**PUBLIC**

**UNITED STATES OF AMERICA**

**BEFORE THE FEDERAL TRADE COMMISSION**

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| In the Matter of<br><br>Louisiana Real Estate Appraisers Board,<br>a state agency. | ) | Docket No. 9374 |

# PRE-TRIAL BRIEF OF RESPONDENT LOUISIANA REAL ESTATE APPRAISERS BOARD

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## INTRODUCTION

This case marks the first time that the Commission has accused a State agency of violating FTC Act Section 5 by complying with a federal mandate that regulates price competition. In that federal mandate, the Dodd-Frank Act, Congress required lenders and their agents ("appraisal management companies" or "AMCs") to pay residential real estate appraisers "customary and reasonable" fees within their geographic market. Congress required state appraiser certifying and licensing agencies to enforce AMCs' compliance with this "customary and reasonable fee" obligation. Louisiana Real Estate Appraisers Board ("LREAB") is such a state agency.

Prior to Dodd-Frank, Louisiana law had never regulated appraisal fees, and LREAB had never involved itself with fees paid to appraisers. When Louisiana became the fifth state to implement Dodd-Frank, the State legislature required AMCs to pay customary and reasonable fees, and instructed LREAB to promulgate regulations and enforce that requirement, consistent with the Dodd-Frank Act and federal regulations. That is precisely what LREAB did. Its regulations faithfully implement these federal regulations, and allow AMCs to use any of the three federally-prescribed methods to determine "customary and reasonable" fees.

In retrospect, LREAB made two mistakes. First, although the AMCs had opposed this mandate at every step of the federal and state legislative and regulatory process, LREAB listened to AMC complaints that they had no cost-effective method to comply with federal regulations, such as an independently-conducted fee survey. So LREAB paid an independent academic institution to create one, and provided the survey free "as a courtesy to all licensees," specifically advising that "its use is not mandatory." CX0023-002. Second, LREAB took its job seriously. It became the first state agency in the country to investigate written complaints and enforce against noncompliance, as it was required to do by federal and state law. LREAB found several AMCs

compliant; a few it found in violation. The violators proposed to come into compliance using the survey for one year. LREAB accepted those plans, as it was legally required to do, since that survey met the presumptive compliance standards imposed by federal regulations and state law.

Complaint Counsel alleges LREAB's good faith efforts to enforce compliance with the customary and reasonable fee mandate were "effectively" price-fixing—for the survey data showed that lenders paid appraisers higher fees than the violators had done, and the violators committed to rely on that data for one year when determining their prospective fee payments. And, Complaint Counsel assert, when other AMCs learned LREAB was enforcing the law, other AMCs started using the survey to comply, too. Thus, based on data from 9 of the 140-some AMCs then licensed in Louisiana (with several of those nine admittedly non-compliant with the customary and reasonable fee mandate), Complaint Counsel allege that enforcement of the "customary and reasonable fee" mandate affected prices.

Which, of course, is exactly what Congress and federal regulators expected the Dodd-Frank "customary and reasonable" fee mandate would do. Notably, Complaint Counsel do not allege that higher fees AMCs paid to appraisers increased prices to homeowners or lenders, the real consumers of the appraisal.

Complaint Counsel's pretrial brief ("CC Br.") all but ignores this relevant regulatory context, and assert that "displacement of price competition is per se unlawful," heedless of Dodd-Frank's requirements. CC Br. 2. However, the Commission has "recognized the basic proposition that, antitrust analysis should take into account the regulatory context," as "'another fact of market life.'" Opinion and Order of the Commission at 5, 7 (May 6, 2019) ("Op. & Order") (citation and quotation omitted). The Commission thus denied Complaint Counsel's motion "to reject the Board's regulatory compliance defense as a matter of law without assessing reasonableness." *Id.*

at 6. Instead, the Commission held that the defense "depends heavily on the design of the particular regulatory scheme at issue and the specific conduct challenged." *Id.* at 7. These concerns for regulatory context, market effects, specific conduct, and reasonableness refute Complaint Counsel's attempts to characterize this case as a mine-run per se price restraint. Indeed, none of the cases applying the good faith regulatory compliance defense applied a per se antitrust analysis.

Viewed through the lens of the rule of reason, it becomes evident that Complaint Counsel will not establish a prima facie case. First, by narrowly focusing their market definition solely on what *AMCs* pay appraisers, Complaint Counsel ignore the market effects of *lenders* who procure the same appraisal services from the same appraisers in the same geographic markets. And Congress by statute expressly deemed the prices lenders pay more reliable measures of "customary and reasonable" fees than those paid by AMCs.

Second, Complaint Counsel's allegations of higher prices in response to Board enforcement are fundamentally unsound, on multiple fronts. Most fatal to their claims, they offer no proof whether these few AMCs had paid customary and reasonable fees prior to adopting the survey method. Failing to consider regulatory compliance when analyzing price effects is like noting that drivers decelerate in the presence of speed cameras, but ignoring that they had been speeding. The evidence will show that those nine AMCs had *not* previously complied with the customary and reasonable fee mandate, and at least three had been found by LREAB in violation of the law. If using a legally-compliant method—in fact, the presumptively compliant method prescribed in Dodd-Frank itself—caused AMCs to raise their prices, then *federal law caused the price increase*, not LREAB.

Even if Complaint Counsel could meet their initial burden, LREAB will rebut Complaint Counsel's case by proving its affirmative defense that LREAB reasonably complied in good faith

with regulatory mandates imposed by Dodd-Frank, four federal financial regulators, and the Louisiana legislature. Although LREAB discusses the applicable federal and state law context at some length below, in truth this brief merely shadows the rigorous federally-mandated regulatory environment for state boards like LREAB, and the appraisers, appraisals, and AMCs they must regulate. Federal law defines "customary and reasonable" not as whatever two parties negotiate, as Complaint Counsel's "marketplace" suggests. "Customary" means "recent rates" paid in the overall geographic market over the prior 12 months; and "reasonable" requires up or down adjustments to the customary fee based on the specific appraisal assignment's demands.

