requirement, 5 U.S.C. § 553

**CFPB Rulemaking Requirement, 12 U.S.C. § 5512(b)

Recommendation

The Appraisal Foundation should consider the following steps to enhance transparency and inclusiveness, and to improve the ability to issue USPAP Standards and Appraiser Criteria that benefit the whole of the housing market, including homeowners and neighborhoods of color:

- **Require the Appraiser Qualifications Board to provide notice to the public, exposure of drafts, and an opportunity for public participation. (The Appraiser Qualifications Board currently engages in this practice but would benefit from having the practice codified in its bylaws.)**

- **Require the Appraisal Standards Board and Appraiser Qualifications Board to state the legal authority under which it is promulgating standards or criteria.**
- **Require the Appraisal Standards Board to make the complete text of USPAP Standards, including Advisory Opinions, available to both appraisers and the public for free.**
- **Require the Appraisal Standards Board and the Appraiser Qualifications Board to consider the impact of proposed standards and criteria on consumers and neighborhoods, including consumers and neighborhoods of color. As a best practice, many agencies that regulate the housing finance market set up specific and regular meetings to hear feedback from civil rights and consumer advocates.**
- **Require the Appraisal Standards Board and the Appraiser Qualifications Board to publish the final standards and criteria at least 30 days before the effective date.**
- **Require the Appraisal Standards Board and the Appraiser Qualifications Board to provide to the public an easily accessible system to request the issuance, amendment, or repeal of any standard or criteria.**