
Appraisal Agency Options for Supervising
Customary and Reasonable Fees:
A Louisiana Real Estate Appraisers Board
Perspective

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October 16, 2017

Agenda

- Setting the Stage:
 - Dodd-Frank Act Requirements
 - Louisiana AMC Registration Act and LREAB Rule 31101
- The FTC vs. LREAB
 - FTC and LREAB Positions
 - Roles of Regulation and the Market in Determining C&R Fees
 - State Action Doctrine Requirements
- State Responses
 - Louisiana
 - North Carolina Legislation
- Conclusion: States Have Multiple Options

SETTING THE STAGE: The Dodd-Frank Act

The Dodd-Frank Act

- History of the Act
 - Response to 2007-2008 financial crisis
 - Builds on the 1989 Financial Institutions Reform, Recovery, and Enforcement Act (“FIRREA”) adopted to deal with 1980’s savings and loan crisis

Dodd-Frank Act (cont.)

- Section 1472 Amends Truth-in-Lending Act
 - New TILA section 129E requires that lenders and agents not take actions that compromise appraiser independence
 - Subsection 129E(i) requires payment of customary and reasonable fees for appraisals
 - Federal Reserve empowered to adopt Interim Final Regulations (“IFR”) implementing section 129E.
 - When effective, IFR replaced Home Valuation Code of Conduct

Dodd-Frank Act (cont.)

- Section 1473 Amends FIRREA
 - New FIRREA section 1124 requires federal financial regulatory agencies to establish “minimum requirements” for state AMC regulation
 - “In response to the growth of and concerns about AMCs, subsection [1473](f) creates a State-by-State system for registering and supervising AMCs.” H. Rept. 111-94 at 97
 - “Nothing in this section shall be construed to prevent States from establishing requirements in addition to any rules promulgated [by the federal financial regulatory agencies].” FIRREA section 1124(b).

Customary & Reasonable Requirement

- TILA 129E(i)(1) sets out the general rule:
 - Lenders and their agents shall compensate fee appraisers at a rate that is customary and reasonable for appraisal services performed in the market area of the property being appraised. Evidence for such fees may be established by objective third-party information, such as government agency fee schedules, academic studies, and independent private sector surveys. Fee studies shall exclude assignments ordered by known appraisal management companies....

Customary & Reasonable (cont.)

- Interim Final Rules established “presumptions of compliance:”
 - First presumption:
 - 1. Use of objective information to demonstrate rates are “customary” based on “recent transactions” (during the last year) for the type of appraisal in the relevant market area

Customary & Reasonable (cont.)

- ❑ 2. Review of six factors to adjust fees to ensure that they are “reasonable”
 - Type of property
 - Scope of work
 - Time in which the appraisal services are required to be performed
 - Fee appraiser qualifications
 - Fee appraiser experience and professional record, and
 - Fee appraiser work quality

Customary & Reasonable (cont.)

- ❑ 3. Assurance that reference rates are not the product of conduct unlawful under the antitrust laws:

“[T]he Board recognizes that if some creditors or AMCs dominate the market through illegal anticompetitive acts, ‘recent rates’ identified under [the first presumption] may be an inaccurate measure of what a “reasonable” fee should be. Thus ... to qualify for the presumption of compliance ... a creditor and its agents must not engage in any anticompetitive acts in violation of state or federal law that affect the compensation of fee appraisers.” 75 F.R. at 66586.

Customary & Reasonable (cont.)

“For example, if appraisal management company A and appraisal management company B agreed to compensate fee appraisers at no more than a specific rate or range of rates, neither appraisal management company would qualify for the presumption of compliance.” Official Comment 42(f)(2)(ii), 75 F.R. at 66586.

Customary & Reasonable (cont.)

□ Second presumption:

- Use of independent third party fee studies or government-specified rates as set out in the statutory safe harbor.
- However, “In preparing this interim final rule, the Board did not identify appraisal fee schedules, surveys or studies that would be appropriate to designate as a ‘safe harbor’ for creditors and their agents....” 75 Fed. Reg. at 66574.

