



STATE OF KANSAS  
OFFICE OF THE ATTORNEY GENERAL

**DEREK SCHMIDT**  
ATTORNEY GENERAL

MEMORIAL HALL  
120 SW 10TH AVE., 2ND FLOOR  
TOPEKA, KS 66612-1597  
(785) 296-2215 • FAX (785) 296-6296  
WWW.KSAG.ORG

June 28, 2012

Raney L. Gilliland  
Kansas Legislative Research Department  
State Capitol - Room 010-West  
Topeka, Kansas 66612

Re: **K.A.R. 117-8-1**

Dear Mr. Gilliland:

Attorney General Schmidt has asked me to respond to your letter of June 12, 2012 requesting input as to whether K.S.A. 58-4121 creates an unlawful delegation of legislative power if K.A.R. 117-8-1 is revoked, and whether amendment of K.S.A. 58-4121 could alleviate any unlawful delegation of power.

As you know, our office recently advised the Kansas Real Estate Appraisal Board (KREAB) that K.A.R. 117-8-1 appears to be unnecessary due to the language of K.S.A. 58-4121, which states: "A state certified or licensed appraiser shall comply with the uniform standards of professional appraisal practice promulgated pursuant to federal law." A private, non-profit entity, the Appraisal Standards Board (ASB), is authorized by federal law to promulgate such standards,<sup>1</sup> which are known as the USPAP. The ASB may amend, interpret, supplement or retire USPAP provisions.<sup>2</sup>

K.A.R. 117-8-1 adopts the current version of the USPAP. Our disapproval of K.A.R. 117-8-1 and our recommendation that the regulation be revoked were based on the following:

1. New USPAP editions are released every two years and clearly establish the effective dates of each edition.<sup>3</sup> Therefore it is not necessary to formally adopt

<sup>1</sup> Financial Institutions Recovery, Reform and Enforcement Act of 1989 (FIRREA), Title XI, 12 U.S.C. 3331-3351.

<sup>2</sup> Uniform Standards of Professional Appraisal Practice, 2012-2013 Edition, p. U-i.

<sup>3</sup> The effective dates of the 2012-2013 USPAP are January 1, 2012 through December 31, 2013 only. See Uniform Standards of Professional Appraisal Practice, 2012-2013 Edition, p. U-i.

the current edition when K.S.A. 58-4121 requires an appraiser to follow USPAP;

2. K.A.R. 117-8-1 adopts the current USPAP edition excluding standard nos. 7, 8, 9 and 10, when K.S.A. 58-4121 does not authorize the KREAB to exclude any USPAP standard; and
3. K.S.A. 2011 Supp. 58-4105(b)(10) authorizes the KREAB to adopt rules and regulations "explaining and interpreting the standards," and K.A.R. 117-8-1 neither explains nor interprets the USPAP.

While not enumerated as a reason for disapproving K.A.R. 117-8-1, our office has concerns that K.S.A. 58-4121 may be challenged as an unlawful delegation of legislative power. The legislative power of the state is vested in the legislature.<sup>4</sup> The legislature is prohibited from delegating legislative powers to nongovernmental associations or groups.<sup>5</sup> However, "the legislature may enact general provisions for regulation and give state agencies discretion to fill in details subject to reasonable and definite legislative standards to govern the exercise of such authority."<sup>6</sup> "If a nongovernmental agency's standards are used as a *guide* to be followed by a state agency, and the agency retains the ultimate authority to approve such standards, no unlawful delegation occurs."<sup>7</sup>

Our concern regarding K.S.A. 58-4121 is that the plain language of the statute requires appraisers to follow the USPAP. An appraiser may be disciplined for failure to follow the USPAP.<sup>8</sup> K.S.A. 2011 Supp. 58-4105(b)(10) authorizes the KREAB to "review from time to time the standards . . . and to adopt rules and regulations explaining and interpreting the standards," but the KREAB retains no ultimate authority to approve – or disapprove – USPAP standards. Therefore, it appears that K.S.A. 58-4121 delegates to the ASB, and not the KREAB, the authority to establish, amend, supplement, and retire standards for appraisal practice.

K.S.A. 58-4121 stands in contrast to most other statutes governing the standards to be applied by state boards, commissions and authorities. Typically, licensing boards are authorized by statute to adopt rules and regulations governing the professional standards applicable to licensees. If a national standard applies to the profession, the licensing board may adopt that standard in regulation.<sup>9</sup> Other state agencies are authorized to promulgate rules and regulations *consistent with* federal law or national

---

<sup>4</sup> Kan. Const., Art. 2, Sec. 1.

<sup>5</sup> *Gumbhir v. Kansas State Bd. of Pharmacy*, 228 Kan. 579, Syl. 4 (1980).

<sup>6</sup> *State ex rel. State Bd. of Healing Arts v. Beyrle*, 269 Kan. 616, 626 (2000).

<sup>7</sup> *North American Safety Valve Indus., Inc. v. Wolgast*, 672 F. Supp. 488, 493-494 (1987). Emphasis added.

<sup>8</sup> K.S.A. 2011 Supp. 58-4118(a)(6).

<sup>9</sup> See, e.g., K.S.A. 1-202(c)(2)(E) (authorizing the Board of Accountancy to adopt by regulation professional standards applicable to accountants); K.A.R. 74-5-201 through 74-5-203 (adopting national standards promulgated by the federal government and nongovernmental associations).

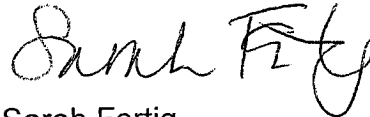
standards.<sup>10</sup> However, we are unaware of another licensing board that is required by statute to enforce standards promulgated by a private entity, but lacks authority to alter or reject such standards.

K.S.A. 58-4121 in its current form mandates rather than permits the KREAB's use of the USPAP as the professional standard for appraisers. Accordingly, we believe that the statute is susceptible to challenge as an unlawful delegation of legislative power. The promulgation of rules and regulations cannot cure that statutory defect; however, the statute could be amended to allow the KREAB to adopt standards not inconsistent with the USPAP.

I hope this letter adequately responds to the Joint Committee's questions.

Sincerely,

OFFICE OF ATTORNEY GENERAL  
DEREK SCHMIDT



Sarah Fertig  
Assistant Attorney General

---

<sup>10</sup> See, e.g., K.S.A. 58-4218 (authorizing the Kansas Housing Resources Corporation to adopt installation standards consistent with 42 U.S.C. §§ 5401 *et seq.*) and K.A.R. 127-2-2 (adopting federal installation standards).



**THIS PAGE LEFT  
INTENTIONALLY BLANK**