



MORTGAGE BANKERS ASSOCIATION



August 21, 2023

Board of Governors of the
Federal Reserve System
20th Street and
Constitution Ave NW
Washington, DC 20551
Docket No. R-1807

Federal Deposit Insurance
Corporation
550 17th Street NW
Washington, DC 20429
RIN 3064-AE68

National Credit Union
Administration
1775 Duke St #4206,
Alexandria, VA 22314
RIN 3133-AE23

Consumer Financial
Protection Bureau
1700 G St NW
Washington, DC 20552
Docket No. CFPB-2023-
0025

Federal Housing Finance
Agency
400 7th Street, SW
Washington, DC 20219
RIN 2590-AA62

Department of the
Treasury
Office of the Comptroller
of the Currency
400 7th Street, SW
Washington, DC 20219
Docket ID OCC-2023-
0002

RE: Proposed Rule on Quality Control Standards for Automated Valuation Models

To Whom It May Concern:

The Mortgage Bankers Association (MBA)¹ and the Consumer Bankers Association² thank the Office of the Comptroller of the Currency (OCC), Board of Governors of the Federal Reserve System (the Board), Federal Deposit Insurance Corporation (FDIC), National Credit Union Administration (NCUA), Consumer Financial Protection Bureau (CFPB), and Federal Housing Finance Agency (FHFA) (together, “the Agencies”) for their consideration

¹ The Mortgage Bankers Association (MBA) is the national association representing the real estate finance industry, an industry that employs more than 400,000 people in virtually every community in the country. Headquartered in Washington, D.C., the association works to ensure the continued strength of the nation's residential and commercial real estate markets, to expand homeownership, and to extend access to affordable housing to all Americans. MBA promotes fair and ethical lending practices and fosters professional excellence among real estate finance employees through a wide range of educational programs and a variety of publications. Its membership of more than 2,200 companies includes all elements of real estate finance: independent mortgage banks, mortgage brokers, commercial banks, thrifts, REITs, Wall Street conduits, life insurance companies, credit unions, and others in the mortgage lending field. For additional information, visit MBA's website: www.mba.org.

² CBA is the only national trade association focused exclusively on retail banking. Established in 1919, the association is a leading voice in the banking industry and Washington, representing members who employ nearly two million Americans, extend roughly \$3 trillion in consumer loans, and provide \$270 billion in small business loans.

of industry feedback on the proposed rule regarding Automated Valuation Models (AVMs).³ Greater industry adoption of AVMs holds the potential to modernize and improve the valuation process, and MBA and CBA look forward to working in partnership with the Agencies to craft a workable regulatory framework for improving quality and lowering the cost of this critical component of mortgage lending.

Mortgage lenders evaluate borrower eligibility based on an assessment of both credit risk and collateral risk – the extent to which value of the real property supports the mortgage loan. Understanding the market value of the collateral is essential to pricing, originating, and servicing the loan. AVMs are used by the mortgage industry not only to assist in making credit decisions but to assess servicing portfolios and screen for outlier appraisals. Fannie Mae and Freddie Mac (the GSEs) are two of the most influential AVM stakeholders, as they use their access to the FHFA appraisal dataset to inform quality control programs such as Collateral Underwriter® and Loan Collateral Advisor®.

The real estate industry in recent years has experienced two significant challenges with respect to the home valuation process – namely, higher costs due to appraiser shortages and concerns regarding bias in home valuations. Recent focus on the potential impacts of racial bias in home valuations has brought new attention to the efficacy of automated valuation models. While increased reliance on the models' underlying datasets could flag "one-off" undervaluations, federal policymakers have expressed concern that the model algorithms themselves could replicate patterns of discrimination embedded in historical datasets.

MBA and CBA appreciate the need for quality control and oversight with respect to AVMs, and strongly suggest that any such regulatory requirements be balanced against the need to promote advancements that reduce costs and broaden access to homeownership. The potential for valuation technologies, including AVMs, to alleviate appraiser shortages and safeguard against appraisal bias should remain top of mind during the rulemaking process.