LREAB hewed closely to these laws and regulations. All three federally-permissible "customary and reasonable" methods are encompassed in Louisiana law and LREAB rules. And LREAB's investigations found AMCs to be compliant, using multiple methods. Where the evidence showed non-compliance, LREAB insisted on a one-year remediation plan using any method permissible under federal regulations. Where an AMC offered a compliance plan using the survey, it was the AMC's choice.

Moreover, Complaint Counsel cannot ignore that federal and state regulators knew of LREAB's rules and enforcement actions, and approved of them. The Appraisal Subcommittee (the federal agency exercising direct oversight over LREAB) attended LREAB meetings where the survey was discussed, received reports from LREAB of its enforcement actions, and audited LREAB's investigational records during the period covered by the Complaint—and gave LREAB solid ratings for compliance with these federal regulatory requirements. All of LREAB's rules were promulgated and approved by state legislative committees and the Governor in accordance with Louisiana's Administrative Procedure Act. And after the FTC issued its Complaint, the Governor, supervisory executive agencies, and the Senate by unanimous vote, reaffirmed:

LREAB's customary and reasonable fee rules promoted state policies to protect the integrity of the mortgage appraisal process and, thereby, the residential housing market. RX0254; *see* Senate Concurrent Resolution No. 117 (May 14, 2018), https://www.legis.la.gov/legis/BillDocs.aspx?i=235260&t=text.

At the initial conference in this case, Complaint Counsel asserted how this case was "just like" the North Carolina Dental Board case. As the law and facts demonstrate, nothing could be further from the truth. LREAB reasonably implemented concrete federal regulatory imperatives imposing "customary and reasonable" constraints on those who pay certain residential mortgage appraisal fees. The evidence will show that LREAB reasonably and in good faith implemented what was then a new and untested regulatory regime. Given the strength of LREAB's defenses, and the manifold weaknesses of Complaint Counsel's case, LREAB respectfully requests a finding of no violation in favor of LREAB.

## LEGAL STANDARDS

### I. LREAB'S AFFIRMATIVE DEFENSE OF GOOD FAITH REGULATORY COMPLIANCE.

The Commission confirmed that LREAB may assert a complete defense to liability under Section 5 based on good faith regulatory compliance. Op. & Order. This is because "[e]ven when the conduct of a regulated firm has not been immunized from the antitrust laws … appraisal under the antitrust laws must take regulation into account." 1A P. Areeda and H. Hovenkamp, Antitrust Law ¶ 246a at 435. Courts, commentators, and the Commission specifically have recognized that the existing regulatory context may not only be relevant to assessing various aspects of an antitrust claim, including the relevant market, whether the subject firm possesses monopoly power, and the reasonableness of the alleged restraint, Op. & Order at 5, citing *MCI Commc'ns Corp. v. Am. Tel, & Tel. Co*., 708 F.2d 1081, 1107-08 (7th Circ 1983) and Areeda and Hovenkamp, *supra* ¶¶ 246a,

246b; but more importantly, a party's *compliance* with a regulatory scheme can completely shield it from liability as conduct that might ordinarily be deemed unreasonable under the antitrust laws may be rendered reasonable in light of a regulatory order or objectives. *Id.* The defense of good faith regulatory compliance emanates from the fundamental principle that a regulatory agency or a regulated entity should not be punished for attempting in good faith to comply with other laws that govern its conduct. *Id.*, ¶ 246a; *cf. Cantor v. Detroit Edison Co.*, 428 U.S. 579, 592 (1976) ("We may assume, *arguendo,* that it would be unacceptable ever to impose statutory liability on a party who had done nothing more than obey a state command").

The Commission has further clarified that the good faith regulatory compliance defense is separate and distinct from an implied antitrust immunity. Op. & Order at 6. Whereas implied antitrust immunities provide narrow exemptions from the antitrust laws where enforcement would be repugnant to a regulatory scheme, *see Credit Suisse Sec. (USA) LLC v. Billing*, 551 U.S. 264, 276 (2007), good faith regulatory compliance provides that courts must take regulation into account when assessing whether conduct is anticompetitive, and allow defendants an opportunity to show that their actions were justified in light of the constraints of the regulatory scheme under which they operated. Op. & Order at 6-7, *citing Phonetele, Inc. v. AT&T*, 664 F.2d 716, 743 (9th Cir.1981) (Kennedy, J.). Accordingly, the defense does not require a clear repugnancy between two statutory regimes; there is no requirement that the regulated entity must have been threatened with sanctions or monetary penalties; and the regulatory compliance defense is not premised on active federal supervision. The Commission has already squarely rejected these arguments.

The required elements of this affirmative defense, rather, are a demonstration that at the time of the alleged anticompetitive acts, an entity subject to a regulatory scheme "had a reasonable basis to conclude that its actions were necessitated by concrete factual imperatives recognized as

legitimate by the regulatory authority." *Phonetele*, 664 F.2d at 737-38; *see also MCI Commc'ns*, 708 F.2d at 1138. Besides this objective showing of reasonableness, the regulatory compliance defense requires a subjective reasonableness by the entity undertaking the challenged conduct. *S. Pac. Commc'ns Co. v. AT&T*, 740 F.2d 980, 1010 (D.C. Cir. 1984) (noting requirement of "both reasonableness and good faith"). For the subjective test, a defendant invoking the defense must show that its action was taken because of the regulatory obligations rather than business considerations. *Id*. at 1009. Hence, the regulatory compliance defense becomes a fact-intensive inquiry, appropriate for decision upon a fully-developed factual record. Op. & Order at 7. ("The application of this defense in the context of Dodd-Frank requirements . . . requires an appreciation of the Board's conduct in relation to both Dodd-Frank and the antitrust laws . . . best derived following factual inquiry at trial.").

