November 19, 2008

The Honorable Sheila Bair
Chairwoman
Federal Deposit Insurance Corporation
550 17th Street, NW
Washington, DC 20429

Dear Chairwoman Bair:

This letter is in response to the *Loss Sharing Proposal to Promote Affordable Loan Modifications* released by your agency on November 14, 2008. As professional real estate appraisers, we stand strongly in support of swift action to assist consumers, lenders and communities in dealing with the current housing crisis. We believe that the *Loss Sharing Proposal* has great merit, and we look forward to working with the FDIC to see it implemented effectively.

The proposal appropriately calls for a systematic review of all loans that may qualify for participation in the program. We assume the identification process would involve an analysis of the value of the underlying collateral. Further, the FDIC proposes to share up to 50 percent of losses incurred if a modified loan defaults, while establishing a reduced loss share percentage for "underwater" loans, or loans that are greater than value of the underlying collateral.

While we support the overall intent of the *Loss Sharing Proposal,* we are greatly concerned that the FDIC is proposing to allow loan servicers to use Broker Price Opinions (BPOs) prepared by real estate agents and brokers to demonstrate the current loan-to-value (LTV) ratio on "underwater" loans. We believe that the LTV ratio should only be determined using valuations that are prepared by professional real estate appraisers. We urge the FDIC to revise this provision immediately to require the performance of appraisals for each property that is being considered for inclusion in the *Loss Sharing Program,* and offer in support thereof the following:

1) **In as many as 24 states[1], it is illegal for a real estate broker or salesperson to perform a BPO for the purposes proposed by the FDIC.** In these states, the performance of a BPO for anything other than establishing the sales or purchase price of property is strictly prohibited. For example, in Mississippi, it is only permissible for a broker or salesperson to "in the ordinary course of business, give[s] an opinion as to the price of real estate for the purpose of a prospective listing or sale."[2]

   Clearly, determining the value of a property to ascertain a loan-to-value ratio that establishes eligibility for a loan modification, as part of this program, has nothing to do with the listing or sale of a property. Thus, it would be illegal for a real estate broker or salesperson to perform a BPO for these purposes in these states.

   Unfortunately, many loan servicers and government agencies appear to be unaware or unconcerned about these state laws, despite clear statements from state law enforcement authorities outlining their misuse.[3] Should the FDIC move forward with the *Loss Sharing Proposal* in its current form it will

[1] AL, AR, CT, DE, GA, HI, ID, KY, MD, MI, MN, MS, NE, NJ, NV, NM, ND, OR, PA, RI, TN, UT, WI, WV

[2] Mississippi Code § 73-34-5. Available at http://michie.com/mississippi/lpExt.dll?f=templates&eMail=Y&fn=main-h.htm&cp=mscode/15df8/16b16/16b22

[3] One example includes a memorandum from the State of West Virginia Real Estate Commission to all Real Estate Associates, Associate Brokers, and Salespersons, dated December 5, 2007. Available at http://www.wvrec.org/BPO-letter.pdf

result in widespread violations of state law. We cannot overemphasize the importance of avoiding this result.

2) **Federal Bank Regulations Require Appraisals.** The *Loss Sharing Proposal* is inconsistent with the FDIC's own regulations that set forth real estate appraisal requirements pursuant to Title XI of FIRREA [4]. Specifically, those regulations state that an appraisal performed by a state certified or licensed appraiser is required for all real estate-related financial transactions, with a few exemptions, including one for transactions involving extensions of existing credit at the lending institution. However, this exemption from appraisal requirements may be taken by financial institutions only if "there has been no obvious and material change in the market conditions or physical aspects of the property that threatens the adequacy of the institutions real estate collateral protection after the transaction even with the advancement of new monies; or there is no advancement of new monies, other than funds necessary to cover reasonable closing costs."[5]

   Under the proposed program no "new monies" will be advanced, so technically an exemption from the requirement for an appraisal by a licensed or certified appraiser might apply. However, one cannot dispute the fact that obvious and material changes in market conditions (and, in many cases, property condition) have taken place. Because of this, we believe that the utmost caution in valuing these properties is warranted.

