



June 5, 2014

Office Comptroller of the Currency, Treasury Department  
Docket No. OCC-2014-0002; RIN 1557-AD64

Board of Governors of Federal Reserve System  
Docket No. R-1486; RIN 7100-AE15

Bureau of Consumer Financial Protection  
Docket No. CFPB-2014-0006; RIN 3170-AA44

Federal Deposit Insurance Corporation  
RIN 3064-AE10

National Credit Union Administration  
RIN 3133-AE22

Federal Housing Finance Agency  
RIN 2590-AA61

Re: Minimum Requirements for Appraisal Management Companies

Dear Sir or Madam:

The American Society of Appraisers (ASA) and the National Association of Independent Fee Appraisers (NAIFA), representing thousands of our nation's leading valuation professionals, appreciate the opportunity to comment on the Joint Notice of Proposed Rulemaking ("Joint Notice" or "Joint Proposal") establishing "Minimum Requirements for Appraisal Management Companies." ASA and NAIFA are professional appraisal organizations which teach, test and credential qualified individuals in residential and commercial real estate appraisal practice and appraisal review.<sup>1</sup> Each of our credentialed real estate appraisers also holds certifications and/or licenses from the 50 states and territories in accordance with Title XI of FIRREA.

The Joint Notice implements Section 1473 (Subtitle F "Appraisal Activities") of the Dodd-Frank Wall Street Reform and Consumer Protection Act. The provisions of Section 1473 relating to the operations and activities of Appraisal Management Companies are intended to ensure the independence of appraisers, promote consumer protection and foster the safety and soundness of mortgage lending transactions in the primary and secondary mortgage markets when AMC-ordered appraisals are involved.

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<sup>1</sup> Additionally, ASA, which is a multi-disciplinary appraisal organization, teaches, tests and credentials its members for professional appraisal practice and appraisal review in business valuation and in personal property valuation (including machinery and equipment, fine art, antiques, gems and jewelry and the contents of offices and homes).

## I. Executive Summary

While ASA and NAIFA believe the Agencies' Joint Proposal has been successful in developing a structural framework for implementing the Dodd-Frank provisions governing the regulation of AMCs, its effectiveness and success will be seriously undermined without a number of major changes. We have reached this conclusion for two overriding reasons: First and foremost, because the proposal fails to detail (or properly explain) the substantive responsibilities that AMCs owe to their appraiser panelists, as required by Dodd-Frank's Title XIV provisions; and, Second, because of certain choices the Agencies have made in implementing the law's provisions that we believe are inconsistent with Congressional intent and diminish its public policy purpose. Our primary concerns are outlined in this Executive Summary and explained in greater detail in the discussion portion of our comments below:

- **The Proposal Lacks Guidance and Fails to Provide Illustrative Examples of Prohibited AMC Conduct That Undermines Appraiser Independence:** The central defect of the Joint Notice is that it fails to adequately address the central public policy purpose of Dodd-Frank's AMC provisions: To ensure that the relationship between AMCs and their appraisers promotes, rather than impedes, the independence of appraisers and the integrity of the appraisal process. Although Dodd-Frank Section 1472 ("Appraisal Independence Requirements") prohibits acts and practices by AMCs and other service providers that violate appraisal independence, it leaves to the Agencies responsibility for describing what those acts and practices are. Remarkably, the Joint Notice fails to do so. The Agencies have done a commendable job in delineating the architecture of how Appraisal Management Companies are to be regulated, but an inadequate job of explaining the substance of that regulation – specifically, it does not delineate in any specific way or provide guidance to stakeholders on, the AMC acts and practices that impair appraiser independence.
- **The Joint Proposal Fails To Establish or Even Discuss a Process For the Filing of Complaints By Appraisers Against Federally-Regulated AMCs Alleging Violations of an AMC's Appraisal Independence Responsibilities:** The proposal requires state appraiser licensing agencies to establish a process for receiving and acting on complaints against AMCs from appraisers and others; but fails to establish or even address a similar process for most of the nation's largest AMCs which, because they are affiliated with or otherwise controlled by federally insured financial institutions, are regulated by the Agencies. The Joint Notice provides no information on how complaints against federally-regulated AMCs are to be reported, investigated or sanctioned;
- **Our Organizations Strongly Object to the Agencies' Decision Not to Adopt Appraisal Review Standards for AMCs in the Proposed Rule:** The proposal requires AMCs to utilize state certified or state licensed appraisers for federally related transactions but defers decision-making on whether AMCs must utilize state certified or state licensed appraisers to conduct appraisal reviews. Given the importance of appraisal reviews as a compliance check in verifying that appraisals have been performed in full

compliance with USPAP, we fail to understand the rationale for the Agencies' decision not to act on this issue;

