

# 2018 FARB Regulatory Law Seminar

September 27-29, 2018  
Portland, Oregon

## The Federal Trade Commission Hour

2018 FARB Regulatory Law Seminar | September, 27-29 | Portland, OR



# Federal Trade Commission v. Louisiana Real Estate Appraisers Board

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2:30 PM

# Additional Resources

- ◉ Association of Appraiser Regulatory Officials, October 16, 2016 Presentation: [https://www.aaro.net/docs/S.\\_Cannon-\\_AARO\\_Fall\\_2017-\\_LREAB\\_v\\_FTC.pdf](https://www.aaro.net/docs/S._Cannon-_AARO_Fall_2017-_LREAB_v_FTC.pdf)
- ◉ FTC case docket (public pleadings): <https://www.ftc.gov/enforcement/cases-proceedings/161-0068/louisiana-real-estate-appraisers-board>
- ◉ LREAB November 20, 2017 Policy Statement: <http://www.lreab.gov/forms/11-20-17LREABPolicyStatement.pdf>
- ◉ Value Expo PowerPoint March 20, 2018: <https://constantinecannon.com/wp-content/uploads/2018/08/Val-Expo-Pres-3-20-18-002.pdf>
- ◉ LREAB 5th Circuit Principal Brief: [https://constantinecannon.com/wp-content/uploads/2018/08/2018\\_07\\_05\\_Brief-of-Petitioner-LREAB.pdf](https://constantinecannon.com/wp-content/uploads/2018/08/2018_07_05_Brief-of-Petitioner-LREAB.pdf)
- ◉ Commission 5th Circuit Response Brief: [https://constantinecannon.com/wp-content/uploads/2018/08/2018\\_08\\_06\\_FTC-Opposition-Brief.pdf](https://constantinecannon.com/wp-content/uploads/2018/08/2018_08_06_FTC-Opposition-Brief.pdf)
- ◉ LREAB 5<sup>th</sup> Circuit Reply Brief: <https://constantinecannon.com/wp-content/uploads/2018/08/REPLY-BRIEF-OF-PETITIONER-LREAB.pdf>
- ◉ Illinois Coalition of Appraisal Professionals, August 20, 2018: <https://constantinecannon.com/wp-content/uploads/2018/09/ICAP-8-20-18-Pres.pdf>
- ◉ *FTC Staff Guidance on Active Supervision of State Regulatory Boards Controlled by Market Participants*: [https://www.ftc.gov/system/files/attachments/competition-policy-guidance/active\\_supervision\\_of\\_state\\_boards.pdf](https://www.ftc.gov/system/files/attachments/competition-policy-guidance/active_supervision_of_state_boards.pdf)

# Agenda

- Setting the Stage:
  - Dodd-Frank Act Requirements
  - The Louisiana Real Estate Appraisers Board
- FTC vs. LREAB:
  - The Complaint and LREAB's Response
  - State Action Defense Requirements
  - Louisiana's Post-Complaint Response
  - The FTC's April 10, 2018 Decision and Louisiana's Further Responses
- LREAB v. FTC: Appeal at the Fifth Circuit
- FTC's Position on Active Supervision
- Conclusions



# 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

# Dodd-Frank Act (cont.)

- ◎ Section 1473 Amends FIRREA
  - > New FIRREA section 1124 requires federal financial regulatory agencies to establish “minimum requirements” for state appraisal management company (“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.)

- ◉ Federal prudential financial agencies to establish rules
- ◉ Interim Final Rules promulgated by Federal Reserve Board on October 28, 2010 establish:
  - > Two “presumptions of compliance,” 75 F.R. 66554, 66556; and
  - > An “all facts and circumstances” test without a presumption of compliance, Official Comment 42(f)(2), 42(f)(3), 75 F.R. at 66586.

