

Analysis of Consent Order to Aid Public Comment

In the Matter of Louisiana Real Estate Appraisers Board, Docket No. 9374

I. INTRODUCTION

The Federal Trade Commission (“Commission”) has accepted, subject to final approval by the Commission, an Agreement Containing Consent Order (“Consent Agreement”) with the Louisiana Real Estate Appraisers Board (“the Board”). The Consent Agreement resolves allegations against the Board in the administrative complaint issued by the Commission on May 31, 2017.

The Commission has placed the Consent Agreement on the public record for 30 days to solicit comments from interested persons. Comments received during this period will become part of the public record. After 30 days, the Commission will again review the Consent Agreement and the comments received, and will decide whether it should withdraw from the Consent Agreement, modify it, or issue the proposed Order.

The proposed Order is for settlement purposes only and does not constitute an admission by the Board that it violated the law, or that the facts alleged in the complaint, other than jurisdictional facts, are true.

II. CHALLENGED CONDUCT

This matter involves allegations that the Board unreasonably restrained price competition for appraisal services in Louisiana. The Board is a state regulatory agency controlled by Louisiana-licensed appraisers. The Commission’s complaint challenges the Board’s promulgation and enforcement of subparts A, B, and C of Rule 31101 of Title 46 Part LXVII of the Professional and Occupational Standards of the Louisiana Administrative Code (“Rule 31101”).

The complaint alleges that the Board’s promulgation and enforcement of Rule 31101 displaced competition and introduced a regime of rate regulation. The Board’s actions had the effect of requiring appraisal management companies (“AMCs”) to pay rates for appraisal services consistent with median fees identified in fee surveys commissioned and published by the Board. Specifically, the Board investigated and issued complaints against AMCs that paid fees below the rates specified in the surveys, and entered into settlement agreements with AMCs that required those companies to pay fees at or above the median fee survey levels.

The complaint alleges that the Board’s actions exceeded the scope of its obligations under the appraisal independence provisions in the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”). The complaint further alleges that the Board’s conduct resulted in anticompetitive harm in the form of higher appraisal fees paid by AMCs in Louisiana, and that this harm is not outweighed by any procompetitive benefits.

III. LEGAL ANALYSIS

The factual allegations in the complaint support a finding that the Board violated Section 5 of the FTC Act, 15 U.S.C. § 45, by promulgating and enforcing Rule 31101.

Section 5 of the FTC Act prohibits unfair methods of competition, including unlawful agreements in restraint of trade prohibited by Section 1 of the Sherman Act, 15 U.S.C. § 1.¹ Under Section 1, a plaintiff must show (1) concerted action that (2) unreasonably restrains competition.²

A state regulatory board that consists of market participants with distinct and potentially competing economic interests engages in concerted action when it adopts or enforces rules that govern the conduct of its members' separate businesses.³ Rule 31101, adopted and enforced by the Board, regulates the fees paid by AMCs to appraisers in Louisiana, including those appraisers that serve as members of the Board.

Price regulation practiced by market participants is a form of price fixing and is per se unlawful.⁴ In the alternative, a restraint on price competition may be judged inherently suspect: that is, the agreement is presumed to be anticompetitive because the anticompetitive nature of the challenged conduct is obvious.⁵

The state action defense is not applicable here. On a motion for partial summary decision, the Commission concluded that: (1) the Board is controlled by active market participants; (2) therefore, in order to constitute state action, the Board's conduct must be actively supervised by the State; and (3) the Board's promulgation and enforcement of Rule 31101 were not actively supervised by the State of Louisiana.⁶

The Dodd-Frank Act also does not give rise to a defense to antitrust liability. Exemptions from the antitrust laws are to be narrowly construed,⁷ and the general rule is that, except where federal statutes impose conflicting obligations, courts will give effect to both statutes.⁸ The

¹ 15 U.S.C. § 45; *see, e.g., FTC v. Cement Inst.*, 333 U.S. 683, 693–94 (1948).

² 15 U.S.C. § 1; *see, e.g., Arizona v. Maricopa Cnty. Med. Soc.*, 457 U.S. 332, 342–343 (1982).

³ *See N.C. Bd. of Dental Exam'rs v. FTC.*, 574 U.S. 494, 510–12 (2015); *In re N.C. Bd. of Dental Exam'rs*, 2011 FTC LEXIS 290 at *38–39, 2011-2 Trade Cas. (CCH) P77,705 (Comm'n Op. and Order, Dec. 7, 2011); *see also Mass. Bd. of Registration in Optometry*, 110 FTC 549, 1988 WL 1025476 at *47–48 (Comm'n Op. and Order, June 13, 1988).

⁴ *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 639 (1992) (equating price regulation by market participants with per se unlawful price fixing); *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 103–106 (1980) (same); *Goldfarb v. Va. State Bar*, 421 U.S. 773, 781–82 (1975) (same); *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 386–390 (1951) (same); *Ky. Household Goods Carriers Ass'n, Inc. v. FTC*, 199 F. App'x 410, 411 (6th Cir. 2006) (same).

⁵ *N. Tex. Specialty Physicians v. FTC*, 528 F.3d 346, 359–63 (5th Cir. 2008); *Polygram Holding, Inc. v. FTC*, 416 F.3d 29, 35–36 (D.C. Cir. 2005).

