
UPDATE:
CUSTOMARY & REASONABLE
A Louisiana Real Estate Appraisers
Board Perspective

W. Stephen Cannon
Valuation Expo
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Additional Resources

- AARO- 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](https://www.ftc.gov/enforcement/cases-proceedings/161-0068/louisiana-real-estate-appraisers-board)
- LREAB November 20, 2017 Policy Statement:
<http://www.reab.state.la.us/forms/11-20-17LREABPolicyStatement.pdf>

AGENDA

■ Setting the Stage

- ❑ Customary & Reasonable Fees Under Dodd-Frank
- ❑ Louisiana Real Estate Appraiser Board Response

■ The FTC vs. LREAB: The Basics

- ❑ The Complaint
- ❑ The Governor's Executive Order and the Response

■ Status of the Case

- ❑ The Issues Are Joined: LREAB Motion to Dismiss; FTC Motions for Partial Summary Decision
- ❑ FTC Commissioners in Transition
- ❑ The Hearing- The ALJ and New Commissioners

■ Conclusions

SETTING THE STAGE

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The Statutory/Regulatory Framework Impacting FTC v. Louisiana Real Estate Appraisers Board

- History of the of the 2010 Dodd-Frank 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'd)

- 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.

The Dodd-Frank Act (cont.)

- Section 1473 Amends Financial Institutions Reform, Recovery, and Enforcement Act
 - New FIRREA section 1124 requires federal financial regulatory agencies to establish “minimum requirements” for state AMC supervision, including
 - “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 subsection 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.)

- The Federal Reserve's October 2010 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
 - 2. Review of six factors to adjust fees to ensure that they are “reasonable”

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.
 - “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), *Id.*

Customary & Reasonable (cont.)

- Second presumption:
 - Use of independent third party fee studies or government-specified rates as set out in the statutory safe harbor.
 - “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.
 - However, fee studies or surveys cannot include fees paid by AMCs for residential appraisals.

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.

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
 - Revised ASC Policy Statements promulgated March 5, 2018 incorporate AMC registration and minimum regulatory requirements into ASC supervision and compliance reviews, 83 Fed. Reg. 9144

LREAB Rule 31101

- AMCs shall compensate appraisers at a rate that is customary and reasonable
- Compliance can be demonstrated by:
 - 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, so long as six factors addressed

LREAB Commissioned a Fee Study

- LREAB commissioned an independent study through the Southeastern Louisiana University to identify, on an annual basis, the 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

FTC V. LREAB: THE BASICS

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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 AMC’s 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”

LREAB's Position

- No Sherman Act violation
- Regulatory compliance defense
 - If a defendant can establish that at the time of the alleged anticompetitive acts, it had a reasonable basis to conclude that its actions were required by a regulatory mechanism, then its actions are not an antitrust violation. *Phonetele v. American Tel. & Tel. Co.*, 664 F.2d at 737-38 (Ninth Cir. 1981)
 - LREAB's conduct was undertaken as a good faith effort to meet its public obligations under federal regulatory requirements
 - FTC's Complaint Counsel has challenged this LREAB defense and asked for the Commission to make such a determination.
<https://www.ftc.gov/system/files/documents/cases/180206ccmotion589561.pdf>

State Action Defense

- 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).

Active Supervision

- State action immunity does not automatically apply to non-sovereign actors
 - 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. State Bd. of Dental Exam'rs v. FTC*, 135 S. Ct. 1101, 1114 (2015).

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.

LOUISIANA'S RESPONSE

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Issued July 11, 2017



*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 or modify C&R rules
 - ❑ Added parallel layer of review to oversight by Senate and House Commerce subcommittees
- Division of Administrative Law 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>

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's November 20, 2017 Policy Statement

- LREAB highlighted the previously discussed three methods of compliance as set out in the Rule.
- “Under each of these three methods, the Rule contemplates that the AMC may make necessary and appropriate adjustments to recent rates paid in the relevant geographic market to ensure that the amount of compensation is ‘reasonable’ as well as customary.”
- LREAB has not adopted a fee schedule, a fourth method, as permitted by Rule 31101, and has no present intention to do so;
- LREAB will also terminate sponsorship of the SLU survey, and as they have become out of date, they have been removed.