3) **Interagency guidance states that appraisals are required for loan modifications and debt restructures.** In addition to the FDIC's regulations, in its proposed *Interagency Appraisal and Evaluation Guidelines,* issued on November 13, 2008, the FDIC (and other federal agencies) state that "Loan workouts, debt restructures, loan assumptions, and similar transactions involving the addition or substitution of borrowers **may** *{emphasis added}* qualify for the exemption for renewals, refinancing and other subsequent transactions." However, the *Interagency Guidelines* further clarify that the use of this exemption from the appraisal requirements is also dependent "upon there being no obvious and material change in the market conditions or physical aspects of the property." Clearly the actions being proposed by the FDIC as part of the *Loss Sharing Proposal* would be classified as loan workouts and debt restructures, and could qualify for an exemption from the appraisal requirements. However, our position is that there have been significant changes in market conditions and the exemption from the appraisal requirements would not apply in the case of this program. In fact, it is likely that there would be no need for the *Loss Sharing Proposal* if there had been no material change in market conditions. We are deeply concerned that the FDIC would contradict itself by suggesting in one document that appraisals are required if there has been a material change in market conditions, and then stating in another document that the use of lower quality valuation products is permitted **as part** of a program that only exists because of drastic changes in real estate market conditions.

4) **BPOs are largely unregulated and are performed with little oversight or training**. While licensed and certified appraisers are required to meet minimum education and experience requirements and to perform real estate valuation assignments in conformance with the Uniform Standards of Professional Appraisal Practice (USPAP), BPO preparers have virtually no training requirements or standards. As a result, BPO value estimates vary wildly and are far less reliable than competently prepared real estate appraisals.

5) **BPOs answer a different question – *price* – than real estate appraisals, which provide opinions of *value*.** Lenders often order BPOs in real estate owned (REO) situations. For REO properties, a

[4] Title XI of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA) required the Office of the Comptroller of the Currency (OCC), the Board of Governors of the Federal Reserve System (FRB), the Federal Deposit Insurance Corporation (FDIC), and the Office of Thrift Supervision (OTS) to adopt regulations on the preparation and use of appraisals by federally regulated financial institutions. The FDIC's regulation was published in 12 CFR 323. Section 323.3 of this regulation lists exceptions to when appraisals by state licensed or certified appraisers, prepared in accordance with the Uniform Standards of Professional Appraisal Practice (USPAP) are required. The FDIC Interagency Appraisal and Evaluation Guidelines are available at http://www.fdic.gov/regulations/laws/rules/5000-4800.html

[5] 12 CFR 323, Section 323.3, Available at http://www.fdic.gov/regulations/laws/rules/2000-4300.html#2000part323.3

BPO might be the appropriate product, given that the lender now owns the property and wants to know how it should be priced for sale. However, there are inherent biases that real estate agents carry when pricing properties on behalf of their clients. By contrast, the relevant question about properties that will be subject to the FDIC's loss sharing program is *What is the* *value*? An appraisal – not a BPO -- answers questions about *value.* An appraisal is the central service offered by independent real estate appraisers, and one that we believe the FDIC should call on during this time of uncertainty.