## II. COMPLAINT COUNSEL HAS THE BURDEN UNDER FTC ACT SECTION 5 TO PROVE UNFAIR METHODS OF COMPETITION AFFECTING COMMERCE.

### A. This Case Must be Decided Under the Rule of Reason.

Because of the unique regulatory environment applicable to this case – wherein federal laws and regulations required the State of Louisiana and LREAB to regulate price competition for certain residential appraisal fees – this court must weigh the competitive effects and consider the Board's legitimate justifications driving the challenged conduct. The Commission's Order recognized that the existence, extent, and nature of regulation shape the antitrust analysis. Op. & Order at 5. As a result, the rule of reason is the only appropriate framework here.

The very existence of state and federal regulation driving the Board's actions means that this court must consider the "interposing of a substantive justification" for them. *Silver v. New York Stock Exch.*, 373 U.S. 341, 347, 360-61, 365-66 (1963) (in absence of implied immunity,

considering regulatory environment "under the aegis of the rule of reason" rather than per se rule).[1] As a result, the fact-intensive burden-shifting makes reasonableness the proper touchstone. *See Phonetele,* 664 F.2d at 740-43 (same, citing *Silver*, 373 U.S. at 360-61, 365); *Jacobi v. Bache & Co.*, 520 F.2d 1231 (2d Cir. 1975) (Friendly, J.) (same). This is because "the proper role of antitrust courts is to accommodate the peculiar circumstances under which regulated entities operate." *Phonetele,* 664 at 742; *Mid-Texas Commc'ns Sys. v. AT&T*, 615 F.2d 1372, 1381 (5th Cir. 1980) (adopting an objective reasonableness standard); *IT&T v. Gen. Tel. & Elecs. Corp.*, 518 F.2d 913, 935-36 (9th Cir. 1975) (regulation is appropriate input to rule of reason inquiry because "the impact of regulation must be assessed simply as another fact of market life"), *overruled on other grounds by California v. Am. Stores Co.*, 495 U.S. 271, 283 (1990).

In contrast, the per se rule ***only*** applies when practices are so "plainly anticompetitive" and "lack . . . any redeeming virtue" that further examination is unnecessary. *Broadcast Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 8 (1979) (citations omitted). Thus, the per se rule, which does not weigh the competitive effects of or consider justifications for the challenged conduct, is inapposite. *Cf. NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 103 (1984) (horizontal restraints inherent to competitive sports leagues required rule of reason analysis of price-fixing allegations rather than per se rule); *United States v. Brown Univ.*, 5 F.3d 658 (3d Cir. 1993) (nature of higher education required rule of reason analysis instead of per se rule).

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[1] The evidence relevant to LREAB's procompetitive justifications overlaps significantly with its good faith regulatory compliance defense. However, the legal analysis for each is somewhat different. Good faith regulatory compliance is a complete factual defense to liability. But even where that defense does not apply, the regulatory environment is relevant to market definition and the reasonableness of the restraint. *See Nat'l Gerimedical Hosp. & Gerontology Ctr. v. Blue Cross of Kansas City*, 452 U.S. 378, 393 n.19 (1981); *Illinois ex rel. Burris v. Panhandle E. Pipe Line Co.*, 935 F.2d 1469, 1484 n.14 (7th Cir. 1991).

The rule of reason requires a three-step burden-shifting analysis. First, Complaint Counsel "has the initial burden to prove that the challenged restraint has a substantial anticompetitive effect that harms consumers in the relevant market." *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2284 (2018). Then, if the prima facie case is made, "the burden shifts to the [Board] to show a procompetitive rationale for the restraint." *Id.* Finally, "[i]f the [Board] makes this showing, then the burden shifts back to [Complaint Counsel] to demonstrate that the procompetitive efficiencies could be reasonably achieved through less anticompetitive means." *Id.*

### B. Market Definition Must Take Into Account the Effect of Regulation on the Market, and Requires Inclusion of Fees Paid By Lenders as Well as AMCs.

The Commission's Order recognized that "regulatory requirements may shape the definition of relevant markets." Op. & Order at 5. *See IT&T Corp.*,518 F.2d at 935-36 ("the impact of regulation ***must be assessed*** simply as another fact of market life"(emphasis added)). Complaint Counsel contends that the relevant market here is limited to covered real estate appraisals procured by AMCs. However, this narrow market definition artificially excludes all real estate appraisals purchased by lenders. As discussed below, undisputed evidence will show that real estate appraisals are identical to and substitutable with one another, regardless of purchaser. But more to the point, Complaint Counsel's restrictive market definition ignores how regulation makes lender-procured appraisals highly relevant to market pricing.

Market definition analyzes "the pool of goods or services that enjoy reasonable interchangeability of use," i.e. "there must be sufficient ***supply and demand*** inelasticity that a monopolist in that market could profit by raising prices." *Morgan, Strand, Wheeler & Biggs v. Radiology, Ltd.*, 924 F.2d 1484, 1489 (9th Cir. 1991) (emphasis added) (internal quotation marks and citations omitted). Courts routinely rejected alleged relevant markets that are limited to a single type of client absent evidence that those clients purchase unique products or services. *See,*

*e.g.*, *Power Analytics Corp. v. Operation Tech.*, Case No. SA CV16-1955, 2017 WL 5479638, at *14 (C.D. Cal. May 10, 2017) (rejecting alleged relevant market limited to products sold to HR Data Centers); *T. Harris Young & Assocs. v. Marquette Elec., Inc.*, 931 F.2d 816, 823 (11th Cir. 1991) (rejecting alleged relevant market limited to paper for electrocardiographic recording sold to hospitals with 200 beds); *Lockheed Martin Corp. v. The Boeing Co.*, 314 F. Supp. 2d 1198, 1226-29 (M.D. Fla. 2004) (rejecting alleged market limited to federal government); *Glynn-Brunswick Hosp. Auth. v. Becton*, 159 F. Supp. 3d 1361, 1380 (S.D. Ga. 2016) (rejecting alleged markets limited to certain medical devices sold to acute care providers).