Note: Fee studies and surveys cannot include fees paid by AMCs for residential appraisals.

FRB Disagreed With REVAA's Position on Including a C&R Requirement

- REVAA argued, due to “how incredibly complex this issue is, and how difficult it will be to develop [a] rulemaking that adequately address all elements of that complexity. ... we strongly urge the Board to exercise the flexibility provided by the statutory language and NOT include ‘customary and reasonable’ fee rules in the 90-day rulemaking.” September 22, 2010 REVAA Letter to Federal Reserve Board (emphasis in original).
- The Federal Reserve Board adopted the C&R fee requirement over REVAA's objection.

Minimum State Requirements

- Federal Financial Agencies Publish Final Rules on June 9, 2015
 - States electing to regulate AMCs must establish within the State appraiser licensing agency a licensing program with the legal authority to, *inter alia*:
 - Examine the books and records of an AMC operating in the State and require the AMC to submit reports, information and documents;
 - Discipline, suspend, terminate, or deny renewal of the registration of an AMC that violates applicable appraisal-related laws, regulations, or orders

Minimum State Requirements (Cont.)

- “Each State electing to register AMCs ... must
 - (b) Impose requirements on AMCs ... to:
 - ... (5) Establish and comply with processes and controls reasonably designed to ensure that the AMC conducts its appraisal management services in accordance with the requirements of section 129E(a) through (i) of the Truth in Lending Act, 15 U.S.C. 1639e(a) through (i), and regulations thereunder.” 12 C.F.R. § 34.213.

Federal Agencies Disagreed With REVAAs Position on Boards' Powers

- REVAAs letter to federal financial agencies, June 9, 2014:
 - “[T]he proposed rule should not permit state appraiser certifying agencies to directly investigate, interpret and enforce the federal independence standards of the Truth in Lending Act and Regulation Z.... Section 1124 of FIRREA does not mandate such authority, but obligates AMCs to require that appraisals are performed in compliance with the TILA appraisal independence standards.”
- Again, the federal financial regulatory agencies disagreed and required state boards to enforce AMC compliance with TILA129E, including customary and reasonable fees.

SETTING THE STAGE:

The Louisiana Real Estate
Appraisers Board

Louisiana Real Estate Appraisers Board

- Created in 1987 by Act of the Louisiana Legislature
- Purpose was to bring the state into compliance with FIRREA requirements for state regulation of appraisers
- Supervised by the Appraisal Subcommittee of the Federal Financial Institutions Examination Council

AMC Minimum Requirements Apply to LREAB

- 2009 Louisiana AMC law required AMCs to be registered and regulated by LREAB
- 2012 amendments to the AMC law required LREAB to regulate and enforce customary and reasonable appraiser fee obligation:
 - “An appraisal management company shall compensate appraisers at a rate that is customary and reasonable for appraisals being performed in the market area of the property being appraised, consistent with the requirements of 15 U.S.C. 1639(e) and the final federal rules as provided for in the applicable provisions of 12 CFR Parts 34, 225, 226, 323, 1026, and 1222.” La. Rev. Stat. 37:3415.15(A)(as amended in 2016).

LREAB's Adoption of a C & R Rule

- LREAB solicited and received input from all stakeholders in public meetings, hearings and through written comments
- Year long rule-making proceeding
- Rule was amended through rulemaking process to reflect public comments

LREAB Rule 31101

- AMCs shall compensate appraisers at a rate that is customary and reasonable
- Compliance can be demonstrated by:
 - Recent rates with the six-factor adjustments
 - Geographically relevant and objective third-party information, including fee schedules and studies
 - A fee schedule established by the Board

LREAB Commissioned a Fee Study

- LREAB commissioned an independent study through the Southeastern Louisiana University to identify, on an annual basis, the median fees paid by lenders for five different types of appraisal services in nine geographic regions (SLU Survey)

SLU Survey (cont.)