Following a Principles-Based Approach

MBA and CBA appreciate the Agencies' commitment to a principles-based approach. Allowing each institution using AVMs to adopt and maintain its own policies, practices, procedures, and control systems better acknowledges differing business models and levels of AVM usage. In addition, prescriptive rules could become outdated if they cannot evolve with technological developments, hindering advancements in the industry. They also may present an undue burden on smaller institutions.

A principles-based approach better complements varying levels of AVM use and business practices of covered institutions. Many factors determine the tolerances and confidence levels associated with AVMs and their practical applications. There may be AVM covered uses that are greatly enhanced when layered with other valuation methods, such as a physical interior and/or exterior assessment or home inspection of the subject property.

³ Quality Control Standards for Automated Valuation Models, Proposed Rule, available at: https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/cfpb_automated-valuation-models_proposed-rule-request-for-comment_2023-06.pdf

Each covered institution should have the flexibility to establish processes and procedures related to AVM usage that reflect its business model and potential future enhancements. An overly prescriptive approach is unlikely to accommodate these differing practices and approaches throughout the industry.

While MBA and CBA support a principles-based approach and would oppose further prescription of standards within regulation, MBA and CBA are simultaneously sensitive to a lender's desire to be provided with some level of guidance or best practices in order to fulfill its due diligence under the rule. In conjunction with principles-based rulemaking, MBA and CBA suggest that the CFPB expand upon its Compliance Bulletin 2016-02, *Service Providers* to more concretely outline expectations and potential recourse for quality control and fair lending oversight of third-party service providers such as those that provide AVMs.⁴ MBA and CBA suggest, additionally, that the Agencies include in the official commentary of the rule an outline of the types of issues they have identified with AVMs, potential remedies with narratives, analytical/quantitative examples, and use-cases/case studies so that market participants can view practical applications of how to remedy these issues.

Scope of Application and Inclusion of the GSEs

Any regulatory framework should apply consistently to entities engaging in covered uses of AVMs rather than specify different requirements for institutions that the statute places under the authority of individual Agencies (i.e., it should apply the same rules for independent mortgage bankers and depository lenders). The Agencies should ensure the rule does not create any inappropriate and unintended competitive disadvantages for certain business models.

MBA and CBA appreciate the inclusion of the GSEs under the rule so as to create a level playing field in the market. One crucial consideration will be the potential impacts to the GSEs' spectrum of alternative valuation options. The ability of the GSEs to offer value acceptance and Automated Collateral Evaluation (ACE), value acceptance/ACE plus property data, hybrid, and desktop appraisal options is an extremely valuable tool in facilitating a smooth lending transaction. Because lending is a cyclical industry, valuation alternatives are particularly essential in times of high demand. New appraisers cannot enter the industry fast enough to respond to a rapid increase in lending volume due to the appraisal industry's current educational and training requirements and other structural hurdles. Recruiting to meet high demand may, in fact, be harmful as the field will become oversaturated when the mortgage and real estate cycle turns to a down market. MBA and CBA suggest that the Agencies consult with the GSEs to ensure that application of the quality control standards would not create adverse effects on the availability of alternative valuation methods.

Small Lender Considerations and Unbalanced Competitive Effects

In crafting a future proposed rule, the CFPB and other federal regulators should recognize the constraints of smaller lenders and avoid requirements that would deter them from using

⁴ CFPB, Compliance Bulletin and Policy Guidance; 2016-02, *Service Providers*, available at: https://files.consumerfinance.gov/f/documents/102016_cfpb_OfficialGuidanceServiceProviderBulletin.pdf

AVMs altogether, thereby resulting in unbalanced competitive impacts. If the costs of excessive review requirements and potential liability effectively preclude small lenders from using AVMs, those lenders – and their customers – would be more severely impacted by appraiser shortages, later closing dates, and higher appraisal fees.