⁶ *In the Matter of La. Real Est. Appraisers Bd.*, No. 9374, Op. and Order of the Comm'n, at 19–20 (Apr. 10, 2018).

⁷ *Union Labor Life Ins. Co., v Pireno*, 458 U.S. 119, 126 (1982).

⁸ *See Pom Wonderful LLC v. Coca-Cola Co.*, 573 U.S. 102, 107 (2014) (“When two statutes complement each other, it would show disregard for the congressional design to hold that Congress nonetheless intended one federal statute to preclude the operation of the other.”); *Morton v. Mancari*, 417 U.S. 535, 551 (1974) (“The courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is

“good faith regulatory compliance defense” to antitrust liability is a narrow, rarely invoked defense. The defense applies only when there is an inconsistency between the antitrust laws and the imperatives imposed on the respondent by federal regulation, such that the respondent is not able to comply with both laws.⁹ “The defense does not insulate anticompetitive conduct that a respondent freely chooses to undertake; the conduct must be necessitated by regulatory and factual imperatives.”¹⁰

With regard to the Board’s conduct at issue here, there is no conflict or inconsistency between the Board’s obligations under the Dodd-Frank Act and its obligations under the antitrust laws; the Board may readily comply with both laws. The Dodd-Frank Act invites States (and not private actors such as the Board) to cooperate with federal authorities in regulating the real estate appraisal industry. The antitrust laws constrain the actions of private actors (such as the Board), but do not apply to states acting in their sovereign capacity.¹¹ It follows that, if the State of Louisiana wishes to use a regulatory board as its instrument for implementing Dodd-Frank responsibilities, it can avoid antitrust complications by complying with the requirements of the state action doctrine. This assures that the resulting regulatory regime furthers the governmental interests of the State, and not the private interests of market participants.¹²

IV. THE PROPOSED ORDER

The proposed Order remedies the Board’s anticompetitive conduct by requiring rescission of Rule 31101 and prohibiting the Board from regulating or fixing appraisal fees in Louisiana.

Sections II and III of the proposed Order address the core of the Board’s anticompetitive conduct.

Paragraph II.A prohibits the Board from enforcing Rule 31101, or adopting or enforcing any other rule that sets, determines, or fixes compensation levels for appraisal services.

Paragraph II.B prohibits the Board from raising, fixing, maintaining, or stabilizing compensation levels for appraisal services; requiring or encouraging an AMC to pay any specific fee or range of fees for appraisal services; or requiring or encouraging appraisers to request any

the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.”); *United States v. Borden Co.*, 308 U.S. 188, 198 (1939) (“When there are two acts upon the same subject, the rule is to give effect to both if possible.”)

⁹ *In the Matter of La. Real Est. Appraisers Bd.*, No. 9374, Op. and Order of the Comm’n, at 5–7 (May 6, 2019) (“*May 6 Comm’n Order*”); see also *PhoneTele, Inc. v. Am. Tel. & Tel. Co.*, 664 F.2d 716, 737-38 (9th Cir. 1981) (defendant must 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”).

¹⁰ *May 6 Comm’n Order* at 7 (citing *PhoneTele*, 664 F.2d at 737-38).

¹¹ *Parker v. Brown*, 317 U.S. 341, 350–51 (1943).

¹² See *N.C. Dental*, 574 U.S. at 505–12.

specific fee or range of fees for appraisal services. Prohibited conduct includes adopting a fee schedule for appraisal services or requiring AMCs to pay fees consistent with a fee survey or schedule of appraisal fees.

Paragraph II.C prohibits the Board from discriminating against any AMC based on the fees that the company pays for appraisal services except in the limited circumstance described below. Prohibited discrimination includes requesting information, conducting audits or investigations, or holding enforcement hearings based on the AMC's fees. The non-discrimination provision includes a proviso that permits the Board to take actions necessary to comply with specific written instructions it receives in conjunction with a compliance review by the Appraisal Subcommittee of the Federal Financial Institutions Examination Council, which monitors States' implementation of minimum requirements for registration and supervision of AMCs under the Dodd-Frank Act. A copy of these instructions must be provided to Commission staff no later than 15 days after receipt, together with a description of how the Board will comply with them. The proviso does not apply to or limit the broad prohibitions on interfering with price competition set forth in Paragraphs II.A and II.B of the proposed Order.

Paragraph III.A requires the Board to rescind Rule 31101, and any enforcement order based on an alleged violation of Rule 31101, within 30 days of the issuance of the Order.

Paragraph III.B requires the Board to notify the Commission within 60 days any time the Board adopts a new rule or amends an existing rule relating to compensation levels for appraisal services.

Section IV requires the Board to provide notice of the Order to the Board's members and employees, as well as each AMC licensed by the Board.

Section V requires the Board to file with the Commission verified written compliance reports.

Section VI requires the Board to notify the Commission in advance of changes in the Board's structure that would affect its compliance obligations.

Section VII requires that the Board provide the Commission with access to certain information for the purpose of determining or securing compliance with the Order.

Section VIII provides that the Order will terminate 20 years from the date it is issued.

The purpose of this Analysis to Aid Public Comment is to invite and facilitate public comment concerning the proposed Order. It does not constitute an official interpretation of the proposed Order or in any way modify its terms.