# 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

80 F.R. 32679

# 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
- ◉ “Nothing in this subpart should be construed to prevent a State from establishing requirements in addition to those in this subpart.” 12 C.F.R. § 34.210(d)

# 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



# Federal AMC Minimum Requirements Apply to LREAB by State Law

- ◉ 2009 Louisiana AMC law required AMCs to be registered and regulated by LREAB
- ◉ 2012 and 2016 amendments to AMC law required LREAB to regulate and enforce AMCs' C&R 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 Rule 31101

- ◉ AMCs shall compensate appraisers at a rate that is customary and reasonable
- ◉ Compliance can be demonstrated by any of three methods:
  - The two “presumptions of compliance” as under Federal rules
    - Recent rates with using the six-factor adjustments
    - Geographically relevant and objective third-party information, including fee schedules and surveys/studies
  - All facts and circumstances (including six factors).

La. Admin Code 46:31101

# LREAB Commissioned a Fee Survey

- ◉ 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

- ⦿ “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

## The Basics

## 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. ... 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's Position (cont'd)

- ◉ 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 controlling Board action.
  - > "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's 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's Position (cont.)

## ◉ Regulatory compliance defense

- LREAB's conduct was undertaken as a good faith effort to meet its public obligations under federal regulatory requirements
- "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 (9th Cir. 1981) (Author: then-judge Anthony Kennedy)
- FTC's Complaint Counsel has challenged this LREAB defense and asked for the Commission to rule that the defense is not applicable to LREAB's conduct.

# FTC v. LREAB:

## The State Action Defense

# State-Action Immunity Defense and 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)



# Question: Is a Board “Controlled by Active Market Participants”?

- ◉ FTC April 10 Opinion held:
  - Any board member who merely holds a license to engage in the activity at issue actively participates in the regulated market. Opinion at 17
  - Market participants could control a board with less than a majority.
- ◉ LREAB argued:
  - Whether a member was an “active” participant required an inquiry into their activities posed an actual potential conflict of interest
  - A majority of LREAB members did no residential appraisals that would be affected by Rule 31101

# State Action Defense Requirements

- ◉ If State Board is controlled by active market participants, *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980) applies.
- ◉ Two-part test :
  - > "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

# Active Supervision

- ◉ State action immunity does not automatically apply to all 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
  - › “Inquiry regarding active supervision is flexible and context-dependent”
  - › Underlying principle: state accepts “political accountability” for a board’s actions

135 S. Ct. at 1116-17

- ◉ Note: The above is effectively dicta because the Dental Board did not claim to be actively supervised so “no specific supervisory systems can be reviewed here.”
- ◉ In turn, the FTC’s *Staff Guidance* on active supervision has neither been adopted by the Commission nor by the courts.

# FTC Statement on Active Supervision

- ◉ July 6, 2017 ALJ 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.

# FTC v. LREAB:

## Louisiana's Post-Complaint Response





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

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

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- 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
- The Louisiana Commissioner of Administration ("COA") has power to accept, veto or modify C&R rules
  - Added parallel layer of review to oversight by Senate and House Commerce subcommittees
- Division of Administrative Law ("DAL") to supervise enforcement of C&R rule, with power to accept, reject, or modify complaints, formal or informal settlements and adjudicated proceedings
  - LREAB and DAL to negotiate contract within 90 days

# Board Resolution

## ◉ LREAB Resolution of July 17:

- › 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 at:

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

# The ALJ's Stay Ruling

- On July 18, 2017, LREAB filed a motion for stay of administrative proceedings based on Executive Order 17-16, and its July 17 Resolution to permit LREAB to implement the E.O.
- On July 28, the ALJ granted a 90-day stay
  - “[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.” Order Granting in Part Motion to Stay Part 3 Proceedings, Docket 9374

# Repeal and Readoption of Rule 31101

- ◉ August 20, 2017- proposed Rule 31101 repeal and readoption published in *Louisiana Register*
- ◉ September 9- comments submitted; September 27, hearing held
- ◉ November 9- Division of Administration approved new rule
  - Rule 31101 “will further the public policy goals of the State of Louisiana by ensuring that real estate appraisers will be paid a customary and reasonable fee by AMCs. This, in turn, will strengthen the accuracy, integrity, and quality of real estate appraisals, which, among other benefits, can prevent a recurrence of the real estate bubble from the last decade.”
- ◉ Louisiana Senate and House Commerce Committee oversight subcommittees each determined that it was unnecessary to hold hearings concerning the proposed Rule, and that promulgation of the Rule should proceed
- ◉ November 20- readopted Rule published in *Louisiana Register* and it takes effect