- “This study is provided as a courtesy to all licensees; however, its use is not mandatory.” LREAB Notice to Appraisal Management Companies
- Reliance on the SLU Survey can be one method of presumptive compliance
- Consistent with presumptions of federal regulations and Rule 31101

THE FTC v. LREAB

FTC vs. LREAB

- Complaint issued on May 31, 2017 alleges:
 - LREAB “has unreasonably restrained price competition for real estate appraisal services provided to appraisal management companies” by requiring that AMCs compensate appraisers at a rate determined by one of the three methods in Rule 31101
 - LREAB has “effectively” required “AMCs to match or exceed appraisal rates listed in a published survey”

FTC vs. LREAB (cont.)

- LREAB Response - Bruce Unangst, Executive Director:

“By issuing this legally faulty and factually incorrect complaint, the FTC is seeking to punish a Louisiana state agency for following federal regulatory mandates. Specifically, Dodd-Frank regulations – intended to protect consumers by ensuring the integrity of home mortgage appraisals – require that state appraisal agencies ensure Appraisal Management Companies (AMCs) pay “customary and reasonable” fees for home appraisals. It is the federal government that put these requirements on state appraisal agencies, and our Board followed these federal regulations after an open, public and transparent rulemaking process. To now suggest that LREAB’s good faith efforts to comply with federal law is some sort of shadowy price-fixing conspiracy is ludicrous. Congress and six financial regulatory agencies in Washington have directed Louisiana to do exactly what the FTC is now alleging is an antitrust violation.”

LREAB Position

- No antitrust violation because LREAB did not engage in collective action to impose an unreasonable restraint of trade.
 - LREAB not controlled by active participants in the residential real estate appraisal market, so no ability for those participants to engage in a conspiracy.
 - “Of course, concluding that the Board has the capacity to conspire ‘does not mean, however, that every action taken’ by the Board ‘satisfies the contract, combination, or conspiracy requirement of section one.’ ... Thus, to be concerted action, the parties must have ‘a conscious commitment to a common scheme designed to achieve an unlawful objective.’” *N.C. State Bd. of Dental Examiners v. FTC*, 717 F.3d 359, 372 (4th Cir. 2013).

LREAB Position (cont.)

- ❑ LREAB did not require AMCs to meet or exceed SLU Survey median fees
- ❑ Any alleged restraint was not unreasonable in the context of LREAB's obligations under Dodd-Frank and state law

LREAB Position (cont.)

- Regulatory compliance defense
 - “If a defendant can establish that, at the time the various anticompetitive acts alleged here were taken, it had a reasonable basis to conclude that its actions were necessitated by concrete factual imperatives recognized as legitimate by the regulatory authority, then its actions did not violate the antitrust laws.”
Phonetele v. American Tel. & Tel. Co., 664 F.2d at 737-38 (Ninth Cir. 1981) (Author: then-judge Anthony Kennedy)
 - LREAB’s conduct was undertaken as a good faith effort to meet its public obligations under federal regulatory requirements

THE FTC v. LREAB: Role of the Marketplace

Role of Marketplace in Determining Customary and Reasonable Fees

- IFR introduction: “The Board interprets the statutory language of TILA Section 129E(i) to signify that the marketplace should be the primary determiner of the value of appraisal services, and hence the customary and reasonable rate of compensation for fee appraisers.” 75 Fed. Reg. at 66569.
- FTC position: LREAB’s enforcement of Rule 31101 “prevents AMCs and appraisers from arriving at appraisal fees through bona fide negotiation and through the operation of the free market.” Complaint, ¶ 3.

Role of Marketplace (cont.)

- LREAB position: The legislative history of the Dodd-Frank Act and its implementing regulations demonstrates the goal of harmonizing consumer protection and marketplace pricing objectives. Congress allowed AMC-paid fees for appraisals to reflect overall trends in appraisal pricing in particular geographies, subject to the requirement that all fees paid must be both customary and reasonable.

