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STATE OF THE INDUSTRY

special report

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EDITOR'S NOTE

What will rebalancing the market mean for industry?

Dear Readers,

Title agents, underwriters, lenders, Realtors, appraisers and the rest of the partners in the real estate transaction are coming off the strongest couple of years many of them have ever had, thanks to low interest rates and record high home prices fueled by housing supply shortages. A downturn toward more “normal” conditions was inevitable, as the boom market was unsustainable.

What will rising interest rates and shifting market conditions mean for the industry? We talked to key industry players for our annual *State of the Industry* special report to find out. In our report, real estate experts share their forecast for the market in 2023, both about what it is expected to look like and, perhaps more importantly, what it’s not expected to look like, namely the housing crash of 2008.

History does tell us a down cycle like the one we are in will inevitably attract more scrutiny by regulators. In our report, experts share what areas in particular should get more regulatory review and what enforcement issues should be top of mind.

Plenty of new rules, regulations and legislation are on deck for 2023. Industry leaders break down what they mean and how they could affect lenders and settlement service providers. They also discuss how new technology and other products, including attorney opinion letters, could present opportunities as well as challenges.

Whatever 2023 brings, we will continue to bring you everything you need to know about it in our publications *The Title Report, The Legal Description, Dodd Frank Update, RESPA News* and *Valuation Review*.

And thank you to our sponsors Qualia and TrustLink for helping us bring you the 2023 *State of the Industry* special report.

Erica Peterson
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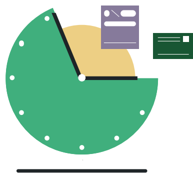

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Title industry, housing market 'inching back to normal'

By Jonathan Delozier — Editor, *The Title Report*

While the inevitable departure from pandemic-related boom periods has challenged the title insurance industry, numerous market declines recorded in late-2022 still represent increases from recent years.

Title insurance industry and real estate professionals sharing outlooks for 2023 seem to anticipate a continued market downturn, at least in the short term. They point to factors like high interest rates, inflation, lack of housing supply and wages for potential homebuyers that aren't keeping up with cost-of-living increases.

While speaking to peers during the National Association of Realtors (NAR) 2023 Real Estate Forecast Summit, NAR Chief Economist **Lawrence Yun** said the recent housing market downturn is unlike what was experienced in the aftermath of 2008's housing crash, despite some similarities on paper.

Yun's report showed annual existing home sales hovering around 5 million in 2022, down 16 percent from 2021 to the lowest levels seen since years ranging between 2007 and 2014.

"The monthly data [for 2022], January was decent, it was looking good, and then decline, decline and decline," he said. "I would not be surprised to see a couple more months of decline before setting the conditions for improvement [in 2023]."

Annual sales of new homes of just over 600,000 in 2022 were down 17 percent year-over-year. However, this drop brought totals in line with pre-COVID levels, as opposed to hovering around 800,000 in 2020 and 2021. Those were the highest figures recorded since 2007.

"Will home prices potentially crash, given the strong run-up on prices over the last couple of years?" Yun asked.

"Back in the 2008 period, there were 8 million job losses in a single year, with that foreclosure crisis. Today, there are some layoffs in the mortgage industry, but if you look at the net, there are still job-creating conditions.

"There are more than 20 million more people working today [than in 2008] whether you're looking at payroll jobs or a household survey. Subprime mortgages, those shady, risky ones with no income documentation? This time around, people have to meet those requirements, the ability to repay."

Title industry down (but still up)

Roughly $5.4 billion in premiums was generated by the title insurance industry in the third quarter of 2022, according to the American Land Title Association (ALTA).

This is down 20.6 percent year-over-year from third quarter 2021. Even with the recent declines, a third-quarter industry net income of $342.9 million was still the fourth highest recorded for that period over the past 13 years.

During the third quarter of 2022, data shows total operating income for the industry as down 19.6 percent and operating expenses down 18.8 percent, while loss and loss adjustment expenses were up 30 percent.

"We expect housing to continue to slow, even though mortgage rates have come down recently," said **Doug Duncan**, Fannie Mae senior vice president and chief economist, in a release. "Home purchases remain unaffordable for many due to the rapid rise in rates over the last year and the fact that house prices, though certainly slowing and in some places declining, remain elevated compared to pre-pandemic levels. Of course, refinancing is still not practical for the vast majority of current mortgage holders, which we expect will also continue to constrain mortgage origination activity."

Scott Agnew, CEO and operating partner at Keller Williams Realty East Valley in Tempe, Ariz., is confident he and industry colleagues can navigate any further troubled waters.

"What we're all experiencing, to be honest, is just the shift," he told *The Title Report*. "It's just the shift from these interest rate changes. We were seeing 3 percent, 3.5 percent, 4 percent. Then it skyrocketed to 7 percent and came back down, but just a little bit. Buyer and seller expectations are starting to come together again. Based on that, in a general sense, sellers have to accept appraisals. They have to stage their home and have an expectation it could be 30 to 60 days before they get an offer. We're putting deals together and selling houses, inching back to normalcy."

Agnew, whose book "Long-term Leader" was released last year, said title industry professionals are working to adjust to changing industry norms, some brought on by natural market shifts and others by shifting regulation.

"Raising interest rates is typically the [Federal Reserve's] response to inflation," he said.

"Of course, it affects the housing market and that has a trickle effect when the housing slows down. Then that begins to affect the homebuilders, who I believe are going to slow down. Then it carries out to other industries: wood, wire, labor, landscaping, air conditioning, roofing … just go right down the pipe. It's not just housing and real estate.