- **We Disagree With the Agencies' View that Dodd-Frank's AMC Provisions Are Not Applicable to Appraisals Ordered Through an AMC When Performed In Connection With Commercial Real Estate Transactions:** Our organizations have concluded, for a variety of reasons we think persuasive, that Congress clearly intended its regulation of AMCs to include AMC activities and operations in connection with appraisals for commercial real estate transactions.
- **The Joint Proposal Fails To Address Growing Problems Involving Payment of Appraisal Fees By AMCs:** Our organizations are increasingly concerned over certain issues involving AMC payments to appraisers, including the nonpayment of appraiser fees by financially troubled AMCs or by the financial institutions which hire them; as well as lingering doubts that AMCs are meeting their responsibilities to pay required customary and reasonable fees to their appraisers.

A detailed discussion of these and other comments can be found below:

## **II. Discussion**

### **(A) The Joint Proposal Lacks Guidance and Is Devoid of Illustrative Examples Sufficient to Establish a Common Understanding of AMC Acts and Practices That Would Constitute a Violation of Their Appraiser Independence Obligations**

Without clear guidance on – and specific examples of – AMC acts and practices that the Agencies interpret as violating the appraiser independence requirements of Dodd-Frank (including its appraisal amendments to TILA and RESPA), uniform enforcement by state appraiser licensing agencies and even by federal agencies will be seriously jeopardized. Without such additions to the Joint Proposal, enforcement among the states and between the states and the federal government will be uneven and inconsistent, at best. Accordingly, we urge the Agencies to amend the Joint Proposal for the purpose of establishing clear guidance on, and specific examples of, AMC acts and practices deemed to impair the independence of appraisers or that would constitute violations of other appraisal-related provisions of Dodd-Frank.

Absent specific guidance and illustrative examples of prohibited AMC conduct, it is unlikely there will be effective enforcement and uniform interpretations of prohibited conduct by state and federal agencies on issues such as –

- The facts and circumstances under which an AMC is permitted to maintain a list (effectively a “blacklist”) of appraisers who are determined to be ineligible for inclusion on the AMC's fee panel and whether excluded appraisers have any due process rights to determine the reasons for their exclusion and to contest it. We are increasingly alarmed over reports that “excluded appraiser” lists are commonplace;

- The facts and circumstances under which an AMC is permitted to remove an appraiser from its approved panel and whether an appraiser has been granted appropriate due process in connection with such AMC removal decisions;
- Whether it is permissible for an AMC to establish “pay to play” requirements for those who wish to join the AMC’s panel;
- The facts and circumstances under which a delayed payment or a partial payment of the appraiser’s fee is permissible and when it is not;
- Whether the appraisal fee paid by an AMC meets the letter and spirit of the “customary and reasonable fee” requirements; and,
- The extent to which it is permissible for an AMC to require an appraiser to revisit his or her conclusion of value.

The federal Agencies have established guidance and provided illustrative examples of their intended policies in numerous other rulemaking proposals involving appraisal issues, consumer protection and compliance with mortgage lending requirements. They should do so in the AMC rulemaking. Our organizations believe that the adoption of such guidelines and the furnishing of such examples are necessary to create a common understanding of acts and practices to be avoided (or that are permitted). This additional detail will benefit all stakeholders, not only appraisers and consumers, but the AMCs themselves and the users of their services. We recognize that the Agencies have promulgated a separate rule on Appraisal Independence but we do not believe that the contents of that rule are an adequate substitute for providing specific guidance and illustrative examples in the AMC rule.