Role of Marketplace (cont.)

- IFR's Official Interpretations:

“In theory, the fact that an appraiser is willing to accept a particular fee for an appraisal assignment may bear on whether the fee is customary, reasonable, or both. However, an appraiser may be willing to accept a low fee because the appraiser is new to the industry and wishes to establish herself, or simply because the appraiser needs any work he can obtain in a slow housing market. In addition, the Board understands that some AMC’s have begun requiring fee appraisers to agree that the fee is “customary and reasonable” as a condition of obtaining the appraisal assignment. In these situations, the Board believes that an appraiser’s agreement that a fee is “customary and reasonable” is an unreliable measure of whether the fee in fact meets the statutory standard.” 75. Fed. Reg. at 66571 (emphasis added).

Role of Marketplace (cont.)

- The C & R requirement “does not prohibit a fee appraiser and a creditor (or its agent) from agreeing to compensation based on transaction volume, so long as the compensation is customary and reasonable.” Official Interpretation 42(f)(1)(5) (emphasis added).

Role of Marketplace (cont.)

- The American Bankers Association conclusion regarding a mutual agreement between an AMC and an appraiser:
 - “ABA believes that the articulation of these provisions will generate useless judicial challenges and much confusion going forward. As written, the interim rule creates an inadvertent trap that misleads honest lenders into believing they can safely engage in ‘negotiations’ ... without fear of running astray of the reasonable restrictions. ... The Board should, at a minimum ... state that a signed document that reflects a mutual agreement to a particular price should be deemed acceptable and sufficient for purposes of the customary and reasonable requirement and remove the Interpretation to the contrary [Official Interpretation 42(f)(1)(4)].” December 27, 2010 ABA Letter to Federal Reserve.

Role of the Marketplace (cont.)

- However, 7 years later, the Official Interpretation's prohibition against using an agreement with an appraiser presumptively to meet the customary and reasonable requirement remains in effect.

THE FTC v. LREAB:

The State Action Defense

The State Action Defense Preserves State Regulatory Sovereignty

- The Sherman Act does not impose antitrust liability if a state acting in its sovereign capacity imposes a mechanism that substitutes regulation for the operation of a competitive marketplace. *Parker v. Brown*, 317 U.S. 341, 350-51 (1943).
 - “If every duly enacted state law or policy were required to conform to the mandates of the Sherman Act, thus promoting competition at the expense of other values a State may deem fundamental, federal antitrust law would impose an impermissible burden on the States’ power to regulate.” *N.C. State Bd. of Dental Exam’rs v. FTC*, 135 S. Ct. 1101, 1109 (2015).

State Action Defense Requirements

- *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97 imposed a two-part test where the actions of non-sovereign entities are at issue:
 - “Under *Midcal*, ‘[a] state law or regulatory scheme cannot be the basis for antitrust immunity unless, first, the State has articulated a clear policy to allow the anticompetitive conduct, and second, the State provides active supervision of [the] anticompetitive conduct.’” *N.C. Dental*, 135 S.Ct. at 1111-12.

Clear Articulation

- The state must clearly articulate a policy to displace competition with respect to the conduct at issue:
 - “*Midcal*’s clear articulation requirement is satisfied ‘where the displacement of competition [is] the inherent, logical, or ordinary result of the exercise of authority delegated by the state legislature. In that scenario, the State must have foreseen and implicitly endorsed the anticompetitive effects as consistent with its policy goals.’” *N.C. Dental*, 135 S.Ct. at 1112.

Active Supervision

- State action immunity does not automatically apply to state agencies:
 - Where a state board is comprised of a “controlling number” of “market participants in the occupation the board regulates,” the state must actively supervise board decisions that may implicate the federal antitrust laws in order for such decisions to qualify for state action immunity. *N.C. Dental*, 135 S. Ct. at 1114.

Active Supervision (cont.)

