

South Dakota Real Estate

Commission

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Winter 2017 Edition

From The Director

The end of another year is nearing which means time is closing in on those who have not met their renewal, continuing education and/or E&O requirements. Remember, if on January 1st, you look at your license and it shows an expiration date of December 31, 2017, you cannot engage in the practice of real estate. If you are a responsible broker, your associates cannot practice either. To those of you who met all your requirements by November 30th, thank you! If a licensee continues to practice real estate in those instances, they will be sent a complaint/consent agreement and a \$100 penalty. The penalty can also be assessed against a responsible broker who continues to be associated with a licensee who does not hold an active license. Responsible brokers — please check the licenses of your associates to make sure they are licensed to do business in 2018.

I wish you all a happy holiday season and prosperous new year!

Real Estate Commission Calendar

Sunday, December 31st– 2017 renewal ends

Monday, January 1st 2018- Real Estate Commission office closed in observance of New Year's Day

Monday and Tuesday January 8th – Real Estate Commission meeting in Pierre

Monday, January 15th– Real Estate Commission office closed in observance of Martin Luther King Jr. Day

Monday, February 19th– Real Estate Commission office closed in observance of President's Day

Renewal Reminders!

- ◆ All licensees, active or inactive, who renew this year should have completed their renewal application on our website. If you have not you will need to have that into our office by or before December 31st in order to avoid having your license placed on a non-renewal status.
- ◆ All licensees who wish to renew on an active status must have their errors and omissions insurance as well as their continuing education completed by or before December 31st to avoid having their license placed on an inactive status.
- ◆ Licensees who wish to purchase the group policy errors and omissions insurance will need to work with RISC directly. Please visit their website at <http://www.risceo.com/> for more details.

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Industry Backs Long-Term Flood Insurance Reforms (Used with permission from ARELLO)

The National Flood Insurance Program (NFIP) is once again nearing its statutory expiration date, thus triggering another round of debates in the U.S. Congress and among real estate industry stakeholders about the proper path to reforming the much-beleaguered program; which the National Association of Realtors® (NAR) says would be accomplished by the enactment of H.R. 2874, “The 21st Century Flood Reform Act.”

Standard homeowner and business insurance doesn’t usually cover flooding. So, in 1968 Congress created the NFIP, which is administered by the Federal Emergency Management Agency (FEMA) and offers federally-backed flood insurance for properties with significant flood risk in communities that adopt floodplain management standards set through the program. According to NAR, the NFIP is the only source of flood damage protection in 22,000 communities where flood insurance is required for a mortgage.

From 1986 to 2005, the NFIP was self-funded. Since then, however, claims arising from successive storms have left the NFIP with a massive funding shortfall that threatened to exceed the program’s \$30 billion limit on borrowing from the U.S. Treasury. A recent write-off of a portion of that debt by Congress temporarily alleviated, but does not resolve, the deficit.

Between 2008 and 2012, the NFIP was extended 17 times, lapsed four times and was shut down for a two month period while Congress debated how to address the growing funding deficit, premiums and subsidy rates, coverage terms, and policy servicing issues. According to NAR, each such event can delay or even cancel thousands of real estate transactions and threaten the marketability of countless properties. In 2012, Congress enacted the

“Biggert-Waters Flood Insurance Reform Act” which among other things reauthorized the NFIP for 5 years and adopted numerous reforms involving premiums and subsidies, flood mapping issues and improper “force placed” insurance policies. Subsequent legislation passed in 2014 provided relief from premium “rate shock” and unintended real estate market impacts that resulted from the 2012 bill.

This time around, the program was scheduled to expire again in September 2017, which Congress has extended to December 8th. Stakeholders say that long-term reenactment of the NFIP is critical to property owners and the real estate industry, and that a broader set of reforms are needed to stabilize the program. NAR says that the needed improvements would be accomplished by H.R. 2874, “The 21st Century Flood Reform Act”, which was recently passed by the U.S. House of Representatives and is pending in the Senate. According to a letter sent by NAR to members of Congress, the legislation would:

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Flood Insurance Reforms (Cont.)