Available at <http://www.reab.state.la.us/forms/11-20-17LREABPolicyStatement.pdf>

The Policy for Future Enforcement of C&R

- The Board's primary goal is that AMCs comply with the AMC Law and Rule 31101.
- The Board strives to enforce the customary and reasonable fee requirement on a non-discriminatory basis.
- AMCs found in non-compliance will be required to submit an effective plan to come into compliance. ...
- The Board's policy has been to assess penalties where it is clear the AMC has not made reasonable efforts to comply with the Rule. ...
- However, the customary and reasonable fee obligation has been part of Louisiana law since 2013. Going forward, AMCs should expect that "reasonable efforts" will no longer be considered sufficient, such that penalties for failure to comply with the law will become more common in addition to requirements for remedial action to achieve compliance.

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.

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 will 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 will review whether proposed informal resolutions, settlements, or dismissals of any approved enforcement action are consistent with those policies.
- The ALJ further will 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 decision to the 19th Judicial Circuit Court.

THE CURRENT STATUS OF FTC V. LREAB

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Pre-Hearing Proceedings Underway

- ALJ and Commission ordered 120-day stay of proceedings after Executive Order;
 - ALJ Chappell: “recent developments in the state law challenged in the Complaint ... fundamentally change the factual and legal basis of this proceeding.”
- Stay expired November 26, 2017
 - LREAB and Complaint Counsel filed “dispositive motions”
 - Pre-hearing discovery underway, including depositions and expert reports
- Hearing before ALJ set for June 11, 2018

On November 27, LREAB Moved to Dismiss Case

- LREAB argued that the 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.”
 - “The Board has eliminated potential current and prospective effects of its past promulgation and enforcement of its prior C&R rule ... and committing to no longer fund an objective third-party survey of fees that the Complaint alleges “effectively” set prices.
 - “All Contemplated Relief requested in the Complaint is immune from further antitrust scrutiny, or is satisfied and moot. The Complaint should be dismissed.”
- <https://www.ftc.gov/system/files/documents/cases/588835motiontodismisscomplaintpdf.pdf>
- FTC Complaint Counsel responded that measures implementing E.O. did not provide active supervision and would not prevent recurrence of alleged price restraints.

FTC Complaint Counsel Moved For Partial Summary Decision on Past Applicability of State Action Doctrine

- Complaint Counsel argued that actions of Louisiana Legislature under the Louisiana’s oversight of LREAB rulemaking was not sufficiently “active” to immunize adoption of Rule 31101, nor was there active supervision of LREAB’s enforcement activities.
- LREAB disputed the factual basis of those allegations, noting, for example, that the Louisiana Legislature and Governor did actively supervise the promulgation of prior rule 31101, for example with a Senate committee voting 6-2 to let it go into effect.

The Commission Ordered Oral Argument on the Motions

- Held on February 22
- Parties instructed to focus on the following question:
 - “Since the issuance of the Complaint, has the State of Louisiana taken sufficient steps to establish active supervision over the conduct of the Respondent at issue in this matter?”
- There were, and are, only two Commissioners, both of whom will be leaving the Commission in the near term: Acting Chairman Ohlhausen has been nominated to the Court of Claims and Commissioner McSweeny’s term has expired—and her successor has been nominated.