- *N.C. Dental* active supervision guidelines:
 - ❑ Supervisor reviews the “substance” of the decision
 - ❑ Supervisor has the power to veto or modify the decision
 - ❑ Supervisor must actually supervise
 - ❑ Supervisor cannot be an active market participant
 - ❑ Underlying principle: state accepts “political accountability” for a board’s actions

135 S. Ct. at 1116-17

FTC Statement on *Active Supervision*

- July 6, 2017 Scheduling Conference:
 - Judge Chappell: So you're telling me that if respondent was actively supervised by the State of Louisiana, we wouldn't be here?
 - FTC Counsel: That's correct.

STATE ACTION:
Louisiana Responds

Issued July 11, 2017



**EXECUTIVE DEPARTMENT
EXECUTIVE ORDER NUMBER 17-16**

***SUPERVISION OF THE LOUISIANA REAL ESTATE APPRAISERS BOARD
REGULATION OF APPRAISAL MANAGEMENT COMPANIES***

- WHEREAS,** the Louisiana Real Estate Appraisers Board (“the LREAB”) protects Louisiana consumers and mortgage lenders by licensing residential appraisers and regulating the integrity of the residential appraisal process;
- WHEREAS,** the federal Dodd-Frank Wall Street Reform and Consumer Protection Act established requirements for appraisal independence, including requirements that lenders and their agents pay “customary and reasonable” fees for residential mortgage appraisals, and mandating that the same state agency that regulates appraisers must require that appraisals ordered by appraisal management companies (“AMCs”) be conducted pursuant to the appraisal independence standards established in Truth In Lending Act section 129E;
- WHEREAS,** the legislature has recognized this federal requirement in enacting La. R.S. 37:3415.15(A) of the Louisiana Appraisal Management Company Licensing and Regulation Act, requiring that: “an appraisal management company shall compensate appraisers at a rate that is customary and reasonable for appraisals being performed in the market area of the property being appraised, consistent with the requirements of 15 U.S.C. 1639E [TILA section 129E] and the final federal rules as provided for in the applicable provisions of 12 CFR Parts 34, 225, 226, 323, 1026, and 1222”;

Full text available at: <http://gov.louisiana.gov/assets/ExecutiveOrders/JBE-17-16.pdf>

Executive Order

- On July 11, 2017, Governor Edwards signed Executive Order 17-16 establishing active supervision over promulgation and implementation of C&R rules
- Commissioner of Administration has power to accept, veto and modify C&R rules
- Division of Administrative Law to supervise enforcement of C&R rule, with power to accept, reject, or modify formal or informal settlements and adjudicated proceedings.
 - LREAB and DAL to negotiate contract within 90 days.

Board Resolution

- LREAB adopted a resolution on July 17 that:
 - ❑ Authorizes rulemaking to rescind and replace Rule 31101, subject to Commissioner of Administration review, and opportunity to veto or modify
 - ❑ Closes pending investigations upon LREAB finding that fees charged were customary & reasonable
 - ❑ Seeks resolution of all decrees, settlements, and compliance plans that have not expired by their terms
 - ❑ No new C&R investigations until replacement Rule 31101 becomes effective.

Full text: <http://www.reab.state.la.us/forms/Board%20Resolution%20to%20Readopt%20311.pdf>

Stay of Proceedings

- On July 28, FTC Administrative Law Judge granted 90-day stay of proceedings:
 - “[T]his case presents recent developments in the state law challenged that fundamentally change the factual and legal basis of this proceeding. Furthermore, any discovery pertaining to the LREAB’s regulatory and enforcement activities under the previous C&R rule may become less relevant in light of the July 11 Executive Order and July 17 Resolution.” *See* Order Granting in Part Motion to Stay Part 3 Proceedings, Docket 9374.

Status Update

- Comment period for new Rule opened on August 20 and ended on September 8
 - Public Hearing held on September 27
 - Record goes to Commissioner of Administration for review and further rulemaking requirements
- Contract for active supervision by administrative law judges of Division of Administrative law under negotiation.