Although the Joint Proposal makes several passing references to the appraisal independence obligations of AMCs towards their appraiser-panelists, the proposal fails to identify, through examples or guidance, the acts or practices that would or would not constitute violations of those obligations. As a consequence, there is no basis on which state appraiser licensing agencies and the federal Agencies themselves can enforce, in a uniform manner, the appraisal independence obligations of AMCs under Dodd-Frank. We note, in this regard, that the CFPB and the federal banking agencies often provide guidance and examples to illustrate the meaning and intent of their regulations. For example, the Bureau’s commentary in its final rule on “Integrated Mortgage Disclosures under RESPA and TILA” states that based on –

“The benefits cited by commenters from the level of detail in the proposal and requests for additional guidance and clarifications...the Bureau has determined to maintain a similar level of detail in the final rule...and to provide additional guidance and clarifying examples where appropriate. The Bureau believes that the level of detail and guidance in the final rule will facilitate compliance with the disclosure requirements of TILA and RESPA, which is one of the purposes of the integrated disclosures set forth by the Dodd-Frank Act.” (‘Emphasis added)

The Agencies final rule on “Appraisals for Higher-Priced Mortgage Loans” cites, approvingly, the fact that USPAP’s Ethics Rule “includes several examples of prohibited conduct related to the [Ethic’s Rule]” requiring that “appraisers exercise their independent judgment in conducting appraisals.” (Emphasis Added). The Agencies’ commentary on the *Independence of the Appraisal and Evaluation Program* in their “Interagency Appraisal and Evaluation Guidelines”

states that “The Proposal reaffirmed that an institution’s collateral valuation function should be independent of the loan production process...and that an institution should implement procedures to affirm its program’s independence. In response to commenters, the Agencies expanded this section in the Guidelines to further detail their expectations for appropriate communications and information sharing with persons performing collateral valuation assignments. The Guidelines address the types of communications that would not be construed as coercion or undue influence on appraisers and persons performing evaluations, as well as examples of actions that would compromise independence.” (Emphasis added).

Similar commentary and reliance on specific real-world examples to explain regulatory intent can be found in dozens of other rulemakings proposed by the Agencies in recent years.<sup>2</sup> ASA and NAIFA strongly believe that the jointly proposed AMC rule, to be properly understood and uniformly enforced by state and federal agencies, requires additional commentary and the use of illustrative examples of specific AMC acts and practices that do or do not violate their appraisal independence obligations.

**(B) We Disagree With the Agencies’ View that the Proposed AMC Rule Excludes Commercial Real Estate Transactions**

The Agencies’ commentary states that the proposed rule “does not extend to appraisal management services provided in connection with commercial real estate transactions or securitizations involving commercial real estate mortgages.” We disagree. The Agencies cite, as reasons for their conclusion that the AMC rule only applies to residential transactions, that this interpretation is “consistent with the text of section 1124 [of FIRREA] and of other relevant portions of the Dodd-Frank Act taken as a whole. Non-residential or commercial mortgages are not mentioned in any AMC provisions in section 1473 [of Dodd-Frank] (or elsewhere in Title XIV of the Dodd-Frank Act).” The Agencies conclude by stating that “The lack of a reference to commercial mortgage lending in the relevant Dodd-Frank Act provisions suggests that AMCs were not intended to be covered by the AMC minimum requirements when they are providing appraisal management services for underwriters or other principals of commercial mortgage securitizations.”

Our organizations disagree with this rationale. In support of our position that the Dodd-Frank AMC provisions were intended to apply when an AMC is used to order appraisals for commercial real estate transactions, we offer the following:

- First, if Congress intended to exclude non-residential transactions from the AMC requirements, it would have said so clearly in the language of the provision. Although Congress did establish Registration Limitations involving ownership of AMCs, it did not

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<sup>2</sup> See, for example, the Agencies proposed rule involving “Appraisals for Higher-Risk Mortgage Loans”; the CFPB’s final rule on “Disclosure and Delivery Requirements for Copies of Appraisals and Other Written Valuations Under the Equal Credit Opportunity Act (Regulation B)” on the issue of waivers, by mortgage loan applicants, of the timing requirement of their right to receive a copy of an appraisal and the Bureau’s decision to “to provide illustrative examples of situations in which the [prompt delivery] timing requirement would or would not be met”; and, the OCC’s proposed Guidelines Establishing Heightened Risk Governance Standards for Certain Large Financial Institutions, which include numerous specific examples of the OCC’s heightened expectations to enhance its supervision and strengthen the governance and risk management practices of large national banks.

