UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: **Joseph J. Simons, Chairman**
Noah Joshua Phillips
Rohit Chopra
Rebecca Kelly Slaughter
Christine S. Wilson

In the Matter of **LOUISIANA REAL ESTATE APPRAISERS BOARD,** **Respondent.**	**DOCKET NO. 9374**

OPINION AND ORDER OF THE COMMISSION

By Chairman Joseph J. Simons, for the Commission:

The Commission's administrative complaint in this matter alleges that Respondent, the Louisiana Real Estate Appraisers Board ("LREAB" or "the Board"), unreasonably restrains price competition for real estate appraisal services provided to appraisal management companies ("AMCs") in Louisiana. Compl. ¶ 1.[1] AMCs act as agents for lenders in arranging for real estate appraisals and thus effectively function as the purchasers of appraisal services. Broadly, the Complaint alleges that the Board violated Section 5 of the Federal Trade Commission Act by (1) issuing a regulation that prevents AMCs and appraisers from arriving at appraisal fees

[1] We use the following abbreviations for purposes of this opinion:

Compl.:	Complaint
CCM:	Complaint Counsel's Motion for Partial Summary Decision Dismissing Respondent's Fourth Affirmative Defense
ROpp:	Memorandum of Respondent Louisiana Real Estate Appraisers Board in Opposition to Complaint Counsel's Motion for Partial Summary Decision on Respondent's Fourth Affirmative Defense
CCSupp:	Complaint Counsel's Supplemental Brief in Support of Its Motion for Partial Summary Decision Dismissing Respondent's Fourth Affirmative Defense
RSuppOpp:	Respondent Louisiana Real Estate Appraisers Board's Supplemental Brief in Opposition Regarding Good Faith Regulatory Compliance
CCSuppRep:	Complaint Counsel's Reply in Support of Supplemental Brief in Support of Its Motion for Partial Summary Decision Dismissing Respondent's Fourth Affirmative Defense
RUF:	Respondent's Rule 3.24(a)(2) Response to Complaint Counsel's Statement of Undisputed Facts and Statement of Material Facts as to Which There Is a Genuine Issue for Trial

through *bona fide* negotiation and the operation of the free market, and (2) effectively requiring that appraiser fees match or exceed the median fees identified in Board-commissioned survey reports through subsequent enforcement of its regulation. Compl. ¶¶ 3-4. In its Answer, Respondent asserts as a fourth affirmative defense that it "acted in good faith to comply with a federal regulatory mandates [sic]." Complaint Counsel have moved to summarily dismiss this affirmative defense, arguing that it is inapplicable here as a matter of law. Although exceptions and immunities to the application of the antitrust laws should be narrowly construed, we recognize that courts have long acknowledged that antitrust analysis should take into account the regulatory context. We deny the motion, finding that additional factual development is needed to determine whether the defense applies.

A. Background

Congress enacted the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 in response to the 2007-08 financial crisis. To help ensure that appraisals are conducted independently and free from inappropriate influence and coercion, Dodd-Frank amended the Truth in Lending Act of 1968 to require lenders and their agents, including AMCs, to compensate appraisers "at a rate that is customary and reasonable for appraisal services performed in the market area of the property being appraised." 15 U.S.C. § 1639e(i)(1). The Act further provides that "[e]vidence for such fees may be established by objective third-party information, such as government agency fee schedules, academic studies, and independent private sector surveys." *Id.* Dodd-Frank also amended Title XI of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 to require federal financial regulatory agencies to establish minimum requirements for state registration and supervision of AMCs. 12 U.S.C. § 3353(a). Such minimum requirements must provide that AMCs adhere to the appraisal independence standards set forth in Section 1639e,[2] including the mandate that AMCs pay appraisers the aforementioned "customary and reasonable" rates. *See id.* Although Title XI does not directly compel states to establish an AMC registration and supervision program, AMCs in a state that has not adopted the federal minimum requirements are barred from providing appraisal management services for federally related transactions, unless the AMCs are owned and controlled by a federally regulated depository institution or fall below a minimum statutory size threshold. *See* 12 U.S.C. § 3353(f)(1); Minimum Requirements for Appraisal Management Companies, 80 Fed. Reg. 32,658, 32,659 (June 9, 2015). At the same time, Dodd-Frank preserves the application of the antitrust laws, stating that "[n]othing in this Act . . . shall be construed to modify, impair, or supersede the operation of any of the antitrust laws." 12 U.S.C. § 5303.