> "We all look forward and anticipate the shifting market. What happened two years ago was just a complete fluke. There's no way you can sustain anything like that."
>
> — Terrie Lund,
> Owner, Ohana Title Insurance Agency

"I do think wages have gotten a bit behind too because of all this inflation. It's causing businesses to pass on to the consumer when their expenses go up. Everything affects everything. Raising interest rates is kind of a one-dimensional response to all of this, and it needs to be multi-dimensional."

Hot takes for 2023

Opinions shared through the NAR Real Estate Forecast Summit, data-gathering organizations and personal experiences from local title offices point to market prosperity in the Midwest and select regions including Utah.

Recent data from Zillow shows prices in most Midwest metro areas not rising to levels seen elsewhere. Mortgage costs still reportedly line up with potential homeowners' wages across Missouri, Kansas, Iowa, Ohio and smaller metros in Illinois, which will allow first-time buyers to enter the market.

Lower rents and home prices in these areas, as well as Pennsylvania, New York and other Northeastern metros, are helping residents save for down payments. A typical mortgage payment in Topeka, Kan., is $1,269, compared with $4,129 in Sacramento, according to Zillow.

"Americans finding ways to make payments on a roof over their heads is going to drive the market next year," said Zillow Chief Economist **Skylar Olsen**.

"Where costs are lower, we'll see healthier sales and inventory levels. If rent is less expensive than a new mortgage, we'll see increased demand for rentals — something builders and landlords understand. Affordability is going to be the biggest factor in housing for 2023, but there's room for optimism on that front if mortgage rates recede."

While speaking at the NAR summit, Yun and his peers considered what will become the next Austin, Texas, or metro that will experience the next large-scale housing boom.

He showed data indicating that area could be Salt Lake City and many of its surrounding communities.

"While we're saying, 'Let's find the next Austin,' it's gotten to the point where you could say, 'Let's find the next Salt Lake City,'" Yun said. "That's in terms of economic performance along with home price performance. Things are moving very quickly there just like they were in Austin."

Terrie Lund, a long-time Utah escrow officer, just established Ohana Title Insurance Agency in Sandy, located roughly 20 miles south of Salt Lake City.

She said her experience in that market as well as current micro and macroeconomic trends should spell more regional prosperity.

"We all look forward and anticipate the shifting market," Lund told *The Title Report*. "What happened two years ago was just a complete fluke. There's no way you can sustain anything like that. There's still so much going on in Salt Lake City, in Utah, all around here. Honestly, we kind of needed a bit of a price correction because our wages in Utah aren't as high as in other places.

"We have one of the strongest job markets there is, and Utah is a family state. They live that family value and they want a home. There's going to be plenty of business to go around."

Industry experts anticipate less legislation, more regulation for 2023

Dodd Frank UPDATE

By Logan Barno, Esq. — Editor, *Dodd Frank Update*

With 2023 underway, the 118th Congress has been gaveled into session and both chambers and their many committees are working to introduce an array of legislation. With Democrats maintaining control of the Senate, and Republicans gaining a narrow majority in the House of Representatives, it is unlikely that much of the legislation being worked up by one chamber will be welcomed in the other.

In the House, Rep. **Patrick McHenry** (R-N.C.) is set to take the gavel from **Rep. Maxine Waters** (D-Calif.) as the new chair of the House Financial Services Committee. In the Senate, Sen. **Sherrod Brown** (D-Ohio) will remain chair of the Senate Banking, Housing, and Urban Affairs Committee. McHenry and Brown have often expressed opposing views on how to approach legislation and regulation regarding the consumer financial services industries.

"Legislatively, I don't think we're going to see very much," Wolters Kluwer Senior Advisor, Regulatory Strategy **Tim Burniston** said. "Some of it may depend on what Rep. McHenry does. But anything the House does is going to be hard to get through [the Democrat-controlled Senate]."

With the two chambers and two committees expected to disagree on the majority of legislation proposed, federal regulators are likely to pick up the slack through additional rulemaking and enforcement actions.

The Republican-controlled House has already made it clear that it intends to engage in extensive oversight of federal executive branch activities, including those actions of the Consumer Financial Protection Bureau (CFPB). This promise of oversight may lead to a self-imposed tempering of agency activity.

"Congressional oversight, if disciplined and informed by a knowledge of agency practices, can absolutely change agency behavior," said **Brian Johnson**, managing partner at Patomak Global Partners and former deputy director of the CFPB.

"I think we're going to continue to see the reinvigoration of the CFPB," Burniston said. "There will definitely be some pressure from Congress. Whether the bureau will tamp anything down or reduce or change what they've been doing? I don't know, but I don't think so. We'll see that the bureau will drive a lot of regulatory change, and when the CFPB does something, we'll have to see whether the prudential regulators will similarly respond."

One issue which looms heavy over both Congress and the CFPB is the likely hearing of the appeal from the CFPB in *Consumer Financial Services Association of America v. CFPB*, the Fifth Circuit case that found the funding structure of the CFPB to be unconstitutional.

"All eyes will be on CFPB structural reform legislation – possibly necessitated by a Supreme Court decision regarding the agency's funding mechanism," said Johnson. "Given the important separation of powers principles involved, I would be surprised if the Supreme Court declined to hear the case."

There are already some major regulatory actions that industry experts are anticipating this year from the CFPB.