Real estate appraisals procured by AMCs are no different from, and are completely interchangeable with, those sold directly to lenders. The major difference lies in the lender's election of whether to maintain in-house or to outsource the duties of finding and retaining a qualified appraiser, and appraisal review. The acquired appraisal is no different, whether paid for by the lender directly or by the lender through an AMC. Moreover, there is no evidence showing that the end ***consumer*** (i.e., the home buyer) paid higher fees for real estate appraisals procured by either a lender or an AMC. And, Complaint Counsel will give no basis for this court to identify whether higher appraisal fees occurred because of the challenged conduct, or rather because of Dodd-Frank and the Louisiana's Appraisal Management Company Licensing and Regulation Act ("AMC Act"), La. R.S. 37:3415.

Further, Dodd-Frank and federal regulations demonstrate the relevance of appraisal fees paid by lenders to the relevant market definition in this case. Both the Dodd-Frank Act itself and the financial federal regulators' rules declare that objective information, including government schedules, academic studies, and fee surveys, can only be presumed compliant if they are based

on fees paid by *lenders*, and specifically *exclude* fees paid by AMCs. Summary of Evidence II.C-D, *infra*.

Accordingly, the relevant market must include appraisal fees for covered transactions paid in the State of Louisiana by both AMCs and lenders.

### C. Absent Proof of Coercion of Unlawful Conduct, There can be No "Restraint" of Price Competition by LREAB's Enforcement of the Customary and Reasonable Fee Law.

As Judge Easterbrook famously stated, "there can be no restraint of trade without a restraint." *Schachar v. Am. Academy of Ophthalmology, Inc.*, 870 F.2d 397, 397 (7th Cir. 1989). In this case, Complaint Counsel alleges, without evidence, that LREAB's enforcement of the AMC Act and La. Admin. Code tit. 46, § 31101 ("Rule 31101") coerced AMCs to raise their appraisal fees. As a result, Complaint Counsel bears the burden to prove "actual coercion," e.g. that LREAB's conduct *forced* the AMCs to pay higher appraisers fees by using the survey to set their appraisal fees in Louisiana. *TYR Sport, Inc. v. Warnaco Swimwear, Inc.*, 709 F. Supp. 2d 802, 810 (C.D. Cal. 2010) (actual coercion involves not only setting a standard, but also requires "the threat of punishing market participants from deviating from that standard"); *see also* BLACK'S LAW DICTIONARY (11th ed. 2019) (Defining economic coercion as "conduct that constitutes the improper use of economic power to compel another to submit to the wishes of one who wields it.") Without proof of actual economic coercion, there can be no restraint of trade.

Here, Complaint Counsel can only show that AMCs made independent decisions on their method of compliance with the Dodd-Frank and AMC Act customary and reasonable fee requirement, with some AMCs adopting the Board's Dodd-Frank-compliant fee survey. Such voluntary conduct *by the AMCs* does not amount to a violation of FTC Act Section 5 by LREAB.

Additionally, Complaint Counsel cannot meet its burden merely by showing that some AMCs allegedly raised their appraisal fees in Louisiana. *Valspar Corp. v. E.I. Du Pont De Nemours and Co.*, 873 F.3d 185, 195 (3d Cir. 2017) (holding that, absent more, 31 parallel price increases is insufficient evidence of an antitrust conspiracy). Instead, to prove an antitrust injury, Complaint Counsel must establish a causal link between higher appraisal fees and the alleged anticompetitive conduct. *Atl. Richfield Co. v. USA Petrol. Co.*, 495 U.S. 328, 334 (1990) (antitrust injury, such as higher prices, must be "attributable to an anti-competitive aspect . . . under scrutiny").

Given the regulatory mandates imposed on LREAB by federal and state law, and the federal and state requirement to pay customary and reasonable appraisal fees, Complaint Counsel has two hurdles to establish a specific causal link between allegedly higher appraisal fees and LREAB's conduct. First, Complaint Counsel must demonstrate that any AMC's increase in appraisal fees was not plausibly caused by regulatory and market factors apart from any action by LREAB. And second, Complaint Counsel must also show that all AMCs were in compliance with the Dodd-Frank's and the AMC Act's customary and reasonable fee mandate *prior to the alleged* increase in appraisal fees. Absent providing this evidence for each and every AMC, Complaint Counsel's reliance on any alleged increase in appraisal fees paid by AMCs does not reliably prove a violation of FTC Act Section 5, but instead, demonstrates a rise in AMC's payment of appraisal fees attributable to compliance with the federal and state customary and reasonable fee mandates.

In addition, Complaint Counsel must show that supposed increases in appraisal fees were not caused by other market factors, such as the well-known lack of qualified appraisers, high demand, increased turnaround time, difficulty of assignment, or distance traveled. Furthermore, Complaint Counsel must also establish that any alleged price increases are solely attributable to

anticompetitive action by LREAB, and not an industry response or reaction to actions by third parties, including independent reaction and response to news of LREAB's enforcement of the AMC Act's customary and reasonable fee requirement.

## SUMMARY OF EVIDENCE

### I. LREAB'S WITNESSES

LREAB will present the following witnesses in support of its defenses. For clarity, "LREAB" will be used herein to refer to the entirety of the Louisiana Real Estate Appraisers Board state agency, including state administrators and employees as well as the individual Board members; "LREAB Staff" will refer to the state employees that are not members of the Board, including the Executive Director, and the administrative and investigative staff; and, the "Board" will refer to the members of the Louisiana Real Estate Appraisers Board.