- Reauthorize the NFIP for 5 years;
- Authorize \$1 billion to elevate, buyout or mitigate high risk properties;
- Cap flood insurance premiums at \$10,000 per year;
- Double increased cost of compliance [ICC] coverage and allow access [to mitigation funds] prior to floods;
- Remove hurdles to the private flood insurance market which often offers better coverage at lower cost than the NFIP;
- Provide for better community flood maps and streamline the [map] appeal process;
- Better align NFIP rates to risk, particularly for inland and lower value properties;
- Improve the claims process in light of Superstorm Sandy;
- Address the repeatedly flooding properties that account for two percent of NFIP policies but 25 percent of the claim payments; and
- Strengthen the overall solvency of the program in the future.

Overall there appears to be substantial real estate and insurance industry support for many features of the legislation, but continued debate in the U.S. Senate is expected regarding matters such the potential impact of premium changes on lower income households and the private insurance provisions. If the Senate and House cannot agree on the legislation, another short term extension of the NFIP seems likely.

Disciplinary Action

The following actions by the Commission have become effective since the last report in the newsletter. A **Consent Agreement** is an admission of violation and voluntary acceptance of the terms determined by the Commission in lieu of a formal hearing.

Roger Chase, Broker, Huron. Consent Agreement. Violation of SDCL 36-21A-71(1), SDCL 36-21A-80, SDCL 36-21A-82. Administrative fine of \$100. Provide the commission of the monthly reconciliation as required by SDCL 36-21A-80, to include a copy of the ledger, check register, and bank statement, for bank statements received in May, June, and July 2017.

Thomas Souvignier, Broker Associate, Canton. Consent Agreement. Violation of SDCL 36-21A-71, SDCL 36-21A-6 (8), SDAR 20:36:16:03, and SDAR 20:14:06:01. Administrative fine of \$500. Suspension of license for twelve month period held in abeyance condition on the payment of the fine and no other violations of SDCL chapter 36-21A or SDAR 20:69 during twelve month period.

Melissa O'Farrell, Broker Associate, Watertown. Consent Agreement. Violation of SDCL 36-21A-71 (15) and SDCL 36-21A-71 (32). Administrative fine of \$500. Attend and successfully complete six hour South Dakota license law course. Failure to comply or committing a violation under SDCL 36-21A or SDAR 20:69 within one year of the agreement being signed by the commission shall result in the suspension of license for up to six months.

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Broker

Close, Christopher C
Haugen, Brian
Morrison, Mitchell
Pace, Bradley P

Baxter
Pine Island
Sioux Falls
McKinney

Read, Courtney M
Sibiga, Stephen P
White, Bradford P

Memphis
Winter Garden
Tulsa

Broker Associate

Blain, Thomas G
Bohner, Blake
Bryan, Trevor R
Bunger, Austin K
Burggraaf, Tarah M
Charo, Omar
Collins, Gary G
Conkling, Jared L
Eddy, Andrea S
Ekle, Donna
Englund, Haley L
Gallagher, Virginia L
Hansen, Michelle L
Hirt, Gary S
Johnson, Nancee J
Kelly, Michael P
Kolb, Michelle L

Hermosa
Sioux Falls
Hermosa
Spencer
Dell Rapids
Sioux Falls
Spearfish
Sioux Falls
Box Elder
Canton
Volga
Spearfish
Rapid City
Custer
Fort Pierre
Sioux Falls
Sioux Falls

McGinnis, Ty
Muller, Stephen T
Napton, Joni
Nelson, Todd M
Nielsen-Doop, Amanda M
Niemann, Kyle
Norton, Christina L
Pankratz, Nicole
Peterka, Sarah
Radke, Tyler
Richter, Maggie J
Simunek, Andrea J
Waldner, Caleb
Walter, Jessica L
Warwick, Michael S
Wermager, Sheryl J
Whitman, Lori

Spearfish
Sundance
Frederick
Wentworth
Sioux Falls
Sioux Falls
Spearfish
Pierre
Sturgis
Mitchell
Sioux Falls
Sioux Falls
Tea
Garretson
Spearfish
Rapid City
Vermillion

Lic. Home Inspector

Shabino, Brian C

Sioux Falls

White, Brady E

Sioux Falls

Reg. Home Inspector

Benedict, Thomas J

Brookings

Krogman, Matt

Winner

Res. Rental Agent

Bott, Abby L
Ellis, Sha'ree L
Hakala, Bruce
Hanson, Susan
Lindstrom, Patricia
McLaughlin, Brianna
Myers, Thomas J
Olson, Wendy L Brandon

Worthing
Dell Rapids
Rapid City
Mitchell
Brandon
Sioux Falls
Hartford

Peterson, Kristy
Pritchett, Jessica
Randby, Melissa
Shearer, Mariah A
Tracy, Duff
Westhoff, Julie
Wipf, Brittany J