Section 1071 – small business loan data collection rule

A rule implementing the small-business loan data collection provision of Dodd Frank Act section 1071 has been anticipated for some time now. The CFPB agreed to a March 31 deadline in a July 2022 court order from a legal action brought by consumer advocacy groups.

The final rule will create an "HMDA-like database

for small-business lending, that includes the race, ethnicity, and gender information for principals of the businesses," said **Rich Horn**, partner at Garris Horn and former senior counsel & special advisor in the CFPB's Office of Regulations.

"Once it's effective, depending on the implementation period, the regulatory agencies could use this data to support discrimination claims, such as redlining, against small business lenders. This means small-business lenders should be starting to think now about how they're marketing to minority demographics," Horn added.

"The CFPB has committed to a final rule by March 31," **Kris Kully**, partner at Mayer Brown, said. "Lenders may have some time to prepare to collect and report data on lending to small, women-owned, and minority-owned businesses. However, they should kick their prep into high gear quickly, as the CFPB is unlikely to be receptive to excuses."

Community Reinvestment Act modernization

Along with the small-business lending data collection rule, proposed modernizations to the Community Reinvestment Act (CRA) regulations are expected in 2023.

There has been some concern that the new data reporting requirements and new CRA rules might be issued by federal regulators in rapid succession, creating a sudden flood of new regulatory requirements for lenders that may cause undue burden to smaller lenders.

"I think we'll also see CRA regulatory modernization start to come out at in close proximity [as the Section 1071 rule]," said Burniston. "That would present a difficult challenge for the industry to manage the implementation of both those which are synced together. To some extent regulators will be using some of the [Section 1071] small-business lending data for CRA purposes as well."

In a hearing before the House Financial Services Committee in December 2022, CFPB Director **Rohit Chopra** assured the legislators that this kind of overlap was being taken into consideration.

"We want to make sure we have an implementation period that gives the smaller firms more time, and the ability to make sure it's not duplicative with existing requirements under the Community Reinvestment Act," Chopra said.

Federal regulators are not the only ones looking to update CRA-based rules and practices. A number of states also are looking to modernize their financial services legislation and regulations.

"While federal CRA modernization is seemingly always on the agenda, states are also in CRA mode, seeking to impose affirmative lending obligations on non-depository lenders," Kully said. "Legislation could surface this year in some of the nation's largest markets, like California, so the industry should be on the lookout for opportunities to provide input to legislators and regulators."

Section 1033 – financial data access rule

In a speech at Money 20/20 in October 2022, Chopra indicated that the CFPB was beginning the process of rulemaking based on section 1033 of the Dodd Frank Act. This rule's purpose is to give consumers greater access and rights to control their financial data. It will also create stricter requirements for how regulated entities store and share consumer

financial data.

"We will be developing requirements to limit misuse and abuse of personal financial data, as well as frauds and scams," Chopra said. "A common point of concern across jurisdictions around the world is how unscrupulous actors will look to harvest and hoard consumer financial data as it increases in scale."

"Under [the 1033] rule, the CFPB will require those entities to provide consumers access to their transaction data and other information," Kully said. "While mortgage servicers are already accustomed to responding to borrower information requests, this rule could add layers of requirements on the use and transfer of such data by many types of industry participants."

There is some concern that these added layers of requirements and changes to the use and transfer of data could create new burdens for those in the consumer financial services industry, including both financial costs, increases in personnel, and additional internal policies and procedures to ensure compliance.

> "The CFPB has been on the war path with redlining exams and investigations, and I think we'll continue to see an upward trend in enforcement activity in that area."
>
> — Rich Horn,
> Partner at Garris Horn

"The financial data access rule could affect business across the entire consumer financial services space, because it could affect how data is stored, maintained, and shared in the marketplace, requiring companies to incur costly modifications of their software," Horn said.

Chopra has indicated that the final rulemaking process is likely to begin in late 2023, with a finalized rule completed in early 2024.

Nonbank repeat offender registry

A recent announcement from the CFPB regarding a proposed registry for nonbank financial institutions that have been subject to a federal, state, or local consumer financial protection agency or court order has also created some concerns within the industry that this registry could create new liability for entities that end up on the registry.

"The new proposed nonbank registry is potentially very problematic, as it not only requires companies to report to the CFPB, but also requires certain individuals at companies to attest to compliance with those state enforcement actions," Horn said.

"This attestation could create additional liability for such companies and individuals with respect to the attestation if there's even the most minor disagreement regarding compliance with the order."

The bureau maintains that this registry is meant to protect consumers from repeat offenders and support state and local consumer financial protection agencies.

"Because the issuance of agency and court orders serves as one of the most important tools to pursue lawbreakers in these markets, it is important that the CFPB maintain a central repository of nonbanks subject to agency and court orders," the bureau stated.

"The repository will allow the CFPB to track and mitigate the risks posed by repeat offenders, while also being able to monitor all lawbreakers subject to agency and court orders. The CFPB will share this powerful source of information with others, including with fellow regulators and law enforcement agencies, by making the registry public."

Enforcement activity

The CFPB is likely to increase their enforcement activities in 2023. Chopra has spoken very openly of the variety of targets in his sights, including "repeat offenders," fintechs, algorithmic bias, redlining, marketing discrimination, and "junk fee" issuers.