LREAB's principal witness will be **Bruce Unangst** who, since November 15, 2010, has been employed full-time as the Executive Director of the Louisiana Real Estate Commission and, by law, also has served as LREAB's Executive Director. Mr. Unangst is not licensed as a real estate appraiser and is not employed by a banking or lending institution or an AMC. All decisions regarding his employment and compensation are controlled exclusively by the Louisiana Real Estate Commission; the Board can neither fire Mr. Unangst nor affect his compensation in any way. As LREAB Executive Director, Mr. Unangst is not on the Board and does not vote on Board matters. He manages the day-to-day operations of the LREAB and ensures that LREAB fulfills its regulatory obligations in accordance with federal and state law, and executes Board decisions consistent with those obligations. Mr. Unangst interacts regularly on behalf of LREAB with departments and agencies within the office of the Governor and the leadership of the Louisiana Legislature, as well as with representatives of entities regulated by the Board and affected by LREAB regulations, including appraisers, lenders, builders, and AMCs. He is responsible for

ensuring that regulations adopted by LREAB are promulgated in accordance with the requirements of the Louisiana Administrative Procedures Act ("Louisiana APA"). Mr. Unangst advised the Louisiana House and Senate with respect to the implementation of the federal Dodd-Frank Act obligations in the AMC Act, and had primary responsibility for overseeing the promulgation of LREAB rules to implement federal and state laws and regulations, including Rule 31101 requiring AMCs to pay residential appraisers customary and reasonable fees for covered residential appraisals. Mr. Unangst further has principal responsibility to oversee enforcement of the Board's rules, including staff investigations into written complaints of non-compliance by AMCs with Rule 31101. Unless otherwise noted, the cited evidence will be presented through Mr. Unangst.

**Cheryl Bella** will testify concerning the research she provided to the Board concerning other States' efforts to draft legislation and regulations to comply with the Dodd-Frank law and federal regulations. Although licensed as a residential appraiser, Ms. Bella will testify that she does not perform residential appraisals, and has not actively participated in the market for appraisals for more than 20 years. Ms. Bella became a Board member after the date of the rule promulgation and enforcement decisions identified in the Complaint.

**Michael Graham** is licensed as a certified general appraiser and formerly served as a member of the Board. He will testify that at all relevant times he performed no residential appraisals and did not actively participate in the market for residential appraisals. Mr. Graham will testify concerning his decisions to approve the settlement with Coester VMS, to find iMortgage Services in violation of Rule 31101, and to approve the compliance plan proposed by iMortgage Services.

**James Purgerson** was formerly a member of the Board. Mr. Purgerson at all relevant times was employed by a bank and was not licensed as an appraiser, although his duties for the

bank included the review of residential appraisals. He will testify concerning his work on the Board, and specifically why he voted to find iMortgage Services in violation of Rule 31101 and to approve the compliance plan proposed by iMortgage Services.

**Robert Maynor** and **Hendrik van Duyvendijk** were employed by LREAB as investigational staff. Among their duties, they investigated allegations of non-compliance by appraisers with appraisal qualifications and requirements, and non-compliance by AMCs with LREAB rules including Rule 31101. They will testify concerning their investigations of written complaints of violations of the AMC Act; that their focus in these investigations was whether the AMC complied with any of the methods of compliance set forth in federal regulations as incorporated in the AMC Act; that where the AMC showed compliance the investigation was closed; that where the AMC documentation failed to demonstrate compliance, they recommended opening a formal investigation. They also will testify that when LREAB was informed of the FTC Part 2 investigation, they were instructed to stop all further investigational efforts. As a result, they halted investigations that would have proceeded further in accordance with their recommendations, and halted further actions on investigations that they had recommended to close.

**Herbert Holloway** is the Research Economist for the Business Research Center of Southeastern Louisiana University. Mr. Holloway will testify concerning the Board's retention of the SLU BRC to produce survey data of fees paid by lenders in Louisiana and other states that could be used by AMCs to comply with the customary and reasonable fee mandates under one of the two Dodd-Frank presumptions of compliance. Mr. Holloway will testify that at all times he was instructed by the Board to produce an objective and independent survey, and that he complied with the Board's instructions. He will testify how the survey took into account data responses

from lenders and appraisers. Mr. Holloway further will testify that any options he presented to the Board concerning the survey data and presentation, and the surveys themselves as produced by SLU BRC, were compliant with generally-accepted standards and practices. He will testify concerning the survey results, and in particular, that, over the course of the surveys, the fees paid by lenders to appraisers for the various types of appraisals surveyed tended to increase over time, and that such results reflected changes shown in other relevant data points such as the schedule of appraisal fees published by the Veterans Administration.

By agreement with Complaint Counsel, the testimony of **Joan Trice** will be presented by declaration. Ms. Trice is the CEO of Clearbox LLC, which produces and sells to the industry information concerning fees charged by appraisers for residential appraisals.

## II. THE LEGAL AND REGULATORY ENVIRONMENT GOVERNING LREAB'S ENFORCEMENT OF HOW AMCS PAY CUSTOMARY AND REASONABLE FEES TO RESIDENTIAL APPRAISERS

### A. Federal and Louisiana State Regulatory Obligations Affecting the Appraisal Market Prior to Dodd-Frank.

For more than 30 years, Congress has imposed statutory and regulatory obligations on states and state boards that license real estate appraisers. In response to the 1980s savings and loan mortgage crisis, Congress, in 1989, enacted the Financial Institutions Reform, Recovery, and Enforcement Act ("FIRREA") in part to protect the public interest in the integrity of home mortgages. 12 U.S.C. § 3331 *et seq*. Title XI of FIRREA tasked the states' appraiser certifying and licensing agencies to uphold federal regulations that protect the public interest in sound real estate appraisals by ensuring that appraisers are qualified. FIRREA further created the federal Appraisal Subcommittee ("ASC"), and granted it oversight, monitoring, and supervision over those state agencies. *See* 12 U.S.C. §§ 3332, 3346, 3347.

The Louisiana Legislature created LREAB in 1987 as the state appraiser certifying and licensing agency, within the Office of the Governor. LREAB's mission is to serve and protect the public interest in all real estate appraisal activities. The Legislature initially tasked LREAB to bring the state into compliance with FIRREA; to license qualified appraisers; and to ensure appraiser compliance with the Louisiana Real Estate Appraisers Law. La. R.S. 37:3391-3413.