# LREAB Actions to Eliminate Ongoing Effects of Enforcement Under Prior Rule 31101

- ◉ Prior Rule 31101 cannot and will not be the basis of any further enforcement action by the Board.
- ◉ As of November 20, 2017, there are no pending enforcement actions before the Board under either prior Rule 31101 or replacement Rule 31101.
- ◉ All actions under prior Rule 31101 have been terminated by the Board with no finding of violation, or have expired by their own terms, or have been vacated by the Board.
- ◉ No proposed fee or payment that occurred prior to November 20, 2017 will be the basis of, or admissible as evidence in, any enforcement action under replacement Rule 31101.
- ◉ The fact of any prior investigation or enforcement action against an AMC under prior Rule 31101 will not be admissible as evidence in any enforcement action under replacement Rule 31101.

# First LREAB Contract with the Division of Administrative Law

- ◉ DAL is an Executive Branch agency that provides independent ALJ's under contract to other agencies.
- ◉ Prior to initiating any enforcement action, the ALJ would review whether evidence submitted by the Board shows a likelihood of noncompliance, and whether the proposed action would serve Louisiana state policies to protect the integrity of mortgage appraisals.
- ◉ The ALJ also would review whether proposed informal resolutions, settlements, or dismissals of any approved enforcement action are consistent with those policies.
- ◉ The ALJ further would review the record of any hearing and any proposed relief in an enforcement action conducted by the Board, consistent with the standards of review set forth in the Louisiana Administrative Procedures Act and the aforementioned state policies, and will approve, reject, or modify the Board's recommended decision and proposed relief, and may remand for further proceedings. The Board will adopt and implement the ALJ's determination. An AMC may appeal the Board's decision to the 19th Judicial Circuit Court.

# FTC v. LREAB

The FTC's State Action  
Decision and Louisiana's  
Response



# November 27, 2017

- Temporary stay of FTC proceedings to permit Executive Order implementation ends
- LREAB files Motion to Dismiss
  - LREAB argued that the Board had state-action immunity and that FTC's complaint is moot: "The State's active supervision over promulgation and enforcement of [readopted] Rule 31101 advances clearly articulated State policies under the AMC Act ... and therefore immunizes the Board's actions from further federal antitrust scrutiny."
- FTC Complaint Counsel files Motion for Partial Summary Decision on Past Applicability of State Action Doctrine (November 2013 through April 2017)
  - Complaint Counsel argued that neither oversight by the Louisiana Legislature over adoption of Rule 31101 nor review of Board decisions were sufficient "active supervision."

# The FTC's April 10 Opinion and Order

- ◉ Denied LREAB's Motion to Dismiss, finding:
  - › Actions of the Commissioner of Administration and the House and Senate Commerce Committee were not sufficient to constitute active supervision of the repromulgation of Rule 31101
  - › Division of Administration's General Counsel had said division lost ability to reject or amend repromulgated Rule when it was sent to legislature, but found rule to be in consistent with Louisiana's public policy
  - › DAL contract could leave some enforcement actions unsupervised and judicial review was not an adequate protection
- ◉ Granted the FTC's motion for partial summary decision finding:
  - › Actions of the Louisiana legislature in reviewing the initial promulgation of Rule 31101 were insufficient to constitute active supervision, and
  - › Judicial review did not constitute active supervision of enforcement actions
- ◉ Dismissed LREAB's state-action immunity defenses both pre- and post-Complaint

# The Senate Affirms Pre-decision Active Supervision

- ◉ On May 14, 2018, the Louisiana Senate unanimously passed Senate Concurrent Resolution 117
  - Reviewed actions of Senate and House Commerce Committees in 2013 and 2017
  - Declared “the Legislature of Louisiana hereby affirms that the promulgation and repromulgation of [Rule] 31101 were the sovereign acts of Louisiana and its legislature”