Oral Argument (cont'd)

- LREAB's counsel explained why the Executive Order and Louisiana Law provided multiple layers of active supervision, by the Commissioner of Administration, the Legislature, the Governor, and the judiciary, as well as by the Division of Administrative Law.
- But FTC Complaint Counsel's position was that none of this mattered:
 - "The Commission has asked, since the issuance of the complaint, has the state of Louisiana taken sufficient steps to establish active supervision over the conduct of the Respondent, and the answer is plainly no. It's no regardless of whether you find that this – these steps and procedures that have been put in place are adequate on their face or not adequate on their face." Tr. 30.
 - Rather, the FTC should issue an order requiring LREAB to cease and desist conduct regarding C&R fees that violate the FTC Act with a proviso that LREAB may demonstrate that such challenged actions constitute state action.

Oral Argument (cont'd)

- LREAB's Counsel objected to this view of Louisiana's active supervision:
 - To accept Complaint Counsel's arguments "you would have to assume that the Governor and the Commissioner of Administration, the House Commerce Committee Oversight Committee, the Senate Oversight Subcommittee, and the Division of Administrative Law, as well as the state courts of Louisiana, cannot be trusted to do their job, that they will innately be derelict in their duties, that they will not take seriously the requirements of the Louisiana Administrative Procedures Act or the requirements of the Executive Order. I respectfully submit, at least as a matter of state sovereignty, that the Commission cannot make that assumption." Tr. 44-45.
- A decision is to be issued by April 9.

Transcript to be posted at <https://www.ftc.gov/enforcement/cases-proceedings/161-0068/louisiana-real-estate-appraisers-board>

NEXT STEPS

**THE FTC IN TRANSITION: WHO WILL
MAKE A DECISION AND WHEN?**

Four New FTC Members Have Received Senate Committee Approval; Confirmation Timing Uncertain

■ Nominees

- ❑ Mr. Joseph Simons, Republican and Chairman-Designate
 - ❑ Mr. Noah Joshua Phillips, Republican
 - ❑ Ms. Christine S. Wilson, Republican
 - ❑ Mr. Rohit Chopra, Democrat
- However, the fifth commissioner, a Democrat, has not yet been nominated

Existing Commissioners May Decide Pending Motions

- Probability that new Commissioners will not be in place before motions must be decided.
 - April 9: LREAB Motion to Dismiss; Complaint Counsel Motion for Partial Summary Decision on past active supervision
 - April 16: Complaint Counsel Motion for Partial Summary Decision on good faith regulatory compliance
- If LREAB Motion to Dismiss is favorable, case ends.
- If Complaint Counsel succeeds on one or both of its Motions, the case is narrowed and any legal conclusions become the “law of the case”

Next Stop: The ALJ Hearing

- The FTC's Complaint Counsel has the burden of proving that LREAB engaged in the unlawful conduct alleged in the FTC's Complaint
 - LREAB believes that the evidence, including its expert's testimony, will demonstrate that no such violation occurred.
- If the Complaint Counsel cannot carry its burden, the issue of affirmative defenses does not arise.
- LREAB believes, to the extent permitted by the decisions on the Complaint Counsel's motions, that it can prevail on state action and regulatory good faith affirmative defenses.

After the ALJ Hearing

- The hearing is expected to run 4-5 weeks
- ALJ decision should come in the fall
 - Addresses remedies as well as liability
- Parties have the right to appeal to the full Commission
 - Conducts *de novo* review on both law and facts
- By then, Commission should have 5 new members, none of whom voted out the complaint or likely participated in deciding dispositive motions
- LREAB may appeal the Commission's decision to the Fifth U.S. Circuit Court of Appeals in New Orleans

CONCLUSIONS

Conclusions

- The FTC's Complaint proceeding is at a crucial stage
 - The FTC should dismiss the case as moot
 - LREAB believes it has a strong case on the merits should the case proceed to a hearing
- What happens could serve as guideposts for other states
- LREAB remains committed to enforcement of the C&R mandate of Dodd-Frank and the Louisiana AMC Act under the active supervision mechanism established by the Executive Order

QUESTIONS?

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Thank you

W. Stephen Cannon

Constantine Cannon LLP

202-204-3502

scannon@constantinecannon.com

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