"I think we'll start to see some of the enforcement actions that were based on investigations initiated by Chopra," Horn said. "Because investigations take a long time, we really haven't seen what he's started since he took the reins. With his focus on tech companies and algorithmic bias, I think we'll see some action in that area. But also, the CFPB has been on the war path with redlining exams and investigations, and I think we'll continue to see an upward trend in enforcement activity in that area."

Regulators, legislatures have choice of issues to address in 2023

By Andrea Golby — Editor, *The Legal Description*

As we enter a new year, there are a variety of issues industry members, and their regulators, continue to keep an eye on. From privacy and security to the impact attorney opinion letters (AOLs) will have on the industry, and from issues surrounding public records and the impact an economic downturn will have on the industry, there are many areas states may be looking to address in 2023.

Privacy and security

Privacy and security became increasingly critical as the industry addressed the challenges of the last few years and will continue to be among significant issues to tackle in 2023.

Cynthia Durham Blair, chief operating officer and owner, Blair Cato Pickren Casterline LLC, noted that states will continue to consider data privacy legislation this year, particularly as conversations of federal data privacy legislation continue.

"Conversations are continuing at the federal level about potential paths forward for national data privacy legislation," she said. "Of note, U.S. Rep. **Patrick McHenry** has released a discussion draft to modernize financial data privacy laws. One of the key pillars of this draft is the modernization of the Gramm-Leach-Bliley Act to 'better align with our evolving technological landscape.'"

Charles Cain, SVP-National Agency Division, FNF Family of Companies, agreed that states will continue to pass privacy legislation and that privacy and security controls will be where both lay and attorney title agents will be spending money.

He noted that not only states, but the Consumer Financial Protection Bureau (CFPB) is looking at security, pointing to the bureau's Circular 2022-004 which laid out specific requirements regulated entities must follow in regard to cybersecurity.

"Everybody needs to look at that circular to be sure they meet the requirements," he said. "They are not hugely burdensome. I think most title and settlement agents that have been involved in cybersecurity and have spent time and money on it probably meet those requirements already. But there are a lot of small title agents, lots of attorney's offices, that just might not. Everybody should look at that circular as to what are the requirements and do you meet those requirements because according to the circular, if you are not meeting these requirements, you are operating, in the eyes of the bureau, illegally right now."

Additionally, Cain said, it's important to keep an eye on what lenders require as a result of new privacy requirements they must conform to.

"If you have a national lender, they are going to look at California, not just your own state's privacy regulatory issues," he said. "Read your closing instructions because your lender may require far more stringent requirements of you than the state in which you reside because those lenders work in multiple states."

Cain said national lenders are going to meet the toughest requirements they could be subject to, rather than have different requirements in different states.

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Impact of attorney opinion letters

Earlier this year, Fannie Mae announced it would begin accepting AOLs for transactions as an alternative to title insurance, following policies Freddie Mac has had in place for years. This led to a flurry of discussion around their use. Whether they have seen them come to their states or not, industry members across the country are paying attention to where AOLs are beginning to be used.

"Freddie started to buy loans with attorney title opinions in the 90s," Cain said. "That was done principally to enable Freddie to buy loans, particularly in remote areas where title insurance might not be readily available. And of course, there is Iowa. But the recent attorney title opinions that I have seen are different. We see some groups that are putting forward products and services where there is an attorney title opinion. They discussed that there is some sort of wrapper of insurance around this that goes beyond standard errors and omissions. That sounds like title insurance to me."

David Townsend, president, Agents National Title Insurance Co., said the potential lack of coverage consumers could receive from AOLs could lead to the CFPB becoming involved.

> "I think that if there is a situation where somebody faces harm as a result of being converted from a title policy to an opinion letter and there's a problem, I can see the CFPB jumping in on this."
>
> — David Townsend,
> President, Agents National Title

"It's one thing for a lender to accept the risk and self-insure to a certain degree with an AOL on related matters," he said. "That's a sophisticated party, they can take the risk. But a consumer cannot. And in most real estate contracts, a policy of title insurance is in the contract. I think that if there is a situation where somebody faces harm as a result of being converted from a title policy to an opinion letter and there's a problem, I can see the CFPB jumping in on this."

"While we haven't seen instances of AOLs in New York, we are closely monitoring the practice," said **Robert Treuber**, executive vice president, New York State Land Title Association. "The stated goal is to lower costs for consumers. However, we do not believe these products provide any actual savings. Even if they did, the deficiencies and the potential consumer harm is of great concern. We hope to bring this emerging trend to the attention of our regulator."

Deborah Bailey, managing member, Bailey Helms Legal LLC, is glad the industry is involved in the discussion.

"We are now part of the conversation, which is a positive development," she said. "The land title industry will continue to adapt, thrive, and innovate in the next year and for the near future. As the world around us is changing, so will the land title industry, and our product offerings will certainly change.

"The rise of alternative title products creates opportunities for our industry to educate consumers about the nature of risk in the industry and how these various products manage risk," Bailey continued. "They also allow us to innovate to meet consumers' changing needs. There is an assumption in the marketplace that alternative title products will grow and displace title insurance, but we should not accept that assumption as a given because these products are mostly theoretical and have not been tested in the marketplace."

Richard Bramhall, chief underwriting counsel, Westcor Land Title Insurance Co., said these conversations must continue.

"With the heavy self-promotion of the AOL forces and the misunderstanding of the multiple benefits of title insurance for consumers, it will be a matter of active and ongoing discussion in the industry, particularly among non-traditional lenders who are

unfamiliar with title insurance products and weren't around in 2008 when the losses incurred by real estate lenders without title insurance were huge."