Implementation of these provisions involves a variety of federal and state actors, as described below.

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[2] Specifically, the amended Title XI states that minimum requirements for State registration of AMCs "shall include a requirement that such companies . . . require that appraisals are conducted independently and free from inappropriate influence and coercion pursuant to the appraisal independence standards established under section 1639e of title 15." 12 U.S.C. § 3353(a).

Customary and reasonable fee requirement. In October 2010, the Federal Reserve System's Board of Governors issued an interim final rule concerning the "customary and reasonable" fee requirement. Federal Reserve System, Interim Final Rule, 75 Fed. Reg. 66,554 (Oct. 28, 2010) (codified at 12 C.F.R. pt. 226). In announcing the rule, the Board of Governors stated 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." *Id.* at 66,569. The rule provides two presumptions of compliance. Under the first, the appraisal fee is presumed to be customary and reasonable if it is reasonably related to recent rates paid for comparable appraisal services in the relevant geographic market, the creditor or its agent has taken into account six enumerated factors in setting the fee,[3] and the creditor or its agent has not engaged in any anticompetitive conduct affecting the appraisal fee. *Id.* at 66,555-56, 66,582. Under the second, alternative presumption, the appraisal fee is presumed to be customary and reasonable if it was determined by relying on rates established by objective third-party information, including fee schedules, studies, and surveys prepared by independent third parties, where such schedules, studies, and surveys exclude fees paid by AMCs. *Id.* at 66,555-56, 66,582. If neither presumption applies, whether the appraiser fee is customary and reasonable is determined "based on all of the facts and circumstances without a presumption of either compliance or violation." *Id.* at 66,572, 66,586.

Federal requirements for state supervision of AMCs. In June 2015, the federal financial regulatory agencies issued a rule setting out the minimum requirements for state registration and supervision of AMCs. 80 Fed. Reg. 32,658. The rule provides, among other things, that any state that elects to register and supervise AMCs under Title XI must require each AMC operating in the state to "[e]stablish and comply with processes and controls reasonably designed to ensure that the AMC" follows the appraiser independence requirements, which include compensating appraisers at a customary and reasonable rate. *Id.* at 33,669; 12 C.F.R. § 225.193(b)(5) (2015).[4] The Appraisal Subcommittee, a federal agency, monitors state AMC registration and supervision programs for compliance with the federal requirements. *See* Appraisal Subcommittee, Revised ASC Policy Statements, 83 Fed. Reg. 9,144 (Mar. 5, 2018).

Louisiana law and the LREAB. Louisiana is among the states that have chosen to adopt an AMC regulation and supervision program. In 2012, Louisiana modified its Appraisal Management Company Licensing and Regulation Act to require AMCs to "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 presumptions of compliance under federal law." La. Rev. Stat. § 37:3415.15(A). The LREAB, a state agency governed by a multi-member board, has authority to enforce this provision, including by promulgating regulations as

[3] The factors to be considered are the type of property, the scope of work, the time in which the appraisal services are to be performed, the appraiser's qualifications, the appraiser's experience and professional record, and the quality of the appraiser's work. 75 Fed. Reg. at 66,582.

[4] This citation is for the Federal Reserve System rule. The rule is codified separately for each federal financial regulatory agency. *See* 12 C.F.R. pt. 34 (2015) (Department of Treasury); 12 C.F.R. pt. 323 (2015) (Federal Deposit Insurance Corporation); 12 C.F.R. pt. 1026 (2015) (Consumer Financial Protection Bureau); 12 C.F.R. pt. 1222 (Federal Housing Finance Agency).

well as investigating, censuring, and disciplining AMCs that violate the regulations or the statute. La. Rev. Stat. §§ 37:3415.19(A)(2), 37:3415.21.