Volga
Sioux Falls
Sioux Falls
Sioux Falls
Sioux Falls
Tea
Tea

Salesperson

Hoffert, Mallori J

South Sioux City

Muirhead, Daniel N

Overton

Appraiser Update

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New Licensees – August 2017 through November 2017

Joshua A. Kiesow, State-Registered – Aberdeen, SD
Jason T. Roos, State-Certified General – Overland Park, KS
Rachel L. Daberkow, State-Certified General – Worthington, MN
Timothy L. Kreft, State-Certified General – Fargo, ND
Scott L. Mausbach, State-Certified General – Omaha, NE
Samuel J. Farraro, State-Certified Residential – Sioux City, IA
Audrey Brown, State-Registered – Rapid City, SD
Erik Coglianese, State-Certified General – Minneapolis, MN
Kurt Kielisch, State-Certified General – Neenah, WI
Kyle Bryant, State-Certified General – Chicago, IL
Jared Miller, State-Certified General – Breckenridge, MN
Sheila Ressler, State-Certified General – Mandan, ND

Upgrades – June 2017 through November 2017

Melissa Roe, State-Licensed – Watertown, SD
Curtis Brooks, State-Certified General – Yankton, SD
Kevin Kennedy, State-Licensed – Sioux Falls, SD
Brandon Stelling, State-Certified Residential – Vermillion, SD

Review of Cases January 1 2017 through November 2017

For the period January 1, 2107 through November, 2017, the Department opened four investigation cases and one upgrade case.

Investigations – Six closed and one pending.

Upgrades – Three issued and one agreed disposition.

Information Regarding Disciplinary Actions

Public information regarding disciplinary action taken against an appraiser is available upon written request to the Department of Labor and Regulation, Appraiser Certification Program, 308 South Pierre Street, Pierre, South Dakota 57501 or e-mail: Sherry.Bren@state.sd.us. Include in the request for information the name of the appraiser and the appraiser's city and state of residence. (Disciplinary action includes but may not be limited to denial, suspension, censure, reprimand, or revocation of a certification by the department. (ARSD 20:14:11:03)

New AMC Registrations Issued– May 2017 through November 2017

Service 1st Valuation – Pittsburg, Pennsylvania
Appraisal Management Specialists, LLC – Eagle, Wisconsin
RRR Appraisal Services, Inc. – Salt Lake City, Colorado

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Attention! Certified Appraisers Eligible to be Endorsed Supervisory Appraisers

Information for the next offering of the Training Course for Supervisory Appraisers and State-Registered Appraisers is as follows:

Date: February 6, 2018
Time: 8:30 a.m. – 1:00 p.m.
Location: 2415 West 57th Street
Sioux Falls, South Dakota
Register: Professional Appraisers Association of South Dakota (PAASD)

Website: <http://www.paasd.com>

Or Call Bev Luke at 605.716.9011

In order to attend the Course, you must register with PAASD!

Questions: Sherry Bren, Executive Director
Appraiser Certification Program
605.773.4608
Sherry.Bren@state.sd.us

2018-2019 Uniform Standards of Professional Appraisal Practice Effective in South Dakota December 10, 2017

The 2018-2019 revisions to USPAP and USPAP Advisory Opinions include:

1. Revising the definition of Report and edits to the ETHICS RULE and the RECORD KEEPING RULE.
2. Creating a definition of Assignment Conditions, revising the definitions of the Assignment, Intended Use and Intended User, and related edits to the COMPETENCY RULE.
3. Removing the definition of Assumption and revising the definition of Extraordinary Assumption.
4. Revising the definition of Appraisal Review, and dividing STANDARD 3, *Appraisal Review*, into STANDARD 3, *Appraisal Review, Development* and STANDARD 4, *Appraisal Review, Reporting*.
5. Dividing STANDARD 6, *Mass Appraisal*, into STANDARD 5, *Mass Appraisal, Development* and STANDARD 6, *Mass Appraisal, Reporting*.
6. Removing the term Market Value from STANDARDS 7 and 8.
7. Revision to the personal property certification requirements in Standards Rule 8-3.
8. Revision to illustration in Advisory Opinion 21, *USPAP Compliance*.
9. Creation of Advisory Opinion 37, *Computer Assisted Valuation Tools*.
10. Revisions to Advisory Opinion 31, *Assignments Involving More than One Appraiser*.
11. Revisions to Advisory Opinion 1, *Sales History*.
12. Revisions to Advisory Opinion 32, *Ad Valorem Property Tax Appraisal and Mass Appraisal Assignments*.