Record integrity

Many issues continue to impact land records as well. This includes efforts to protect homeowners from deed theft and providing authorities with a path to criminally prosecute those thieves, noted **Marianne Mathieu**, national agency accounts, FNF Family of Companies.

Blair agreed, pointing to the recent indictment of five people for their involvement in a deed theft ring for allegedly stealing three homes worth more than $1 million in total from elderly, vulnerable homeowners in New York.

"In September, following reports of deed fraud in Jackson County, Mo., U.S. Rep. **Emanuel Cleaver** (D-Mo.), along with Rep. **Dwight Evans** (D-Pa.) introduced the Good DEED Act, legislation that would establish the first federal definition of deed fraud, increase penalties for criminals, create a federal grant program to assist law enforcement and local government with tracking and combating the practice, and expand access to legal services for victims," Blair said.

It also includes addressing the trend toward Homeowner Benefit Programs that emerged during the last year.

"More states will be looking into the unfair and deceptive practices of Florida-based real estate brokerage MV Realty, which state attorneys general are arguing misled consumers regarding the terms of the company's 'Homeowner Benefit Program,'" Blair said.

She noted that the American Land Title Association (ALTA) has prioritized combating this practice, working with national stakeholders to design model legislation to make these types of unfair agreements unenforceable, prevent the recording of these agreements in land records and provide consumers with options for seeking damages.

Effects of an economic downturn

After the real estate boom of the last few years, an economic slowdown is going to shift regulators' focus. However, it is unclear how that may manifest itself.

James O'Donnell, president, Equity National Title, noted that every time there is a downturn, legal issues arise and regulatory scrutiny gets more intense.

"I think we are going to see regulators showing more interest in title agents, in the title business and enforcement associated with rules and regulations associated with the business," he said. "Some of that is going to be motivated by a variety of things we can expect to happen in a contracting market. You are

going to have claims; you'll see more foreclosures, and with more foreclosures there is more review of title work that has been done by folks. You may even see some borrowers being negatively impacted. That leads to regulatory issues as well."

Townsend noted that during the downturn of 2008-2010, there was a significant amount of correction by legislatures and regulators.

"The last time we had a kind of a reset on the housing industry, you had a lot of reactionary state legislatures enacting title insurance oversight statutes and escrow because of issues the industry had with defalcations, with not getting policies out timely, with a lot of things like that," he said.

"What is interesting is that there are a lot of people that entered the industry since then that have never known a down cycle," Townsend continued.

"It's going to be interesting to see how that's being handled. But I think there are enough guard rails now on everything that we are in a lot better place as an industry, so I don't see a ton of regulatory trends that are directed mainly toward us."

He did say it will be important to keep an eye on state legislatures and regulators to address any potential unintended consequences that come from rules and laws they introduce.

"I think what you are going to see is kind of business as usual when it comes to state legislatures," Townsend said.

"They are not going to be so much focused on what we do because they were reactionary 12 years ago and 14 years ago because of the Great Recession. I don't think you are seeing that now because there haven't been issues like that. We just have to make sure we are staying on top of [what's going on]. We can't get complacent because some of those bills could have something in there that is unexpected."

Cain said he believes that states that are more active with the title industry particularly will be looking at rate reviews and conducting data collection. He said this is due in part to the market but also due to public concerns about home affordability.

"I think we can see states where we have not seen much regulatory scrutiny come forward because they are under a lot of pressure about what our rates are," he said. "We all know the appreciation of home values has been astronomical in the last two or three years, and with that our rates generally in every state are tied to … the dollar amount of coverage."

Opportunities, challenges moving appraisal profession forward

By Mike Holzheimer — Editor, *Valuation Review*

It has been well-documented that no profession may have had to endure more change and adaptation over the past few years than that of real estate valuation. Appraisers had to execute a full 360-degree turn pertaining to how they normally conducted their daily assignments during the pandemic. And while COVID may not be a true "thing of the past," there is a more positive outlook, with most businesses returning to a state of normalcy, looking to remain efficient and relevant.

But how will the adjustments made in 2022 affect the appraisal profession heading into 2023? Will the alternative methods and new technology remain vital to the appraiser and still be a "game changer" for the profession?

Dustin Harris, "The Appraiser Coach," said 2022 was a year of change.

"For those of us who have been in the valuation profession for a few decades, change is not new," he said. "For those who are a bit greener, change on this level has been surprising. To all of us, change offers an opportunity to step back, reevaluate, retool, rethink, and redo.

"More than anything, the pandemic's effect on the mortgage industry caused us appraisers to be reminded that there is more than one way to skin a cat," Harris added. "The 1004 traditional appraisal is but a tool in a larger box full of other instruments of design. Most business owners have been able to wake up, once again, to the opportunities before us. 2023 is a year before us. I hope we can take the lessons learned over the past few years and design products and ways of doing things that will better serve our customers as well as our businesses."

"Appraisal volumes declined greatly during the second portion of the year," MyAMC Managing Director **Tony Pistilli** said of 2022. "While not specifically a great thing for appraisers, I think we can all agree that two years of incredibly high volumes and 18-hour days were beginning to wear on everyone. A slowdown like this is a great time to reset and focus on the important things in all of our lives."

The Appraisal Foundation (TAF) saw a unified focus across the profession, including membership organizations, relevant stakeholders and government agencies, to create additional education, enforcement and guidance to appraisers so they are able to understand the importance of upholding the public's trust in the profession.