Rule 31101 and its enforcement. In 2013, the Board adopted Rule 31101, which specifies how AMCs must comply with the customary and reasonable rate requirement. *See* La. Admin. Code tit. 46, § 31101. It provides that AMCs can demonstrate compliance by using "objective third-party information such as government agency fee schedules, academic studies, and independent private sector surveys" or by using a schedule of fees established by the Board. *Id.* § 31101(A). AMCs not using one of these methods must, at a minimum, ensure that appraiser compensation is reasonable by adjusting the recent rates paid in the relevant geographic market to account for the six factors set out in the Federal Reserve's interim final rule. *See id.* In addition to issuing Rule 31101, the Board contracted with the Southeastern Louisiana University Business Research Center to survey typical fees paid by lenders to appraisers. *See* RUF ¶ 22.

The Complaint alleges that Rule 31101 amounts to an unlawful restraint of competition on its face because it prohibits AMCs from arriving at an appraisal fee through the operation of the free market. Compl. ¶¶ 30-31. It also alleges that the Board has unlawfully restrained price competition though its enforcement of the Rule by effectively requiring AMCs to set rates at least as high as the median appraisal fees set forth in the Southern Louisiana University surveys. *Id.* ¶¶ 32-43. The Board's Answer denies that the Rule unlawfully restrains competition either on its face or as applied, and asserts several affirmative defenses. The fourth affirmative defense states that the Board "acted in good faith to comply with a federal regulatory mandate[]."[5]

B. Motion for Partial Summary Decision

Complaint Counsel's motion seeks partial summary decision rejecting the fourth affirmative defense as a matter of law. Under Rule 3.24 of the Commission's Rules of Practice, a party may move for summary decision "upon all or any part of the issues being adjudicated." 16 C.F.R. § 3.24(a)(1). We review motions for partial summary decision using the same legal standard as applies to motions for summary judgment under Federal Rule of Civil Procedure 56 in federal courts. *See N.C. State Bd. of Dental Exam'rs*, 151 F.T.C. 607, 610-11 (2011), *aff'd*, *N.C. State Bd. of Dental Exam'rs v. FTC*, 717 F.3d 359 (4th Cir. 2013), *aff'd*, 135 S. Ct. 1101 (2015). A party moving for summary decision must show that "there is no genuine dispute as to any material fact," and that it is "entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also* 16 C.F.R. § 3.24(a)(2) ("If the Commission . . . determines that there is no genuine issue as to any material fact regarding liability or relief, it shall issue a final decision and order.").

[5] We previously dismissed Respondent's third and ninth affirmative defenses, which relied upon the state action doctrine, following a separate motion for partial summary decision filed by Complaint Counsel. Opinion and Order of the Commission (Apr. 10, 2018), https://www.ftc.gov/system/files/documents/cases/d09374_opinion_and_order_of_the_commission_04102018_redacted_public_version.pdf.

C. Regulatory Compliance Defense

In general, exemptions and immunities from the antitrust law should be narrowly construed.[6] For instance, prior Commission work has identified limits to the *Noerr-Pennington* doctrine and state-action immunity.[7] That said, courts have long recognized the basic proposition that antitrust analysis should take into account the regulatory context. *See, e.g.*, *United States v. Marine Bancorporation, Inc.*, 418 U.S. 602, 627 (1974) (application of antitrust doctrine to bank mergers "must take into account the unique federal and state regulatory restraints on entry into that line of commerce"); 1A Areeda & Hovenkamp, *Antitrust Law* ¶ 240c3 (4th ed. 2013) ("[A]ntitrust courts can and do consider the particular circumstances of an industry and therefore adjust their usual rules to the existence, extent, and nature of regulation."). Regulatory context can affect the antitrust analysis in a variety of ways. For instance, regulatory requirements may shape the definition of relevant markets. *See, e.g.*, *McWane, Inc.*, 2014 WL 556261, at *13 (F.T.C. Jan. 30, 2014), *aff'd, McWane, Inc. v. FTC*, 783 F.3d 814 (11th Cir. 2015). The presence and effect of regulatory schemes may also be relevant to assess elements of a monopolization claim, including whether the subject firm possesses monopoly power and whether it has unlawfully acquired or maintained such power. *See MCI Commc'ns Corp. v. Am. Tel. & Tel. Co.*, 708 F.2d 1081, 1107-08 (7th Cir. 1983); Areeda & Hovenkamp, *supra* ¶¶ 246a, 246b. And, in rare cases, regulation can completely shield a party from liability where conduct that is ordinarily unreasonable under the antitrust laws is rendered reasonable in light of regulatory orders or objectives. Areeda & Hovenkamp, *supra* ¶ 246b; *see also Mid-Texas Commc'ns Sys., Inc. v. Am. Tel. & Tel. Co.*, 615 F.2d 1372, 1390 (5th Cir. 1980). This last consideration underlies the good-faith regulatory compliance defense addressed by this motion. *See* RSuppOpp at 19-20.