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USPAP Continuing Education Requirements

Pursuant to ARSD 20:14:13:01 credentialed appraisers in South Dakota must complete the 2018-2019 7-Hour National Uniform Standards of Professional Appraisal Practice Update course no later than June 30, 2018.

Engagement Agreements Revisited [by Peter T. Christensen, LIA Administrators and Insurance Services' general counsel. Article from Valuation Q2 2017 – re-printed with permission from the Appraisal Institute]

Three provisions that probably aren't in your engagement agreements – but perhaps should be

"Get it signed and keep a signed copy in the work file," advised attorney and former appraiser Lindsay McMenemy about engagement agreements when I talked to her in 2013 in preparation for my first article on the topic for *Valuation* magazine (see "Rules of Engagement": <http://bit.ly/2oxhF7q>).

Four years later, it's worth revisiting the topic. The valuation profession has encountered new challenges and different legal tactics. Accordingly, the language used in engagement agreements needs to evolve. Here, I'll discuss three new provisions that appraiser should consider. But first, a review of engagement agreement basics.

The basics

Appraisers aren't required to use engagement agreements by federal or state law, nor by the Uniform Standards of Professional Appraisal Practice or the Appraisal Institute's Standards of Valuation Practice and Code of Professional Ethics. However, experienced practitioners and legal counsel agree that

well-crafted engagement agreements can assist appraisers by identifying the basic items needed in appraisals to satisfy professional standards, clarifying for client and appraiser the work that will be done, enabling smoother collection of fees, and helping appraisers successfully defend against lawsuits.

Good engagement agreements present a strong professional image, and at a minimum they should clearly state:

- Client name.
- Property identification and property type.
- Interest to be valued.
- Intended use and users.
- Type and date of value.
- Assignment-specific requirements, including those mandated by USPAP or other applicable standards.
- Anticipated scope of work.
- Date of deliver.
- Appraisal fee and payment terms.
- Any prior service regarding the subject property if the assignment is performed under USPAP.

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Engagement Agreements

Engagement Agreements Revisited (Cont.)

I recommend appraisers spend time fleshing out the explanation for scope of work. In many of the claims we receive, I see very generic descriptions of the appraiser's scope of work in engagement agreements and in completed reports for even the most complex assignments. Often, the description is just the generic scope of work statement copied and pasted from the standard Fannie Mae Form 1004.

A good scope of work description provides details about the work the appraiser will perform for a specific assignment. For example, in an engagement agreement for an appraisal review, it would be prudent for an appraiser to clearly state whether the scope of work will include an independent search for and analysis of market data, or whether the work will be limited to the information presented within the appraisal under review. When a reviewer fails to provide that specificity and a claim occurs asserting the reviewer failed to identify a deficient appraisal because more appropriate sales comparables existed, the plaintiff and their experts almost certainly will argue that the reviewer should have conducted independent research. A good scope of work description informs the client in plain English what you propose to do, the degree of your inspection of the property (if any), your anticipated research and the level of detail in which the results will be reported. (For more information, see *Scope of Work*, Second Edition, Appraisal Institute, 2016; <http://bit.ly/2pr1APQ>.)

McMenamin's advice about making sure clients sign engagement agreements and appraisers keep a copy bears repeating. There have been many situations where appraisers or valuation firms had excellent engagement agreements that should have helped defend against legal claims but ended up useless because they weren't signed. I see this story played over and over again, even with large and sophisticated firms.

Beyond the basics

Recent liability claims have exposed new areas that many appraisers can better address in their current engagement agreements. Here are three provisions appraisers should consider including.

1 A provision that connects your engagement agreement with the appraisal report and makes your limiting conditions more effective.

If you'd like your limiting conditions and other reporting to have maximum legal value, your client should acknowledge in the engagement agreement that the appraisal or appraisals you perform will be subject to the statements and limiting conditions. For example, if appraisers are accused of failing to identify a title problem, they typically will defend themselves by pointing to the limiting condition in the report stating that they have no responsibility for determining matters concerning title.

However, unless the statement and conditions are incorporated into the engagement agreement, a plaintiff client could argue that the limiting condition was not part of the contract, which would make it more difficult for the appraiser to prevail at an early stage of the case – if at all.