<http://www.legis.la.gov/legis/ViewDocument.aspx?d=1096438>;

<http://www.legis.la.gov/legis/BillInfo.aspx?s=18RS&b=SCR117&sbi=y>

# Louisiana Acts to Reinforce Active Supervision of Rulemaking

- ◎ 2018 Act 623, The Occupational Board Compliance Act, signed May 30
  - Legislative intent to “ensure that occupational boards and board members will avoid liability under the federal antitrust laws;” scope is boards controlled by individuals licensed or regulated by the board
  - Occupational Licensing Review Commission composed of Governor, Secretary of State, Commissioner of Agriculture, Commissioner of Insurance, Treasurer (or designees); supported by governor, with agency staff as requested
  - Effective January 1, 2019, occupational regulations must be submitted to the Commission to justify the rule and, e.g., explain why it is the least restrictive alternative prior to issuing a notice of intent, and then follow rulemaking proceedings; the Commission has the power to approve, reject, or to require modifications.

<http://www.legis.la.gov/legis/ViewDocument.aspx?d=1103393>

# LREAB and DAL Amend Contract

- ◉ Revised MOU effective for fiscal years beginning July 1, 2018
  - Clarified that all formal or informal enforcement actions and settlements thereof are subject to review by DAL
  - Decoupled the review standard from the Louisiana APA to reinforce ability of ALJ independently to review LREAB findings of fact, legal conclusions, and remedies to assure that LREAB actions serve “Louisiana’s policy of protecting the integrity of residential mortgage appraisals, rather than merely serve[ ] the interests of affected market participants.”
  - Added other provisions strengthening DAL’s role



EXECUTIVE DEPARTMENT  
EXECUTIVE ORDER NUMBER JBE 2018 - 20

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

***AMENDING EXECUTIVE ORDER NUMBER JBE 17-16***

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**WHEREAS**, Executive Order Number JBE 17-16, issued on July 11, 2017, directed the Louisiana Real Estate Appraisers Board (“the LREAB”) to submit to the Commissioner of Administration (or the Commissioner’s designee) for approval, rejection, or modification within 30 days of the submission any proposed regulation related to appraisal management company (“AMC”) compliance with the customary and reasonable fee requirement of La. R.S. 37:3415.15(A), along with its rulemaking record, to ensure that such proposed regulation would serve Louisiana’s public policy of protecting the integrity of the residential mortgage appraisals by requiring that the fees paid by AMCs for an appraisal are customary and reasonable;

Full text available at: <https://www.doa.la.gov/osr/other/JBE%202018/JBE18-20.html>

# Governor Edwards Issues A Revised Executive Order

- ◎ E.O. 18-20 promulgated August 17
  - Primary objective was to revise E.O. 17-16 in light of Act No. 623; but also confirmed ongoing COA and DAL authority
  - Until January 1, 2019, "The authority of the Commissioner of Administration under this section shall continue in effect, including the obligation to approve, reject, or modify any such proposed LREAB regulation and to direct LREAB to comply with such determination, notwithstanding the submission of such proposed regulation to the Legislature by LREAB."
  - The DAL's review "is to ensure fundamental fairness and that the proposed action serves the interests of the State of Louisiana. The LREAB shall maintain a contract with the DAL to establish the procedure for this review."

# **LREAB v. FTC: Appeal at the Fifth Circuit**



# On April 19, LREAB Filed a Petition for Review of the Decision In Fifth Circuit Court of Appeals

- ⦿ Appealed the dismissal of LREAB's state-action immunity defenses (both the denial of LREAB's motion to dismiss and the granting of the Complaint Counsel's motion for partial summary decision)
- ⦿ Appeal is based on the "collateral order doctrine," which permits states to appeal decisions to deny immunity on an interlocutory basis
  - There is a split among the Circuits whether the doctrine applies to antitrust state action immunity; Fifth Circuit precedent holds that it does

# Motion to Stay FTC Proceedings

- On June 6, the Commission denied LREAB's Motion to Stay, in part stating that a prompt resolution of the Complaint will provide guidance to states
- LREAB then filed a Motion to Stay FTC Proceedings with the 5th Circuit, which the court granted on July 17
- All FTC administrative proceedings are now stayed