The good-faith regulatory compliance defense (also known as the regulatory justification defense) has rarely been invoked, and its precise contours are not well established. Most of the cases applying the defense arose decades ago in a single regulatory setting—telecommunications—and involved issues raised by denials of, or restrictions on,

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[6] *See, e.g.*, *Union Labor Life Ins. Co., v Pireno*, 458 U.S. 119, 126 (1982) ("Accordingly, our precedents consistently hold that exemptions from the antitrust laws must be construed narrowly."); *Group Life and Health Ins. Co., v. Royal Drug Co.*, 440 U.S. 205, 231 (1979) ("It is well settled that exemptions from the antitrust laws are to be narrowly construed."); *United States v. Phila. Nat. Bank*, 374 U.S. 321, 348 (1963) ("It is settled law that '(i)mmunity from the antitrust laws is not lightly implied.'") (quoting *California v. Fed. Power Comm'n*, 369 U.S. 482, 485 (1962)); *United States v. Gosselin World Wide Moving, N.V.*, 411 F.3d 502, 508 (4th Cir. 2005).

[7] The *Noerr-Pennington* doctrine, which immunizes from antitrust scrutiny activities designed to influence the passage or enforcement of laws, may carry less force when "applied to filings that seek purely ministerial government responses, misrepresentations outside of the political arena, and repetitive filings." FTC Staff Report, Enforcement Perspectives on the *Noerr-Pennington* Doctrine 5 Oct. 2006), https://www.ftc.gov/reports/ftc-staff-report-concerning-enforcement-perspectives-noerr-pennington-doctrine. The state-action immunity also receives less weight when the State delegates authority to active market participants. *N.C. State Bd. of Dental Examiners v. FTC*, 135 S. Ct. 1101, 1111 (2015) ("Limits on state-action immunity are most essential when the State seeks to delegate its regulatory power to active market participants, for established ethical standards may blend with private anticompetitive motives in a way difficult even for market participants to discern.").

interconnections.[8] *See S. Pac. Commc'ns Co., v. Am. Tel. & Tel. Co*, 740 F.2d 980 (D.C. Cir. 1984); *MCI Commc'ns*, 708 F.2d 1081; *Phonetele, Inc. v. Am. Tel. & Tel. Co.*, 664 F.2d 716 (9th Cir. 1981); *Mid-Texas Commc'ns Sys.*, 615 F.2d 1372. Courts that have recognized the defense have not fully delineated how it would apply outside the factual contexts before them. Perhaps the clearest explanation is set out in *Phonetele*, which states:

> 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.

664 F.2d at 737-38. In addition to this objective test, the defendant must show that its action was taken because of the regulatory obligations, rather than business considerations. *S. Pac. Commc'ns*, 740 F.2d at 1009; *see also MCI Commc'ns*, 708 F.2d at 1138.

Complaint Counsel ask that we reject the Board's regulatory compliance defense as a matter of law without assessing reasonableness. CCM at 13.[9] Complaint Counsel assert that the regulatory compliance defense is an offshoot of implied immunity and shares many of its elements. *Id.* at 10-11. In addition to the requirements above, they argue that the regulatory compliance defense can be upheld only if (1) there is a conflict between a federal regulatory statute and antitrust law, (2) the defendant is a regulated entity, defined as an entity that is obliged to comply with a regulatory scheme or face sanctions, and (3) a federal agency has authority to review and, if appropriate, correct the defendant's performance of its obligations. *Id.* at 1-2, 13-18. Complaint Counsel claim these conditions are not satisfied here. *Id.* But they identify no case that expressly holds that their three propositions are essential prerequisites for the good-faith regulatory compliance defense. Rather, Complaint Counsel derive these factors from the factual contexts of cases applying the defense and from case law concerning implied antitrust immunity.