The following provision is a good way to connect your engagement agreement with your report:

Appraisal Statements and Condition. The appraisal performed under this Agreement will be subject to all statements, assumptions, limiting conditions and other conditions (collectively, "Appraisal Conditions") set forth in the appraisal report. Client agrees that Client will review the Appraisal Conditions upon receipt of the report and that Client's use of the appraisal will constitute acceptance of the Appraisal Conditions. The Appraisal Conditions shall be considered as being incorporated into and forming part of this Agreement with respect to the appraisal in which they are contained and to the services relating to that appraisal. [Consider adding: "Appraiser's anticipated Appraisal Conditions at this time are attached and incorporated into and form part of this Agreement. Additional Appraisal Conditions may be developed during performance of the appraisal and set forth in the report."]

Part of making appraisal statements and conditions more effective is making them easier to enforce in disputes involving third parties that may have received a copy of your report and then claimed they relied on it for one purpose or another (whether an "intended use" or not). Include a provision in the report itself stating that any party that receives the report and uses or relies on it acknowledges that such use or reliance is subject to all of the statements and conditions stated in the report.

A straightforward provision to accomplish that purpose could read:

Acceptance of Appraisal Statements, Conditions and Assumptions. Any use of or reliance on the appraisal by any party, regardless of whether the use or reliance is authorized or known by Appraiser, constitutes acceptance of, and is subject to, all appraisal statements, limiting conditions and assumptions stated in the appraisal report.

Engagement Agreements Revisited (Cont.)

2 A provision that creates a maximum time frame for pursuit of legal claims.

Many professional liability lawsuits are filed against appraisers more than five years – sometimes even 10 – after the appraiser delivered the report. Appraisers are often disturbed to learn that the statutes of limitations that apply to professional liability lawsuits offer little help. The reason: Whatever the statute of limitations may be (usually two to four years), in most states that period commences under a “discovery rule,” meaning that the period starts when the plaintiff discovered or should have discovered the alleged errors or damages. However, appraisers have the ability in most states to contractually change the applicable statute of limitations with their engagement agreements. Even when such a time limitation may not be completely enforceable under a given state’s law, the presence of the limitation can still work to the appraiser’s benefit by dissuading parties with frivolous claims from filing a legal action.

The following provision seeks to create a two-year period in which lawsuits may be pursued following delivery of the appraisal. It’s advisable to include such a provision in both the engagement agreement and the report itself to address third-party claims:

Maximum Time Frame for Legal Actions. Unless the time frame is shorter under applicable law, any legal action or claim relating to the appraisal or Appraiser’s services shall be filed in court (or in the applicable arbitration tribunal, if the parties to the dispute have executed an arbitration agreement) within two (2) years from the date of delivery to Client of the appraisal report to which the claims or causes of action relate or, in the case of acts or conduct after delivery of the report, two (2) years from the date of the alleged acts or conduct. The time frame stated in this section shall not be extended by any delay in the discovery or accrual of the underlying claims, causes of action or damages. The time frame stated in this section shall apply to all non-criminal claims or causes of action of any type.

3 A provision that addresses the specter of litigation from investors suing appraisers for profit.

The phenomenon of mass litigation against appraisers began in 2014 when several investment entities calling themselves “claim servicers” filed more than 450 professional liability cases against residential appraisers. Often operating under interrelated management, these entities have names like “First Mutual Group” and “Llano Financing Group,” and their business plan involved getting lenders to assign them the right to sue appraisers over defaulted loans. These entities aren’t the first to sue appraisers for profit, but they have been the most aggressive and prolific. They currently are failing in the venture, thankfully, but they seem to be in a continuous state of reinvention, so there may be similar approaches in the future or attacks outside the residential loan arena.

One way to protect against such litigation is to prevent lender-clients from assignment lawsuit claims to investors. The following provision should be included in the report to be effective with parties other than your client:

No Assignment of Claims. Legal claims or causes of action relating to the appraisal are not transferable or assignable to a third party, except: (i) as the result of a merger, consolidation, sale or purchase of a legal entity, (ii) with regard to the collection of a bona fide existing debt for services but then only to the extent of the total compensation for the appraisal plus reasonable interest, or (iii) in the case of an appraisal performed in connection with the origination of a mortgage loan, as part of the transfer or sale of the mortgage before an event of default on the mortgage or note or its legal equivalent.

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