"The Appraisal Foundation led the way in this work completing a comprehensive review of the Ethics Rule and expanding and updating its content around bias and discrimination in the 7 Hour National USPAP Update Course," TAF Vice President of Appraisal Issues **Lisa Desmarais** said. "As we head into 2023, we need to continue to promote and foster new pathways into the profession. Next year, we will see the first PAREA programs hit the marketplace, which will offer an exciting new pathway for the next generation of aspiring appraisers to join this profession."

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>
> — Tony Pistilli,
> Managing director, MyAMC

Tech helps advance industry

Technology would have to be the most significant of changes for the appraiser. And based on the feelings of industry experts, these changes have been welcome sights, with more doors of opportunity being opened than one would have thought possible.

"PAREA will really be a game-changer in welcoming a new generation of appraisers to the profession. We've also seen states and universities begin to take advantage of the Appraiser Qualifications Board's practicum model as another alternative for gaining experience to become an appraiser," Desmarais said. "With more data available virtually, it is possible for appraisers to conduct some parts of their work from the office, including spending more time being able to understand and interpret larger data sets. The profession has evolved heavily from one of clipboards to sophisticated computer processing and being able to spend more time with data and less time passively observing physical geography is certainly very beneficial for some types of appraisal assignments."

Appraisal Institute 2022 President **Jody Bishop** also had thoughts on the PAREA model moving forward.

"The Appraisal Institute has made great strides with the development of its Practical Applications of Real Estate Appraisal program (AI PAREA) and I'm excited for the potential opportunities this will provide to aspiring valuation professionals," Bishop said. "I'm also very proud of our efforts with the Appraiser Diversity Initiative, which is a collaboration with Fannie Mae, Freddie Mac and the National Urban League to offer scholarships to minority appraisal trainees."

Harris is excited for the technology advanced recently given to appraisers as well as opportunities for new technology in the future.

“The ability to rely on (really good) tech to see things and places that appraisers could not before is eye-opening. New ways of doing things, using these tools, is the future of real estate appraisal,” he said.

Florida Certified General Real Estate Appraiser **Tim Andersen** noted that entrepreneurs in the tech space are coming to the fore to make the more mechanical aspects of real estate appraisal more efficient.

“To appraise real estate ‘by hand’ is ridiculously time-consuming, to the point the appraiser must cut protocol and procedural corners to save time,” Andersen said. “Advances in the areas of real estate appraisal technology, such as the ability to amass and then analyze large amounts of data quickly, will accrue to the benefit of not only the real estate appraiser, but also the real estate appraiser’s clients and intended users.”

Andersen also said, to some extent, the progress of COVID was a “back-handed blessing” to the real estate appraisal industry. During this hiatus, it became clear that, in many cases, the appraiser did not need to put boots in the living room in order to complete a real estate appraisal assignment credibly. In addition, the GSEs realized the same benefit also applied to them. While, clearly, there are appraisal assignments in which boots in the living room will be, and are an “absolute necessity,” appraisers have discovered that this necessity is not universal.

“The industry will soon be shifting to a risk-focused approach to valuations and will allow bifurcated appraisals on more and more of the transactions,” Pistilli, a veteran chief appraiser, said. “Appraisers will need to become more comfortable with new products, processes, and emerging technologies to enable those new workflows.”

“Some appraisers have concluded the ability not to put boots in the living room is a liability for which the real estate appraisal industry itself will eventually suffer. Many of these same appraisers mistakenly believe it is the real estate appraiser’s responsibility to protect the public,” Andersen said.

“They conclude the protection of the public includes inspecting the property to be appraised. This is a gross misinterpretation of USPAP. The appraiser is not charged with protecting the public trust, nor inspecting the subject property.

“Rather, the appraiser is charged with protecting the public trust in the context of following the ethical and practical requirements of USPAP which, when the appraiser does, will give the public reason to trust real estate appraisers, what they do, how they do it, and why they do it. This is the public trust to which USPAP refers,” he added.

Pistilli also noted all appraisers should use the slower times to get up to speed with new and emerging technology and understand how they can use these in the appraisal process, while when there is an appraisal ordered, more and more will likely be desktops. Appraisers will need to fully understand USPAP and what their obligations are and more importantly, what their opportunities are to complete these new assignments, he added.

Pending legislation could impact appraisal

There are some proposals being discussed on Capitol Hill that will greatly impact appraisers moving forward.

Andersen referenced Rep. **Maxine Waters** (D-Ca) proposing legislation that would make the borrower a de facto intended user of the appraisal and report, thus effectively lengthening the appraiser's chain of liability from the client to include the potential borrower as well.

"If the borrower wants an appraisal to determine if the purchase price is market-oriented (or for any other reason for that matter), let the borrower order and pay for one," Andersen said. "But to put the appraiser under the tonnage of having to report to two 'bosses', both of which have conflicting objectives, is to remove from the appraiser the ability he or she has to be independent, impartial, and objective."

Andersen, "The Appraiser's Advocate," also brought up, with regards to what to watch out for in 2023, that the Fed has recently increased its interest rates. Residential first-mortgage interest rates increased over 100 percent between the first and third quarter of 2022. Therefore, demand for not only new mortgages, but the demand to refinance existing mortgages, is going to stay below previous levels as long as interest rates stay high.

"Economics 101 states that such a condition should force the price of housing downward to an equilibrium point, thus housing and mortgages will become affordable again," he said.

