

February 13, 2014

[via email: ASBComments@appraisalfoundation.org](mailto:ASBComments@appraisalfoundation.org)

Appraisal Standards Board  
The Appraisal Foundation  
1155 15<sup>th</sup> Street, NW, Suite 1111  
Washington, D.C. 20005

Dear Board Members:

This letter is in response to your First Exposure Draft of proposed changes to the 2016-17 edition of Uniform Standards of Professional Appraisal Practice (“USPAP”) dated January 7, 2014.

The American Institute of Certified Public Accountants (“AICPA”) is a professional organization of over 395,000 Certified Public Accountants (“CPAs”). Our constituency of CPAs actually exceeds this number because, under many state accountancy laws, AICPA professional standards also apply to CPAs who are not AICPA members. We estimate that over 25,000 CPAs in the U.S. provide business valuation services to their clients. Many of these CPAs are also members of other professional organizations that provide benefits to business valuation practitioners, such as American Society of Appraisers (“ASA”). As you likely know, ASA members are required to follow USPAP as a condition of their membership.

The AICPA’s Forensic and Valuation Services Executive Committee (“FVSEC”) is a senior technical committee of the AICPA. The FVSEC is empowered to issue valuation standards for our members and to comment on valuation-related topics (such as USPAP) on behalf of the AICPA. In 2007, the AICPA issued valuation standards, *Statement on Standards for Valuation Services No. 1*.

This letter presents our comments with regard to your exposure draft.

1. Proposed changes to preliminary communications and related workfile requirements of appraisers

Section 2 of the exposure draft proposes changes to required appraiser behavior related to preliminary communications of their work. The exposure draft presents these proposed changes in two alternatives, Proposal 1 and Proposal 2. These two proposals create one or two new terms for preliminary communications of an appraiser’s work. The proposals also modify the Record Keeping Rule for required appraiser behavior as to what must be kept in their workfile in terms of documenting these preliminary communications, and a provision that such materials can later be removed from a workfile if the work is superseded.

We strongly oppose these proposed changes. Such proposals are impractical and may create business risk for business valuation specialists (business appraisers) who have been hired in litigation matters as testifying experts. The proposals deviate from common practices in litigation and possibly lead to serious appraiser violations of laws on the preservation of evidence. We address these concerns in two areas: (i) record keeping and (ii) document creation of oral preliminary communications.

The proposed new definitions and changes to the Record Keeping Rule create new obligations for business valuation specialists so they must document preliminary communications of their work in a prescribed way and place such documentation into their workfile.

In terms of oral communications of preliminary work, the proposals require appraisers to create a written summary of each oral communication of assignment results and put the summaries into their workfile.

For written preliminary communications of their work, we interpret the proposals to include communications in a variety of forms such as spreadsheets, exhibits showing calculations, PowerPoint slides, and so on, in addition to drafts of a traditional written appraisal report. Appraisers would be required to put true copies of all of these kinds of written preliminary communications into their work file.

The proposals also include provisions that the written documentation of such preliminary communications can be removed from a workfile later, if the work is superseded.

Even though the proposed changes to USPAP allow appraisers to remove documentation from their workfile, such removal might cause appraisers to violate applicable evidential laws. Spoliation of evidence is a common term for such violations. Laws define the duty of individuals or organizations to preserve evidence. Even if USPAP allows removal of documentation from a workfile, evidential laws may not. Simply put, the law trumps USPAP in terms of preserving evidence that has been explicitly placed into a workfile as documentation. An attorney might make the following argument for a spoliation claim:

1. The appraiser expert-witness admits putting the documentation in their workfile at time  $t$ .
2. The documentation was not in their file later at time  $t+1$  (such as time of deposition).
3. Thus, the appraiser intentionally removed documents that were once part of their file.
4. Claim: Such removal of documents from a workfile is spoliation of evidence.

Even if a court eventually disagrees with this kind of argument, appraisers can still be put at risk of such serious claims and may need to incur costs for hiring their own lawyers to defend them. Alternatively, courts might agree with this argument and impose sanctions on an appraiser or their litigation client or both.

Should appraisers choose to leave the newly-required documentation of preliminary communications in their workfile to avoid such spoliation claims, these actions tend to be contrary to common practices and expectations for testifying experts in litigation. Since American judicial proceedings are an adversarial system that is subject to well-established Federal rules of evidence and procedure, attorneys who hire appraisers as expert witnesses tend to have strong preferences that their experts do not create or maintain preliminary documentation that may be subpoenaed later by an opposing attorney. Such legal tactics are part of this adversarial system. If appraisers were required by USPAP to create and place preliminary documents into their workfile, such behavior is generally contrary to common practices in litigation.<sup>1</sup> Appraisers who insist on such recordkeeping because USPAP requires it may find that attorneys hire other business appraisers who follow another set of valuation standards (such as AICPA's valuation standards) that do not have similar requirements. Such attorney behavior would lead to a competitive advantage for business appraisers who follow a professional valuation standard other than USPAP and would likely cause confusion in the marketplace. Moreover, business appraisers who now follow both USPAP and another valuation standard who do not want to lose their competitive advantage

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<sup>1</sup> In current practice, many business appraisers consider preliminary work as part of their *working papers* that evolve as a project progresses even when communicated to a client or third party. The proposed USPAP changes require the creation of a *document* and placement into the workfile. We believe that such documentation is different from the general perception of working papers.

may terminate their membership in the organization that requires them to follow USPAP and comply with only the alternative valuation standard.

## 2. Proposed changes linking preliminary work and communications to the Ethics Rule

The proposed changes in Section 2 link an appraiser's preliminary work and communications to the Ethics Rule. Although well-intentioned, business appraisers in litigation are often asked to perform preliminary work and communicate preliminary findings using information that is incomplete because the legal discovery process is still ongoing. Attorneys often make such requests for settlement negotiations, attempting to resolve disputes at an early stage.

Knowingly having incomplete information, a common practice of business appraisers, in litigation, is to assist their clients and clients' attorneys by responding to such reasonable requests. But this conduct may now violate the proposed USPAP. Linking preliminary work and communications to the Ethics Rule requires appraisers to perform work in certain ways prior to the release of these kinds of preliminary communications. Such proposed USPAP requirements may be impractical and contrary to practice in litigation matters. For instance, the Ethics Rule includes a provision that appraisers must not perform an assignment with bias. In the early stages of litigation matters when full information has not yet been collected, attorneys may ask a business appraiser to determine the value of a business making certain financial assumptions. Is the appraiser violating the Ethics Rule by performing work using a lawyer's assumptions that *could be* biased in their client's favor? In these circumstances, is a business appraiser at risk of violating the Ethics Rule that prevents them from communicating a report that may be misleading because information is incomplete and an attorney's assumptions may be biased in their client's favor? Is the business appraiser now violating the rule that says such work should not be performed in a grossly negligent manner?

The exposure draft seems to impose obligations upon a business appraiser at preliminary communication stages with links to the Ethics Rule that are unreasonable for litigation matters. We oppose these proposals as impractical in litigation matters and creating unnecessary business risk for business appraisers.

Finally, we thank the Board for its consideration of our comments and for its continued service to the valuation profession.

Very truly yours,



Carol Carden, CPA/ABV, ASA, CFE  
Chair, AICPA Forensic and Valuation Services Executive Committee