6) **Permitting reliance on BPOs would be a step toward *loosening* valuation requirements, which sends the wrong message in this time of economic crisis.** By contrast, other entities are tightening their requirements in an effort to improve the situation. Just last week Fannie Mae announced that appraisers will be required to add a Market Conditions Summary Form to every appraisal report. Further, the amount of loss sharing assumed by the government, and the amount of taxpayer money exposed to risk, will be determined as a result of the valuation of the property. We believe that the exposure of taxpayer funds to risk mandates that the highest quality valuation product – an appraisal performed by a licensed or certified appraiser be performed for each property that is being considered for participation in the *Loss Sharing Program.*

7) **The real estate appraisal community can offer an array of cost effective and efficient services to the loan servicer community to assist in this effort.** We understand many loan servicers and government agencies are turning to BPOs because BPOs are seen as cheaper and faster alternatives to appraisals. We dispute this contention. Many BPO providers routinely advertise turn-around times similar to appraisals. We do not dispute that BPOs often cost less than appraisals. However, this is due to the different nature of the product. As a valuation product, appraisals are far more robust when compared to BPOs. In fact, it surprises us that the FDIC would want to use a less robust product, given the dramatic declines in market and property conditions that exist today.

   Further, the turn-around time for appraisals is largely a function of the scope of work of the assignment. However, there is great flexibility in the scope of work for an appraisal assignment. The Uniform Standards of Professional Appraisal Practice (USPAP) gives appraisers great flexibility to develop a "scope of work" consistent with the needs of their clients. Unfortunately, the FDIC proposal fails to recognize this flexibility, and worse, helps to perpetrate a commonly held, but unfounded view by many, that there is only one type of real estate appraisal available and it is too costly or inflexible for such circumstances.

8) **Use of other available products, such as automated valuation models ("AVMs") and comparative market analyses ("CMAs"), would present or similar shortcomings.** While our comments thus far have focused on the use of BPOs as part of the *Loss Sharing Proposal,* we have similar concerns with the use of other lower quality valuation tools. Unreliable valuations would jeopardize the success of the proposed program. We would urge the FDIC not to substitute one of these products in place of BPOs.

To address these concerns, we strongly urge the FDIC to require, for purposes of the proposed program, the use of real estate appraisals prepared by competent appraisers who are, at a minimum, state licensed or certified. Such a requirement would be consistent with FIRREA and regulatory guidelines.

Further, since these are all troubled loans, many properties may have deferred maintenance. Because of this, we believe the most prudent approach is for the FDIC to require an interior inspection appraisal. We understand, however, that the FDIC is attempting to provide incentives to loan servicers to participate in this loan modification proposal. To this point, it may be helpful for the FDIC to provide guidance about specific types of appraisals that can be utilized for purposes of this initiative. Such guidance could include, but not be limited to, information about "appraisal updates," appraisals that are limited in scope (for example, exterior only or no property inspection), and streamlined appraisal reports that take less time and are less costly to prepare.

In closing, our organizations stand in strong support of your agency's initiative. However, we are deeply concerned about the negative ramifications of permitting the use of BPOs. Not only would this violate the FDIC's own long-standing regulation, but it also would send the wrong message about whether the agency is serious in its attempt to rectify the mortgage problem that is strangling our economy. The initiative requires mortgage renegotiations, and the expert advice of qualified on-site appraisers is required to help restore stability and confidence in the mortgage market. The cost is small considering the overall big picture. Taxpayers deserve a program that is responsible in the way it addresses the valuation of property. Substituting a BPO because it is supposedly cheaper is irresponsible.

We commit to you the services of our organizations to help accomplish your agency's program goals. Specifically, our organizations have project teams actively working to create the appropriate appraisal tools (forms and processes) and educate appraisers about their use. Such tools are being designed to strike a balance between cost and efficiency and the risk associated with the transaction. We are working to ensure that appropriately qualified appraisers are ready to assist with the valuation of these properties

We respectfully request an immediate meeting to discuss these concerns with you or your designated staff. We will follow up with your office to make these arrangements. Please contact Bill Garber, Director of Government and External Relations, Appraisal Institute, at 202-298-5586 or bgarber@appraisalinstitute.org or Peter Barash, Government Relations Representative, American Society of Appraisers at 703-466-2221 or peter@barashassociates.com if you have any questions or require more information.

Sincerely,

Appraisal Institute
American Society of Appraisers
American Society of Farm Managers and Rural Appraisers
National Association of Independent Fee Appraisers