Although both the regulatory compliance defense and implied antitrust immunity can insulate a defendant from antitrust liability, the doctrines are separate and distinct. Courts have allowed antitrust defendants to raise the regulatory compliance defense even when those courts have rejected implied antitrust immunity. *See, e.g.*, *Phonetele*, 664 F.2d at 742; *MCI Commc'ns*, 708 F.2d at 1138; *Mid-Texas Commc'ns Sys.*, 615 F.2d at 1380-81. Implied antitrust immunity, or implied repeal, provides a narrow exemption from the antitrust laws when antitrust enforcement would be repugnant to a regulatory scheme. *See Credit Suisse Secs. (USA) LLC v. Billing*, 551 U.S. 264, 276 (2007); *Gordon v. N.Y. Stock Exch.*, 422 U.S. 659, 688-90 (1975). The good-faith regulatory compliance defense, on the other hand, provides that, when assessing whether conduct is anticompetitive, courts must take regulation into account and allow

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[8] The few cases addressing the defense outside telecommunications include *Columbia Steel Casting Co., Inc. v. Portland Gen. Elec.* Co., 111 F.3d 1427 (9th Cir. 1996) (electric utilities), and *Illinois ex rel. Hartigan v. Panhandle E. Pipe Line Co.*, 730 F. Supp. 826 (C.D. Ill. 1990), *aff'd*, 935 F.2d 1469 (7th Cir. 1991) (natural gas pipelines).

[9] Complaint Counsel preserve the ability to later argue that the Board's conduct was neither subjectively nor objectively reasonable. *Id.*

defendants an opportunity "to show that their actions were justified by the constraints of the regulatory schemes in which they operated." *Phonetele*, 664 F.2d at 743. In making this assessment, the defense is considered solely within the context of antitrust analysis. *Id.* at 742 ("the sole legal perspective is that afforded by the antitrust law"); *see also id.* ("the impact of regulation must be assessed simply as another fact of market life"); *Mid-Texas Commc'ns Sys.*, 615 F.2d at 1385 ("The fact of regulation may . . . operate within the confines of the applicable antitrust laws.").

None of the regulatory compliance defense cases expressly sets out the prerequisites Complaint Counsel urge us to adopt, and, at this point, we decline to hold that those factors are always necessary. This does not mean, however, that they are irrelevant. For instance, although the regulatory compliance defense case law does not require a clear repugnancy between the statutory regimes, there must be some inconsistency between the antitrust laws and the imperatives imposed on the respondent by the federal regulation. Indeed, the defense is intended to provide parties with "'breathing space' between the dictates of the regulatory regime and the antitrust laws." *Phonetele*, 664 F.2d at 741 n.63. The defense does not insulate anticompetitive conduct that a respondent freely chooses to undertake; the conduct must be "necessitated" by regulatory and factual imperatives. *See id.* at 737-38; *Illinois ex rel. Hartigan*, 730 F. Supp. at 933-34 (regulatory justification defense fails where conduct "resulted from an exercise of discretion" rather than "adherence to regulatory obligations"); *see also Columbia Steel Casting Co.*, 111 F.3d at 1445 (regulatory justification defense inapplicable in the absence of compulsion).

As noted above, exemptions from the antitrust laws should be narrowly construed, and the same cautionary principle may well govern any adjustment of the antitrust laws' application based on regulatory concerns. But determining exactly how the good-faith regulatory compliance defense applies here requires additional factual development. The defense depends heavily on the design of the particular regulatory scheme at issue and the specific conduct challenged. Courts that have applied the defense have linked its contours to the specific regulations and facts in those cases. *See Phonetele, Inc. v. Am. Tel. & Tel. Co.*, 889 F.2d 224, 229 (9th Cir. 1989) (regulatory justification defense "should be viewed as a factual inquiry"). The application of this defense in the context of Dodd-Frank requirements is an issue of first impression, and our assessment of it requires an appreciation of the Board's conduct in relation to both Dodd-Frank and the antitrust laws, an appreciation best derived following factual inquiry at trial.[10]

[10] There are no uncontested facts material to the resolution of this motion, and therefore we decline to make any findings of fact at this stage.

Accordingly, **IT IS ORDERED THAT** Complaint Counsel's Motion for Partial Summary Decision Dismissing Respondent's Fourth Affirmative Defense is **DENIED.**

By the Commission.

April J. Tabor
Acting Secretary

SEAL:
ISSUED: May 6, 2019