express an intent to exclude AMC-ordered appraisals prepared for commercial transactions;

- Second, we are deeply concerned that the proposed interpretation sends an awkward and unfortunate public policy message to AMCs that they do not have to comply with Dodd-Frank's Title XIV requirements in connection with any of their activities involving the management of appraisals for commercial loans. This could encourage the kinds of deleterious conduct for a substantial book of business by some AMCs that the proposed regulations are designed to prohibit;
- Third, the key operative portion of the Dodd-Frank definition of an Appraisal Management Company speaks of "valuing properties collateralizing mortgage loans or mortgages incorporated into securitizations." It does not refer to valuing residential properties collateralizing mortgage loans or residential mortgages incorporated into securitizations. Further, while the AMC definition references "a consumer credit transaction secured by a consumer's principal dwelling," it also includes a separate reference to "secondary mortgage markets," (not secondary residential mortgage markets);
- Fourth, a final rule by the Agencies which excludes commercial real estate transactions from the AMC requirements would be in direct conflict with – and effectively nullify – the clear language of Dodd-Frank section 1473 which explicitly gives states the authority to establish "requirements in addition to any rules promulgated under subsection (a) [of FIRREA section 1124]." The OCC's proposed Subpart H – Appraisal Management Company Minimum Requirements (section 34.210(d) "*Rule of construction*") states that "Nothing in this subpart should be construed to prevent a state from establishing requirements in addition to those in this subpart;"
- Fifth, the definition proposed by the Agencies would create serious administrative problems for state appraiser licensing agencies which are mandated to receive reports from and oversee the operations and activities of Appraisal Management Companies doing business in their states. If AMC activities involving appraisals for commercial mortgage transactions were excluded from the supervisory jurisdiction of state appraiser licensing agencies, it would greatly complicate and seriously compromise their ability to seamlessly perform their supervisory responsibilities;
- Sixth, the provisions of FIRREA, collectively, govern all real estate related federal transactions requiring an appraisal. They encompass both residential and non-residential transactions. The Dodd-Frank amendments to Title XI of FIRREA, including new section 1124, do not change the fundamental purpose of the Act – which is to foster consumer protection and safety and soundness in all federally-related collateralized lending, not just lending involving residential properties. The Agencies' interpretation of the AMC protections should not deviate from this purpose.

We respectfully urge the Agencies to reconsider and reverse their conclusion that the Dodd-Frank AMC requirements do not apply when AMCs are utilized to order appraisals for commercial real estate transactions. However, in the event the Agencies' decide not to reverse their conclusion on this issue, we strongly urge them to make clear that in accordance with FIRREA's AMC Section 1124 (b) ("Relation To State Law"), States have the authority to enact AMC reporting and regulatory statutes which govern AMC-ordered appraisals performed in connection with commercial real estate transactions.

**(C) The Joint Proposed Rule Fails To Establish or Even Discuss a Process For Complaints By Appraisers Against Federally-Regulated AMCs Alleging Violations of an AMC's Appraisal Independence Responsibilities**

While the proposed rule requires state agencies to have “supervisory systems in place that would allow a state to process complaints against an AMC and conduct investigations in connection with those complaints,” it does not establish or even discuss a similar supervisory system for receiving, investigating and acting on complaints made by appraisers against federally-regulated AMCs. Given the fact that a very large number of appraisals are ordered through AMCs which are affiliates of or are owned by federally regulated financial institutions and, therefore, fall within the supervisory responsibility of the federal Agencies, we believe it is imperative that the final rule establish and describe how such a complaint process will work.

**(D) Our Organizations Strongly Object to the Agencies' Decision Not To Adopt Appraisal Review Standards For AMCs In the Proposed Rule**

We fail to understand the logic of and rationale behind the Agencies' decision to defer action on requiring the use of state certified or state licensed appraisers in connection with AMC appraisal review functions. The Joint Proposal's definition of appraisal management services includes “reviewing and verifying the work of appraisers.” Appraisal reviews – as opposed to backroom administrative or ministerial services – should only be performed by properly qualified and credentialed appraisers. The performance of appraisal reviews by individuals who are not designated as professional appraisers will inevitably undermine the integrity and reliability of appraisals as much as if the original appraisal itself were performed by an unqualified individual. A rulemaking, whose essential purpose is to ensure that the activities of AMCs promote consumer protection and safety and soundness and that they are consistent with the highest standards of appraisal practice relative to real estate-related financial transactions, is the appropriate and logical place for the Agencies to establish these requirements.