Board members are appointed by the Governor and approved by the Louisiana Senate. La. R.S. 37:3394(A)-(C). The Board is comprised of members representing different geographic regions of the State and distinct professional interests relevant to the appraisal of real property. The Board members serve part-time without remuneration. Typically, those who serve as Board members are appointed based on outstanding achievements in their respective fields relating to commercial and residential property appraisal. Until 2013, under La. R.S. 37:3394 the Board had nine members. Two members selected by the Governor represented lenders – one proposed by the Louisiana Bankers Association, and another proposed by the Community Bankers Association. A minimum of four members were "general appraisers" who are licensed to appraise complex commercial properties as well as residences, and a minimum of two members were residential appraisers. Like most professional appraisal boards nationwide, the Board membership contributed their knowledge and experience from their respective fields to the Board's deliberations. This structure of the Board is consistent with the definition of a state board adopted by the ASC: "'State board' means a group of individuals (usually appraisers, AMC representatives, bankers, consumers, and/or real estate professionals) appointed by the Governor

or a similarly positioned State official to assist or oversee State Programs. A State agency may be headed by a board, commission or an individual."[2]

Louisiana's state policies recognize that real estate appraisals are essential to securing the integrity of the real estate mortgage market and the real estate market. Those markets in Louisiana were ravaged by two major crises in the mid-2000s. In August 2005, Hurricane Katrina and the breach of the levees destroyed some 50 percent of the housing stock in Orleans parish. The 2007-08 financial crisis delivered a second wallop to those markets statewide.

These dual crises exacerbated the shortage of residential real estate appraisers and trainees – a concern of LREAB that continues to this day. From about 2008 to 2015, the number of certified residential appraisers dropped by about 5%, with a large percentage of appraisers over the age of 60. More troubling, during that same period the number of trainees seeking to enter the appraisal profession plummeted by about 60%.

### B. The Role of Real Estate Appraisals in the 2007-2008 Financial Crisis

The State of New York responded quickly to the financial crisis by signing the Home Valuation Code of Conduct in December 2008 with Freddie Mac and Fannie Mae. The Code was designed to promote appraiser independence, in part, by recognition of AMCs as intermediaries

[2] *See* ASC Policy Statements, Appendix B "Glossary of Terms" at https://www.asc.gov/Documents/PolicyStatements/2018%20March%20-%20Revised%20ASC%20Policy%20Statements.pdf. Following passage of the 2012 amendments to the AMC Act, the legislature amended the Appraisers Law to add a tenth Board member, in the AMC category.

between lenders and appraisers.[3] However, AMCs proved no panacea for unscrupulous appraisals. By April 2009, Congress was considering legislation to regulate AMCs.[4]

The Louisiana legislature and LREAB learned how low-price, poor quality appraisals in Louisiana contributed to the 2007-2008 collapse of the housing market and the financial crisis. Lenders and AMCs pressured appraisers to appraise the properties at full value. But they achieved that goal not by *over*compensating appraiser fees, as Complaint Counsel suggest. Quite the opposite: Lenders and AMCs sidestepped competent appraisers with the integrity to stand behind their appraisals and, instead, engaged in a "race to the bottom." They hired less experienced appraisers hungry for business and willing to work below market, and would reward them with repeat appraisal assignments at low fees *if* they were willing to play ball, on a quick turnaround.[5]

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[3] *See* Home Valuation Code of Conduct, http://www.freddiemac.com/singlefamily/pdf/122308_valuationcodeofconduct.pdf

[4] *See* Opening Statement of Congressman Paul E. Kanjorski, House Committee on Financial Services, Hearing on H.R. 1728, The Mortgage Reform and Anti-Predatory Lending Act, (April 23, 2009) at 98: "[W]e must establish oversight for appraisal management companies. They now touch 64 percent of written appraisals, but they are subject to little supervision. Going forward, we cannot allow anyone to play in the dark corners of our markets. We must ensure that everyone who operates in our financial system is subject to appropriate oversight, whether they are a hedge fund, a credit rating agency, or an appraisal management company." Congressman Kanjorski has been recognized as the legislator responsible for the Appraisal Independence provisions of the Dodd-Frank Act.

[5] For example, at a hearing before the Subcommittee on Insurance, Housing and Community Opportunity of the Committee on Financial Services, U.S. House of Representatives on June 28, 2012, William B. Shear, Director Financial Markets and Community Investment of the Government Accounting Office testified: "appraiser groups said that some AMCs selected appraisers based on who would accept the lowest fee and complete the appraisal report the fastest rather than on who was the most qualified, had the appropriate experience, and was familiar with the relevant neighborhood"; and Francois Gregoire, President of the National Association of Realtors, stated that "[t]he insertion of appraisal management companies between loan originators and appraisers results in a focus on fee and turnaround time rather than appraiser competency and experience." *See also*, Testimony of James Amorin, President, Appraisal Institute, Hearing on H.R. 1728, the Mortgage Reform and Anti-Predatory Lending Act of 2009, before the Committee on Financial Services, U.S. House of Representatives at 72 (April 23, 2009): "Consumers unwittingly believe that [the AMC appraisal management fee] includes a quality appraisal when

The Louisiana legislature first responded to these crises in 2009 in keeping with the Home Valuation Code of Conduct. They enacted the AMC Act, which required AMCs that operated in the State of Louisiana to meet certain licensing and certification requirements. La. R.S. 37:3415. The legislature delegated to LREAB the obligation and authority to license AMCs, to enact regulations to implement and enforce the AMC Act, and to hold hearings and discipline AMCs that failed to comply with the Act. *Id.*

The 2009 AMC Act had no provisions relating to appraisal fees to be paid by AMCs, and LREAB had no obligations or responsibilities with respect to the payment of fees to residential appraisers. That is, until Congress passed the Dodd-Frank Act.