MBA and CBA propose that the Agencies include a small lender/servicer exemption from the AVM Quality Control standards. Lenders and servicers who engage in limited use of AVM models should be able to benefit from the technologies in the same manner as larger lenders and servicers, despite not having the resources to conduct as intensive a level of quality control reviews. This exemption is also appropriate as these small lenders/servicers are likely to rely on larger outside service providers who are already subject to thorough review by regulators or larger clients.

Access to GSE Data

Access to the GSEs' appraisal dataset would help AVM providers and the lenders assessing their models to better understand their efficacy and compliance. For AVM providers, access to the data would improve consistency across the market and provide for more opportunities to test the accuracy of a model's valuation result. For lenders, it would create the potential for greater confidence and accuracy related to underwriting collateral risk and minimize friction and unexpected outcomes related to loan delivery. Additionally, access to the GSEs' appraisal dataset would help lenders who may not have sufficient internal data to test AVM accuracy.

Creditors Should Not Be Liable for Violating Nondiscrimination Law When Relying on Third-Party AVMs

MBA and CBA disagree with the Agencies' interpretation of the Fair Housing Act ("the FHA") in that they assert that the statute establishes liability for lenders when an AVM provider violates nondiscrimination law. In general, the FHA imposes liability for the discriminatory acts of a third party by applying traditional principles of vicarious liability. The FHA does not impose a nondelegable duty on a creditor to ensure that third parties with whom it conducts business do not discriminate.⁵ Whether a creditor has a duty to ensure third-party compliance depends on the extent of the creditor's **control** over that third party.⁶ Creditors do not exercise control over independent third-party AVM providers, and those AVM providers are not agents or employees of the creditor. Most third-party AVM providers are not economically dependent on a specific creditor, nor are third-party AVM providers limited to working with any one creditor. AVM providers—like other independent third parties—do not satisfy the legal standard for control necessary to establish liability on the part of the lender who works with them.

Best Practices in Third-Party Oversight

Lenders can, in the process of following best practices and guidance on third-party oversight, assess that the goals, design, data inputs, and instructions for model use do not

⁵ See *Meyer v. Holley*, 537 U.S. 280, 289-91 (2003).

⁶ 24 C.F.R. § 100.7(a)(iii) (emphasis added).

contain overt evidence of discrimination or evidence of disparate treatment.⁷ Lenders can confirm with AVM providers that they are endeavoring to provide fair valuations and devote resources to fair lending compliance. Lenders can obtain affirmation that AVM providers are designing their models with those goals in mind and intentionally ensuring data inputs do not relate to protected class characteristics. Finally, lenders can ensure that they follow the instructions for AVM use and are observant of the model's constraints. Insofar as a lender is correctly using the model per the provider's guidelines, and does not introduce input mechanisms derived from or based on protected class membership, that lender should be in line with third-party management best practices and in compliance with the AVM Quality Control rule.

Lenders Cannot Isolate Effects of Systemic Bias

Lenders are not in any position to detect or assess evidence of systemic racial bias in the loan-level results they derive from an AVM. There is neither sufficient consensus on strategies to achieve this goal nor a clear way for lenders to attempt to do so. While there are several reports that have been released that make an attempt at quantifying systemic bias, there is not broad consensus on the efficacy of the methodologies used within these studies to factor measurements into transaction-level decisions.

Further, there is not a clear understanding of the legal framework by which a claim for harm by systemic bias would be made and what mitigative efforts a lender or servicer would be expected to take in the face of that risk. Underlying assumptions (or framing) of the impacts of systemic bias radically alter the types of risk mitigation procedures an entity would employ to identify, isolate and attempt to "correct for" systemic bias. Having reviewed the complexities and unanswered questions, MBA and CBA strongly oppose the establishment of any new expectation by the Agencies for a lender or servicer to engage in risk mitigation and quality control oversight for systemic bias effects within AVM results.

This is not to say that systemic bias should not be addressed, nor should the harms of past discrimination go without remedy. MBA and CBA members support efforts to increase the supply of affordable housing and many initiatives aimed at reaching underserved communities and first-time homebuyers. Indeed, resolving this issue requires a holistic and multifaceted approach.