"However, because housing tends not to study economics, this has not taken place. It is true the increase in prices of housing has slowed way down, and even stopped in some markets. And because of the current shortage of new housing, its supply is lower than demand for it, which is keeping house prices up when, in reality, they should be falling."

Desmarais pointed out legislation to once again allow the licensed appraiser to appraise residential properties for FHA would be a true game changer if Congress is able to pass that bill this session.

"In 2008, when FHA passed the law that prohibited licensed appraisers from appraising residential properties for them, there was a huge negative ripple effect of licensed appraisers leaving the profession," she said.

"Reopening this door would also reopen an important pipeline for new appraisers just entering the profession to jumpstart their career at the licensed residential level."

Bias and diversity and the need to improve upon both those matters moving forward will continue to be topics of conversation.

"Appraisal bias will continue to be a growing discussion point. Hopefully there will be a common ground determined and new training developed for appraisers and financial institutions," Pistilli said.

"Appraisers need to really be open to emerging technologies and look for ways to augment what they do on a daily basis. Artificial intelligence, machine learning, computer vision are technologies that will become more mainstream and help us be better appraisers."

As to what needs to happen now, Andersen said now is a great time for appraisers to "sharpen the axe."

"Now is the time to learn how to branch out of GSE work and to transition to private work such as estates, divorces, tax appeals, appraisals for listings, relocation appraisals, and so forth," he said.

"Now is the time to go back to school and finish up that college degree. Because of a lower volume of appraisal work, now is the time to take on a well-qualified trainee since there is sufficient time to educate and train that trainee, not merely accommodate him or her to a mechanical, thus outdated, appraisal process.

"In other words, because staying current with all that is happening in real estate appraisal requires appraisers to change, now, with a slowdown in work volume, is the time to make those changes, as well as the time to make those changes work for the appraiser, the appraiser's office and business, and the appraiser's associates and trainees."

CFPB 'not the only [RESPA] sheriff' in town

By Elizabeth Childers, Esq. — Editor, *RESPA News*

Over the last few years, the industry has seen very few (if any) RESPA enforcement actions by the Consumer Financial Protection Bureau (CFPB). *RESPA News* asked **Rich Andreano**, Ballard Spahr's Mortgage Banking Group practice leader, and **Loretta Salzano**, Franzén and Salzano, P.C. president, why that may be, what the industry can expect going forward, and if any legislative changes to the regulation may be on the horizon.

A lack of enforcement

Part of the reason the industry hasn't seen a lot of enforcement actions, Andreano said, could be because of the expansive authority and obligations the CFPB has under its jurisdictional umbrella. To put it simply, the bureau has been putting its focus in other areas.

"People think it is a large agency, and it does have a lot of folks, but its bandwidth is not unlimited," Andreano said. "I think what it's been doing is focusing a lot of its efforts in other areas that it thinks are particularly ripe for causing harm to consumers."

What that means for RESPA is the bureau appears to be focusing less on §8, which addresses kickbacks and referral fees, and more on the servicing of mortgage loans and whether servicers are compliant with the Coronavirus Aid, Relief, and Economic Security Act (CARES Act), particularly in relation to forbearances and how loss mitigation applications were handled.

Andreano said the bureau also seems to be more focused on fair lending and "digital redlining," especially with automated valuation models (AVMs) in underwriting and the increased use of artificial intelligence and machine learning.

Before creation of the CFPB, the office of the U.S. Department of Housing and Urban Development (HUD) that regulated RESPA also regulated only one other statute. As a result, HUD was more aggressive looking for violations and making technical arguments that some action violated RESPA. Things are different at the bureau because of the number of regulations under its purview, such as the Truth-in-Lending Act, the Equal Credit Opportunity Act, Fair Credit Reporting Act, Fair Debt Collection Practices Act, and unfair, deceptive, or abusive acts or practices.

"It has a wide range of areas that it regulates, and mortgage is only one," Andreano said of the bureau. "I've had former CFPB attorneys, who were in the RESPA enforcement area, indicate they have to be more judicious in how they use their enforcement resources. Clearly, if they come across something they view as a clear quid pro quo referral fee arrangement, they will enforce it because Congress said it was a violation.

"But do they aggressively look for things that they could make a RESPA §8 argument? No."

Andreano said even in instances where there is a technical RESPA §8 issue, but no quid pro quo referral fee arrangement, the bureau will look more into whether consumer harm occurred before deciding whether to take action. If there is no consumer harm, the CFPB may be less likely to act than HUD would have been.

However, this current pattern can create a false sense of security and lead to companies taking bigger RESPA risks, resulting in the CFPB noticing and instigating enforcement. Not to mention there are other agencies who conduct examinations and regulate consumer harm and have authority to enforce RESPA.

Salzano also stated the bureau's lack of RESPA enforcement action is likely a matter of bureau priorities. She said the bureau has listed other focuses, mostly related to increasing homeownership among minority populations and promoting diversity

and inclusion – things that do not go hand-in-hand with §8.

"You have to remember the bureau is not the only sheriff in town when it comes to RESPA," Andreano said. "You might see some state saying, 'Hey, the bureau doesn't seem to be active here – maybe we should step up.'

"The statute expressly gives the insurance commissioners and attorneys general jurisdiction, and usually [state] mortgage statutes require compliance with all federal laws, and that brings RESPA into the purview of [state] mortgage regulators while they're doing their examinations."