# Fifth Circuit Merits Briefing Completed

- ◉ LREAB's Opening Brief filed on July 5; its key points:
  - › *Parker v. Brown* was not overturned by *N.C. Dental*
  - › Like the commission in *Parker*, LREAB's members are appointed by the governor, confirmed by the Senate, and removable for cause, totally unlike the Dental Board whose members are elected by dentists
  - › Even if active supervision is required, Louisiana has met that requirement through actions of its legislative, executive, and judicial branches
  - › Case is moot because, given prospective state action and LREAB actions post-Executive Order, no effective relief remains to be granted

# Fifth Circuit Merits Briefing Completed (cont'd)

- ◉ FTC Response Brief filed on August 6; its key points:
  - Fifth Circuit should dismiss the appeal for a lack of jurisdiction
  - State Action does not apply
    - *Parker* does not apply, only look to *N.C. Dental*
    - No clear articulation
    - No active supervision, either pre- or post-Executive Order
  - Case is not moot because relief can still be granted

# Fifth Circuit Merits Briefing Completed (cont'd)

- LREAB Reply filed August 20; its key points:
  - Fifth Circuit has jurisdiction to hear appeal; FTC mischaracterizes precedent.
  - LREAB's conduct is the sovereign act of Louisiana either under *Parker* or *Midcal*

# Fifth Circuit *Amici* Briefs Filed

- ◉ The Federation of State Medical Boards argued that what constitutes active supervision should be assessed on a continuum of factors under the “flexible and context-dependent” standard; Louisiana’s supervision meets those tests.
- ◉ Mississippi, Idaho, Iowa, Rhode Island, and Utah argued that the interlocutory appeal should be heard under the collateral order doctrine.
  - > This question had been before the Supreme Court in 2018 in *Salt River Project v. Tesla Energy Operations f/k/a SolarCity* (dismissed as moot), Docket No. 17-368; twenty-four states filed an *amicus* brief supporting use of the collateral order doctrine in state action immunity cases
  - > [https://www.supremecourt.gov/DocketPDF/17/17-368/28740/20180122160135390\\_17-368%20Amici%20Brief%20States.pdf](https://www.supremecourt.gov/DocketPDF/17/17-368/28740/20180122160135390_17-368%20Amici%20Brief%20States.pdf)

# As of Sept. 26, Five New FTC Members Have Been Sworn In

- ◎ New Commissioners
  - › Joseph Simons, Republican and Chairman
  - › Noah Joshua Phillips, Republican
  - › Rohit Chopra, Democrat
  - › Rebecca Kelly Slaughter, Democrat
  - › Christine S. Wilson, Republican
- ◎ If the Fifth Circuit orders a remand, the result will be that there will have been an unprecedented complete turnover of the Commission members between the filing of a Complaint and its potential adjudication; the two commissioners who voted out the Complaint and issued the April 10, 2018 Opinion are no longer on the Commission.

# The FTC's Position on Active Supervision

What states consider  
enough is likely insufficient



# The FTC's Enforcement Framework

- ◉ "To be clear, neither antitrust enforcement nor the state action doctrine is a vehicle for the federal government to *micromanage* the affairs of the sovereign states."
- ◉ However, "[T]he critical inquiry is 'whether the State's review mechanisms provide *'realistic assurance'* that a nonsovereign actor's anticompetitive conduct 'promotes state policy, rather than merely the party's individual interests.' ... The appropriate scope of the active supervision requirement in the state action defense is the central issue raised by the instant Motions we decide here."