Should the Agencies wish to pursue a greater understanding of detecting evidence of systemic bias, MBA and CBA suggest that they sponsor an effort to develop a testing strategy that can be shared with the AVM industry.⁸ The federal government is in a unique position to develop testing strategies for evidence of systemic bias, as it has access to

⁷ MBA recognizes the OCC's Bulletin 2023-17, Third Party Relationships: Interagency Guidance on Risk Management as a best practice guidance document for lenders and servicers. Available at: <https://www.occ.gov/news-issuances/bulletins/2023/bulletin-2023-17.html>

⁸ Such government partnership would be welcome, as attempts to regulate through enforcement or punitive liability in this area may push disparate impact liability beyond its legal bounds. See *Texas Department of Housing v. Inclusive Communities, CITE, (2015)* ("disparate-impact liability has always been properly limited in key respects that avoid the serious constitutional questions that might arise under the FHA, for instance, if such liability were imposed based solely on a showing of a statistical disparity. Disparate-impact liability mandates the "removal of artificial, arbitrary, and unnecessary barriers,"...")

property valuation data, borrower credit and demographic information, and historical record of regions impacted by discriminatory housing policies. The agencies should investigate whether there is a pathway for data science experts to gain access to this information in order to develop more widely agreed upon assessment strategies of systemic bias.

Safe Harbor for AVMs Conforming to Standards and Third-Party Tested

MBA and CBA propose that the Agencies include language in the final regulation outlining a safe harbor or presumption of lender compliance with respect to this regulation, including fair lending obligations, when using an AVM approved by a Standards Setting Organization (SSO)⁹ and tested by a third party. MBA and CBA envision a future state wherein an SSO establishes model standards for the AVM industry, and a non-profit entity additionally develops a third-party test for AVM efficacy. For example, the Mortgage Industry Standards Organization (MISMO) could be an ideal venue for creation of such standards. Alongside MISMO, MBA is currently engaging in an effort to develop an AVM third-party testing platform. Establishment of industry standards and testing could further promote programmatic and underwriting policy changes by the GSEs to create allowable applications of AVMs for GSE-backed loans, igniting greater adoption – with appropriate standards and validation -- of this time and money-saving technology. Reliance on an SSO and third-party validation will be particularly important for smaller and mid-sized mortgage banks, community banks, and credit unions.

Implementation

An adequate timeline for implementation is crucial for mortgage lenders to properly incorporate quality control standards required by any future rulemaking. Following feedback from our members, MBA and CBA request that the CFPB and other regulators allow for an implementation period of at least 12 months.

Conclusion

MBA and CBA appreciate the need for quality control and oversight with respect to the usage of AVMs. Regulation governing this oversight, however, should take into consideration the practicalities of model risk management, potential unintended consequences like the impact on the availability of GSE waivers and alternative valuation methods, unbalanced market effects, conflicting interpretations of the legal framework, and the lack of established methodologies in examining systemic bias in the United States. As a general principle, MBA and CBA urge the Agencies to be mindful of the tradeoff between heightened compliance costs and homeownership affordability. AVMs and technologies like them can alleviate appraiser shortages, reduce transaction costs for consumers and safeguard against individual appraisal bias. A robust regulatory framework continues to be a critical imperative in order to achieve these outcomes.

⁹ The Standards Setting Organization would be required to conform to OMB Circular A-119. Available at: <https://www.whitehouse.gov/wp-content/uploads/2017/11/Circular-119-1.pdf>

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MBA and CBA appreciate the opportunity to provide comment on this important rulemaking. Should you have questions or wish to discuss these issues further, please contact Hanna Pitz, Assistant Director of Housing Finance Policy, MBA at (202) 557-2796 or hpitz@mba.org, and Shelley Thompson, Vice President and Associate General Counsel, CBA at (202) 989-5340 or sthompson@consumerbankers.com.

Sincerely,



Pete Mills
Senior Vice President
Residential Policy and Strategic Industry
Engagement
Mortgage Bankers Association



David Pommerehn
General Counsel & Senior Vice President
Consumer Bankers Association