### C. The Dodd-Frank Act Requires AMCs to Comply with the Appraiser Independence Obligations, Including the Customary and Reasonable Fee Mandate.

In response to the 2007-2008 financial crisis, the federal government mandated all states that license AMCs to impose minimum requirements for state appraisal boards to supervise and regulate AMCs. Among the many reforms imposed by Dodd-Frank, Congress amended the Truth-in-Lending Act ("TILA") to require that lenders and their agents (including AMCs) "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." 15 U.S.C. § 1639e(i)(1). Congress provided that compliance with this requirement could be demonstrated by use of "objective third-party information, such as government agency fee schedules, academic studies, and independent private sector surveys." *Id.* However, Congress deemed that fees paid by AMCs would not meet

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in fact it is typically a cut-rate substitute. . . consumers are short-changed by quick valuations by AMC contractors paid a fraction of the normal compensation."

the requirements for objectivity or independence: "Fee studies shall exclude assignments ordered by known appraisal management companies." *Id.*

Complaint Counsel incorrectly suggests (CC Br. 7, 33) that nothing in Dodd Frank contemplates regulation of appraisal fees by a state board with members who are *appraisers*. In fact, Dodd-Frank compelled Louisiana to do precisely that. For 30 years it was known to federal financial regulators that Louisiana, along with many other states, had entrusted regulation of appraisers to boards composed, in part, of licensed appraisers. In Title XI of FIRREA, in 1989 Congress tasked state appraiser agencies to license and supervise appraisers to ensure sound real estate appraisals, and Louisiana task LREAB with the responsibility of complying with the FIRREA mandates. And as noted *supra* at 18, the federal Appraisal Subcommittee defines "State boards" as comprised of stakeholders, including certified licensed residential appraisers.

When enacting Dodd-Frank, Congress required that states that registered AMCs, as Louisiana had begun to do in 2009, must ensure that AMCs "register with and be subject to supervision by a State appraiser certifying and licensing agency in each State in which such company operates"; and that such supervision must include the AMCs' compliance with the appraiser independence requirements of TILA 129E, including the customary and reasonable fee mandate. 12 U.S.C. § 3353(a). Accordingly, Congress understood and directed that boards in states like Louisiana with appraiser members must supervise AMCs' compliance with the customary and reasonable appraisal fee mandate.[6]

[6] The Supreme Court did not issue its opinion in *N.C. State Bd. of Dental Examiners v. FTC*, 574 U.S. 494 (2015) until April 25, 2015 – nearly 30 years after the creation of LREAB, more than four years after Dodd-Frank took effect, some three years after the AMC Act amendments, one and a half years after the Louisiana legislature approved Rule 31101, and after LREAB had commenced each of its investigations of violations of the customary and reasonable fee rule. The ASC has not since changed its definition of "State board." And given the stark differences between the facts of *N.C. Dental* and this case, the State and

Dodd-Frank further required the federal banking agencies and the Federal Housing Finance Agency to establish by regulation, within 90 days, "minimum requirements to be applied by a State in the registration of appraisal management companies." 12 U.S.C. § 3353(a). Section 3353(a)(4) expressly includes in these "minimum requirements" ensuring AMC compliance with the new appraiser independence provisions in § 1639e(h). Congress thereby made clear its determination that AMCs' adherence to appraisal independence requirements was of sufficient concern to warrant ongoing supervision by state appraiser agencies.

### D. The Federal Financial Regulators Prescribe Interim Final Rules to Implement Dodd-Frank and the Customary and Reasonable Fee Mandate.

On October 18, 2010, the Federal Reserve Board released the Interim Federal Rules required by Dodd-Frank. These regulations prescribed two presumptions and a catch-all method for compliance with the Dodd-Frank customary and reasonable requirement:

(1) Presumption 1 requires application of a six-factor adjustment "to recent rates paid for comparable appraisal services performed in the geographic market of the property being appraised." Those six factors focus on understanding the nature of the task, and the skill and time required to perform the appraisal competently;

(2) Presumption 2 allows lenders and AMCs to use objective third-party information, including independent surveys and government fee schedules based on appraisal fees paid by lenders to a representative sample in the relevant geographic market. In accordance with Dodd-Frank, any survey compliant with Presumption 2 may not include appraisal fees paid by AMCs; and,

(3) AMCs not relying on either presumption must demonstrate that their fees are customary and reasonable based on "all facts and circumstances," with no presumption of compliance.

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LREAB justifiably continued to believe that the Board retained its state action immunity despite the Supreme Court's ruling. *See* Summary of Evidence II.I and N, *infra*.

75 Fed. Reg. 66,554, 66,569, 66,574 (Oct. 28, 2010). Additional regulatory provisions required that the methods used to determine customary and reasonable fees must ignore transaction-specific fees paid to appraisers in favor of a 12-month snapshot of "recent rates," and ignore AMC data when relying on objective and independent surveys. *See id*. at 66,554, 66,565, 66,569.

The Federal Reserve Board notice explained that TILA Section 129(E)(i) "focuses on the marketplace by permitting use of objective market information to determine rates. The statute also makes allowances for factors reflecting the complexity of an appraisal and thus the reasonableness of the fee for appraisal services in a given transaction, such as 'increased time, difficulty, and scope of work.'' TILA Section 129E(i)(1) and (3)." *Id.* at 65,570.

The Federal Reserve Board "interprets the statutory language of TILA Section 129E(i) to signify that the marketplace should be the primary determiner of the value of appraisal services, and hence the customary and reasonable rate of compensation for fee appraisers." 75 Fed. Reg. at 65,570. But this one sentence out of context does not begin to cover the 15 pages of commentary and regulations that follow. As the commentary explains, Section 129(E) defines the contemplated "marketplace" objectively, not by the type of unconstrained fee negotiations that contributed to the residential mortgage market collapse crisis in the first place. *Id.*

> [A]n appraiser may be willing to accept a low fee because the appraiser is new to the industry and wishes to establish herself, or simply because the appraiser needs any work he can obtain in a slow housing market. … an appraiser's agreement that a fee is "customary and reasonable" is an unreliable measure of whether the fee in fact meets the statutory standard.