Recent statements made by CFPB Director **Rohit Chopra** echo a similar sentiment. At the National Association of Attorneys General Capital Forum, Chopra mentioned the bureau "do[es] not have a monopoly on consumer protection."

He said the bureau should be partners in consumer protection, especially since states have concurrent authority and access to the bureau's victim relief fund in certain cases.

Andreano said eventually the bureau will start focusing more on RESPA, especially if it finds something in examinations it believes to be a problem. The issue there is if it is only done in a supervisory context, the industry doesn't learn about it initially. In that situation, actions taken to remedy a RESPA issue may be summarized in the supervisory highlights, but there is no public release about the specificities.

Should an enforcement action or consent order arise, however, it might not provide reliable guidance to those wishing to avoid the same issues.

"The problem with these consent orders is they're negotiated, and therefore we don't have all the facts about what really happened," Salzano said.

"Yes, we can read the tea leaves and glean things the regulators found to be problematic, but oftentimes, it's an amalgamation of facts. There might not be any one element of the arrangement that in and of itself would cause a different arrangement to fail."

Rulemaking, or guidance?

When it came to whether there were aspects of RESPA Congress or the CFPB need to address, Andreano suggested regulators do not necessarily need to make changes to the statute, or even promulgate rules. What is needed is guidance to address the new subtleties presented by the internet and social media.

"There's just no guidance," Andreano said. "You sit there and try to apply older RESPA concepts to these new dynamics, and it's like trying to put a square peg in a round hole. At least some generalized guidance as to where the guard rails are would be helpful, similar to the FAQs issued by the CFPB in October 2020 addressing §8 in general, as well as gifts and promotional arrangements and marketing services agreements."

For those looking for additional guidance without formal rulemaking, Salzano said to be careful what you wish for, because in the past when the industry has asked for guidance, it did not like what was issued.

"I'd rather operate in the gray and help our clients craft initiatives I think are defensible based on the current law," she said. "Certainty is virtually impossible in this area because it is so fact-specific, and this allows for greater creativity."

Salzano said a term she has heard in place of regulation by enforcement is "regulation by inference," where instead of bringing enforcement actions, the CFPB issues statements, proclamations, blog posts, and other communications short of formal rulemaking, or FAQs that leave the industry confused as to whether these informal declarations need to be instituted despite lacking the force of law. Members of Congress criticized Chopra for this exact issue at the bureau's semi-annual report to the House Committee on Financial Services.

"Even the FAQs can be problematic, because there is no administrative procedure for that," she said. "The bureau can just fire those off. And while yes, it's helpful, the last FAQs it issued relative to marketing servicing agreements didn't tell us anything new about the law, because the CFPB can't make law through an FAQ. The FAQs don't change the rule but

are helpful in highlighting principles in existing law and the bureau's interpretation of the law."

Salzano said while this did give some comfort because the bureau withdrew prior guidance on MSAs that was more negative and perhaps cast some doubt on the legality of such arrangements, it didn't give any new guidance.

Looking forward

"Don't take the lack of any recent enforcement action as meaning the bureau will not enforce RESPA. It will," Andreano advised. "As people get more and more aggressive, the bureau will come across something and it will take action. So, don't read a lot into their recent inaction because they could wake up tomorrow and decide to launch a §8 investigation into particular practices. And they could do that today. They could do it Monday. So be careful."

Salzano echoed this warning. She said even though RESPA is definitely something the CFPB is looking at as part of routine examinations, she didn't foresee them diving into RESPA in an aggressive way.

"[The bureau] obviously could change its priorities at any time," Salzano said. "It did issue guidance regarding MSAs [market servicing agreements], which was an area where people were trying to get some clarification, and that indicates MSAs are OK. The FDIC and OCC seem to be looking more closely at RESPA §8, and it's possible that that might cause the CFPB to jump in more aggressively."

Despite the amount of pro-consumer policy, a director who has shown to be creative and arguably aggressive in his jurisdiction, and the current democratic administration, there has been little coming out of the bureau related to RESPA. If something would change, Salzano said, such as a political shift to a Republican president or administration, it would be hard to imagine that as a signal for more RESPA enforcement actions.

"There's definitely examination of initiatives with referral sources, and there's tire-kicking, but I don't see the CFPB really digging in its heels in this area," Salzano said.

However, Salzano brought up an example where the Federal Deposit Insurance Corp. (FDIC) imposed robust reporting requirements on certain banks, such as requiring auditing of MSAs and other initiatives to demonstrate compliance. The FDIC did so because it felt there was a possibility the banks were not complying with §8 in their marketing arrangements with real estate professionals.

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> — Rich Andreano,
> Practice leader, Ballard Spahr's Mortgage Banking Group

"It required the banks to audit for adherence to RESPA and implement other more robust policies and procedures," Salzano said. "That same thing could be happening at the CFPB – it's just not public."

Salzano said she has frequently seen various depository regulators working with banks and lenders in "gray areas," in that they may ask examinees to either tighten up certain policies or request data to justify certain payments to demonstrate compliance with §8(a), but no fine or consent order was imposed.

"The CFPB has taken the same position in routine exams regarding other regulations that are especially fact-specific or might have some gray," she said. "And I think that's consistent with RESPA §8. You can look at something that might have indicia of a violation, but the facts determine if the parties are violating RESPA §8. We've been successful in demonstrating that they're not and building controls to give the regulators assurances that they are not [violating the statute] and will not in the future."