Moreover, we are unable to comprehend the basis for the Agencies' statement that “section 1110 of FIRREA, as amended by section 1473 of the Dodd-Frank Act, requires a separate rulemaking to require ‘appropriate’ appraisal review for compliance with USPAP in connection with federally related transactions.” If this were an accurate statement – and we do not believe it is – it would not make sense for the Agencies to request, as they do in question 7, “comment on the proposed approach to the appraisal review issue.” If Dodd-Frank actually “requires” a separate rulemaking, what is the purpose of the Agencies requesting comment on the proposed delay?

Our organizations generally support the Proposal's provisions and commentary regarding the requirement that AMC's utilize the appraisal services of state certified or licensed appraisers. In this regard, the Proposal's “AMC Minimum Requirements” include a mandate that state appraisal agencies require that AMCs “verify that only State-certified or State-licensed appraisers are used for Federally related transactions.” Somewhat similarly, the CFPB's Regulatory Flexibility Act analysis notes that the *Interagency Appraisal and Evaluation*

*Guidelines* “already require Federal financial institutions to select appraisers who are certified or licensed, qualified, in compliance with USPAP, and independent.” We fail to understand why the Proposed Rule, which requires AMC’s to utilize state certified and licensed appraisers in federally-related transactions, does not also establish the same requirement in connection with AMC appraisal reviews.

Accordingly, we strongly urge that the final rule establish a requirement that any appraisal review function performed by an AMC must be performed by individuals who hold appraiser state appraiser licenses.

**(E) The Agencies’ Proposal Would Benefit From A Definition of the Terms “Residential Mortgage Transaction” and “Commercial Real Estate Transaction”**

We recognize that the Joint Proposal includes a definition of the term “Principal Dwelling”; and that the terms “residential mortgage transaction” and “commercial real estate transaction” – or terms similar to those – are defined or discussed in other federal statutes pertaining to appraisals and real estate-related financial transactions. Nevertheless (and whether or not the Agencies reverse their conclusion that Dodd-Frank AMC requirements do not apply in connection with commercial real estate transactions), we believe that the Agencies should define those terms in the AMC rule. Absent such definitions, there is likely to be a certain degree of confusion about which appraisals ordered through an AMC are covered by the rule’s requirements;

**(F) Our Organizations Generally Agree With the Proposed Definition of “AMC”; “Appraisal Management Services”; and “Appraisal Panels/Appraisal Networks”**

Our organizations are in general agreement with the Agencies’ proposed definitions of an Appraisal Management Company and an “appraiser panel or network”. We agree that an essential difference between an AMC and a valuation firm that is local, regional or national is that the former essentially manages appraisal services and generally has an arms-length relationship with the independent fee appraisers they hire to perform appraisals. By contrast, valuation firms are essentially in business to perform appraisals, not manage them; and they generally enjoy an employer/employee relationship with those who perform their appraisals. We do, however, share the Agencies’ concerns over the possible gaming of its proposed AMC definition by those who seek to avoid regulatory scrutiny. In this regard, we support the Agencies’ decision to treat so-called hybrid firms (which operate in a space between an AMC and a valuation firm) as AMCs; and we further support the Agencies’ decision to carefully monitor AMCs to assess “whether they are hiring appraisers as part-time employees to avoid state registration requirements.”

**(G) The Joint Proposal’s Definition of “Secondary Mortgage Market Participant” Should Leave No Doubt That It Includes Fannie Mae, Freddie Mac and Other Government-Related Enterprises (or Successor Entities) That Purchase Residential Mortgages For Their Own Portfolios or for Packaging and Resale to Investors**

Although we find the Proposal’s definition of “Secondary Mortgage Market Participant” to be satisfactory and to accurately reflect the broad coverage Congress intended, the Agencies may



find it desirable, for purposes of stakeholder clarity, to add language specifying that Fannie Mae, Freddie Mac and the Federal Home Loan Banks (or successor entities) are within the definition. The FHFA's Regulatory Flexibility Act analysis specifically references these entities but they are not specifically referenced in the proposed rule itself or in the accompanying Agencies' commentary.