April 10, 2018 Opinion at 1-2 (emphasis added)

# LREAB's Argument

- ◉ LREAB argued that active supervision was provided by:
  - The Commerce Committees' affirmative actions in 2013 and 2017 in allowing Rule 31101 to become effective
  - The Governor's and Commissioner of Administration's 2017 reviews of Rule 31101 repromulgation
  - DAL's prospective review of investigations and enforcement actions
  - Judicial review of enforcement actions

# “Realistic Assurance” or “Micromanagement”?

- ◉ While recognizing that one method of active supervision would be sufficient, the FTC held that each method individually and collectively was insufficient
- ◉ Troubling positions include:
  - Oversight committees always need to hold a hearing to make supervision active
  - Supervisor has to memorialize in detail the facts and reasoning supporting its conclusion
  - Claimed procedural deficiencies override substantive findings
  - No deference given to a state’s interpretation of its own contracts
  - Contention that Louisiana’s post-April 10 efforts to address the FTC’s concerns is evidence that LREAB could end active supervision without an ongoing FTC decree

# Refusal to Accept Legislative Procedure

- ◉ Louisiana law provides for legislative approval/veto of agency regulations when the legislature is not in session, including by holding hearings on them.
  - The record demonstrated that the Senate and House Commerce Committees affirmatively reviewed LREAB's rulemaking record and legislative report and determined not to hold hearings.
  - The Senate Commerce oversight subcommittee met in October 2013 and voted 6-3 not to hold a hearing as the quickest way to let Rule 31101 come into effect.
  - The subcommittees' determinations in 2017 were made with full knowledge of the FTC's allegations regarding Rule 31101.

# Refusal to Accept Legislative Procedure (cont'd)

- Nevertheless, the FTC held that, because no hearings were held in 2013 and 2017, there was no active supervision.
- The FTC's binary view of legislative supervision as hearing or inaction invades states' prerogatives:
  - Principles of federalism and state sovereignty reject any notion that federal antitrust laws may insist on "day-to-day involvement in an agency's operations or micromanagement of its every decision." *N.C. Dental*, 135 S. Ct. at 1116. Standards of "realistic assurance" and "flexible and context-dependent" assess state supervision along a spectrum, not at polar extremes.

LREAB Reply brief at 25.

# Criticizing the Procedure, Not Substance, of COA Review

- ◉ The Commission cannot dismiss the COA's judgment merely by questioning it: "[D]etermination of 'the public interest' in the manifold areas of government regulation entails . . . value judgment, and it [*Parker*] was not meant to shift that judgment from elected officials to judges and juries." *City of Columbia v. Omni Outdoor Advert., Inc.*, 499 U.S. 365, 377 (1991).
- ◉ Further, "a procedural irregularity in the adoption of the challenged state regulation does not render *Parker* inapplicable." *Llewellyn v. Crothers*, 765 F.2d 769, 774 (9th Cir. 1985) (Kennedy, J.). Given that "[a] state's antitrust immunity springs from an essential principle of federalism . . . actions otherwise immune should not forfeit that protection merely because the state's attempted exercise of its power is imperfect in execution under its own law." *Id.*

# Using Louisiana Actions to Enhance Active Supervision to Justify an FTC Decree

- ◉ The FTC argued to the Fifth Circuit that Louisiana's remedial actions demonstrate the need for continuing FTC oversight of LREAB:
  - "[T]he State of Louisiana and the Board have created a moving target by changing supervision measures multiple times since the Commission issued its administrative complaint. ... Indeed, the speed with which Louisiana amended its regime in response to the Complaint suggests the ease of doing the same in reverse. And the terms of DAL supervision are set out in a *contract* that may be readily modified." FTC Br. 50, 53 (emphasis in original).

# Using Louisiana Actions to Enhance Active Supervision to Justify an FTC Decree (cont'd)

- ⦿ This argument blinks the reality of what Louisiana has done. All State actions have marshaled Louisiana's legislative and executive power to shore up the immunity that the State intended LREAB to have *before* the Complaint was filed.
- ⦿ There is thus no basis for the Commission's speculative concern.



# Conclusions

Lessons From Engaging  
With the FTC

# Conclusions

- ◉ Be proactive, rather than reactive, regarding state action issues
- ◉ Most regulatory board actions should not raise antitrust concerns
- ◉ Consider the structure of board membership
- ◉ However, if challenged, the FTC's approach has been to focus on any supposed defects in state action requirements for boards having market participants
- ◉ Conversely, FTC staff might not provide you with guidance as to what is sufficient

# Questions?

# Thank you

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