What's Next in the Case

- Stay ends October 26, 2017
- Case will proceed, be further stayed, be dismissed, or be settled
- If the case proceeds, the Administrative Law Judge will issue a decision on remaining issues after a hearing
- Parties may appeal ALJ determination to Commission
- Only two sitting commissioners when Complaint issued
- Three additional commissioners may be appointed between now and early next year
- Any appeal of an ALJ determination could go to five member panel of commissioners

OTHER STATE DEVELOPMENTS

Proposed North Carolina C&R Legislation Was the Subject of FTC Comments

- House Bill 829's key provisions:
 - AMC-paid compensation presumed reasonable if reasonably related to recent rates paid by the consumer for comparable appraisal services performed in the geographic market of the property being appraised
 - Recent rates shall not include those amounts paid by AMCs
 - C&R rates shall be based on objective third-party information, such as academic studies, government fee surveys, and independent private sector surveys
 - Board shall adopt rules necessary to enforce this subsection

See FTC June 30, 2017 Letter to N.C. Assistant Attorney General Ouellette

FTC June 30, 2017 Letter

- H.B. 829 contains restrictions beyond Federal requirements.
- “We are concerned that [H.B. 829’s] approach restricts free-market determination of appraisal fees and therefore may ultimately result in higher prices for consumers.”
- “[T]he [N.C. Appraisal] Board appears to be controlled by active market participants. Thus, as currently constituted, the Board’s regulatory and enforcement activities mandated by HB-829 would be subject to federal antitrust law unless independent state officials actively supervise the Board’s activities, assuming the bill satisfies the clear articulation requirement.”
- “States may comply with Dodd-Frank requirements in ways that promote the goals of competition law.”

Response Letter of N.C. Real Estate Appraiser Association

- FTC “relies on an implicit assumption that ‘free-market’ negotiation of transaction-specific appraisal fees would result in appraisers receiving a customary and reasonable fee. This assumption is wrong. The C&R requirement is a federally-mandated regulatory check on free market outcomes.”
- No evidence that enforcement of C&R leads to higher prices paid by consumers, particularly where lender pays a fixed fee to AMC
- “[N]othing in the antitrust laws gives the Commission authority either to override a State’s obligations under Dodd-Frank to protect the public interest by promoting the integrity and quality of residential mortgage appraisals ...or to re-empower AMCs to compel appraisers to accept unduly low fees for inadequate appraisals.”

NCREAA Response (cont.)

- The C&R requirement “follows sound federal and state policies to protect North Carolina consumers as prospective mortgage borrowers. Any state requirements that exceed federal minimums for AMC regulation would be lawful Congressionally-anticipated exercises of North Carolina’s sovereign ability to go beyond federal requirements as the Legislature deems appropriate to protect North Carolina consumers.”
- “[T]he Legislature should consider appropriate amendments to HB-829 so that the Board may implement and enforce the AMC customary and reasonable fee requirements consistent with the requirements of federal antitrust law, such as under the doctrine of state action immunity ...”

Full text at <http://www.ncreaa.org/Home>

CONCLUSION

States Have Multiple Options

- August 10, 2018 deadline for having AMC supervision programs in place, with state-by-state extensions possible
- Enforcement of Dodd-Frank requirements under state law need not violate the antitrust laws
 - Most conduct not affecting pricing should not pose antitrust issues
 - Key facilitator: legislation setting out state C&R requirement and standards and appraisal agency requirements, which may exceed Dodd-Frank minimums
 - No active supervision needed if regulatory decisions vested in state employees or a board not “controlled” by active market participants

State Options (cont.)

- Active supervision may be prudent if board has active market participants as members
 - Nature of active supervision will vary by state and may be influenced by existing state mechanisms for professional licensing agencies
 - Mechanism may be set by legislation, but executive orders or other reorganization plans may be possible
 - Louisiana approach used existing state agencies given specific C&R oversight responsibilities by governor
 - AGs or departments of regulation may have leading role