**(H) Clarification of National Credit Union References**

The Joint Proposal's requests comment on "whether references to the NCUA and insured credit unions should be removed from the definition of 'Federally regulated AMC' and other parts of the final regulation to clarify that AMC CUSOs are subject to State registration and supervision." We leave it to the NCUA and the other Agencies to determine how best to provide the clarity necessary for appraisers, state licensing agencies and other stakeholders to fully to understand that AMC credit union service organizations that provide AMC-like services are subject to state registration and supervision.

**(I) Questions Relating to Challenges That State Appraiser Licensing Agencies Might Face In Implementing the Proposed AMC Rule (Joint Proposal Questions 8 – 11:**

Our organizations are deferring to state appraiser licensing agencies in connection with responses to questions 8 – 11.

**(J) The Problem of Nonpayment of Appraiser Fees By AMCs and The Issue of Mortgage Lender Responsibility for Paying Appraisers When the AMCs They Hire are Unable or Unwilling to Do So:**

Our organizations are increasingly concerned over reports we are receiving from our members that the AMCs who hire them will occasionally fail to pay for delivered appraisals, generally because the AMC has filed for bankruptcy or is otherwise experiencing financial difficulties. Residential fee appraisers hired by AMCs typically are not paid until their appraisal reports are delivered to the AMC; and, payments are generally made within 45 to 60 days after delivery. On occasion, an AMC will find itself in financial difficulty during the lag time between when it orders or receives delivery of an appraisal report and when payment is due, the end result of which is that the appraiser does not receive payment. An informal survey of our members who are on AMC fee panels or are very familiar with how they operate indicates that nonpayment of the appraiser's fee by financially troubled AMCs has become a serious problem; and that nonpayment by AMCs for delivered appraisal reports has already resulted in the loss to appraisers of thousands of dollars in fees.

ASA and NAIFA believe that the nonpayment issue should be examined by the Agencies and addressed in the Joint Proposal, including the issue of the legal and public policy responsibility of mortgage lenders who order appraisals through AMCs as a key component of their loan underwriting process, to pay for appraisals they have received when the AMC is unable to do so. The Agencies are on record that mortgage lenders, who order appraisals through AMCs, are jointly responsible for ensuring AMC compliance with appraisal requirements in federally-

related transactions. Indeed, the Agencies' commentary in the proposed rule states the following:

“The purpose and scope section of the proposed rule notes that the AMC minimum standards do not affect the responsibility of banks, Federal savings associations, state savings associations, bank holding companies, and credit unions for compliance with applicable regulations and guidance concerning appraisals. Under the interagency appraisal standards, for example, if an appraisal is prepared by a fee appraiser (as opposed to in-house, by the institution), the appraiser must be engaged directly by the regulated institution or its agent, and have no direct or indirect interest, financial or otherwise, in the property or the transaction. As such, as stated in the Interagency Appraisal and Evaluation Guidelines, **an institution that engages a third party such as an AMC to act as its agent in administering any part of the institution’s appraisal program remains responsible for compliance with applicable laws concerning appraisers and appraisals.**” (Emphasis added)

Equally important, the Joint Proposal also states that the “proposed rule also requires that an AMC establish and comply with processes and controls reasonably designed to ensure that the AMC conducts its appraisal management services in accordance with... (2) the AMC’s obligations as a creditor’s agent with respect to appraiser compensation...” The public policy logic of this and related commentary – that the AMCs are agents of the mortgage lender who hires them to fulfil their regulatory responsibilities – should also extend to AMC nonpayment of delivered appraisal reports.

Accordingly, we urge the Agencies to address the issue of AMC nonpayment of appraisal fees (and other AMC payment issues, including the failure to pay customary and reasonable fees, as well as the problem of late payments) in the final rule.

We hope the agencies find our comments useful and our recommendations for changes to the proposed Joint Rule, persuasive. If you have any questions or require additional information please contact Peter Barash, Government Relations Consultant for ASA and NAIFA, at 202-466-2221 or [peter@barashassociates.com](mailto:peter@barashassociates.com), or John D. Russell, JD, Director of Government Relations for ASA, at 703-733-2103 or [jrussell@appraisers.org](mailto:jrussell@appraisers.org).

Sincerely,

ASA and NAIFA