*Id.* at 65,571.

Accordingly, the regulations define "customary" and "reasonable" to reflect rates paid in the market as a whole, and not individual negotiations between AMCs and appraisers. Under presumption (1) (the six-factor analysis), "to be 'customary,' the fee must be reasonably related to

recent rates for appraisal services in the relevant geographic market." *Id.* at 66,569. And, "to be 'reasonable,' the fee should be adjusted as necessary to account for factors in addition to geographic market that affect the level of compensation appropriate in a given transaction, such as the type of property and the scope of work." *Id.* Thus, presumption (1) requires a two-step process: first, to identify recent rates paid for comparable appraisal services in the relevant geographic market; and second, to review the six factors and make any adjustments to recent rates appropriate to ensure that the amount of compensation is appropriate for the current transaction. *Id.* at 66,572. The rules define "recent rates" as generally those charged within the prior year on a rolling basis. *Id.* Notably, the rules suggest that "recent rates" in the relevant geographic market reflects market data and not solely the AMC's own prior rates—an AMC "may, but is not required to, use or perform a fee survey." *Id.* Moreover, the Fed observed that "recent rates" would be "an inaccurate measure of what a 'reasonable' fee would be" where the lender or its agents had committed anticompetitive acts that affect appraiser fee compensation. *Id.* at 66,569.

The Fed observed "that Congress was especially concerned that AMCs, serving as creditors' agents in managing the appraisal process, be covered by [the customary and reasonable fee] provision." 75 Fed. Reg. at 66,570. Thus, the regulations required each state that registers AMCs must empower their state appraiser certifying and licensing agency with "the legal authority and mechanisms to," *inter alia*: "(5) Conduct investigations of AMCs to assess potential violations of applicable appraisal-related laws, regulations, or orders; (6) Discipline, suspend, terminate, or deny renewal of the registration of an AMC that violates applicable appraisal-related laws, regulations, or orders; and, (7) Report an AMC's violation of applicable appraisal-related laws, regulations, or orders, as well as disciplinary and enforcement actions and other relevant information about an AMC's operations, to the Appraisal Subcommittee." 12 C.F.R. § 323.11.

The regulations expressly established a five-month deadline for compliance (April 11, 2011), and defined the implementing steps AMCs were to take. Regardless of whether a state had adopted laws or regulations covering these provisions, AMCs were *required* to have systems and procedures in place to meet this requirement by that date. *Id*. at 66,554. The federal regulators alerted AMCs and lenders that they could no longer rely on their existing systems for determining appraisal fees. But, the Fed emphasized, Dodd-Frank created a new regime to be implemented promptly, and business as usual would no longer be tolerated:

> Although some provisions in the interim final rule are similar to existing § 226.36(b), the interim final rule contains new requirements, such as the reasonable and customary fee requirement. … *The rule's new requirements will likely require creditors and AMCs to change their systems, adjust policies, and train staff.* The Board believes that five months should be sufficient for these purposes. Accordingly, the interim final rule *is mandatory* for consumer credit transactions secured by the consumer's principal dwelling in which an application is received by the creditor on or after April 1, 2011.

75 Fed. Reg. at 66576 (emphasis added).

In its comments, the Federal Reserve Board also noted that AMCs had expressed two concerns when commenting on the proposed rules. First, the AMCs noted that they were not aware of any existing objective and independent market studies that met the regulatory requirements. Second, AMCs anticipated that the "customary and reasonable fee" requirement would result in increased appraisal costs. The Fed did not dispute either proposition. 75 Fed. Reg. at 66,570.

A GAO Report discussing the appraisal market further corroborated the expectation that the "customary and reasonable" fee mandate would result in increased appraisal fee payments. General Accounting Office Report to Congressional Committees, "Residential Appraisals: Opportunities to Enhance Oversight of an Evolving Industry," at 25-27 (July 2011). In a section titled, "How the New Requirement That Appraisers Be Paid Customary and Reasonable Fees Will

Affect Consumer Costs Is Unknown," the GAO reported that objective survey data reflecting appraisal fees paid by lenders, whether in studies commissioned by lenders or the VA appraiser fee schedule, would reveal that appraisal fees covered by Dodd-Frank as then being paid by AMCs were below market:

> Because these studies cannot include the fees AMCs pay to appraisers, some industry participants, including some AMC officials, expect them to demonstrate that appraiser fees should be higher than what AMCs are currently paying. If that is the case, these lenders would require AMCs to increase the fees they pay to appraisers to a rate consistent with the findings of those studies. The expected result would be an increase in appraisal costs for consumers, as well as potential improvements in appraisal quality.

*Id.* at 26.

### E. The Appraisal Subcommittee's Regulatory Oversight of State Appraiser Boards

The Appraisal Subcommittee provides oversight of state board compliance with the Dodd-Frank mandates. *See* 79 Fed. Reg. 19521, at 19,527 (noting that "sections 1103, 1109, and 1118(a) of FIRREA, as amended by the Dodd-Frank Act, [] describe the elements of State regulation of AMCs that will be monitored by the ASC."). The ASC requires LREAB, as Louisiana's appraiser certifying and licensing agency, to investigate every complaint of AMC violations of the customary and reasonable fee requirement, and to report to the ASC complaints and disciplinary actions against appraisers and AMCs. *See* 12 U.S.C. § 3347(a) and Appraisal Subcommittee, Federal Financial Institutions Examination Council, Proposed Revised Policy Statements, 82 Fed. Reg. 43,966, 43,977-78 (Sept. 20, 2017) (setting forth duties of state AMC licensing boards under authority of the ASC). The ASC further requires state boards to exercise regulatory authority to appropriately discipline and sanction AMCs and appraisers. 12 U.S.C. § 3347(a)(3). The ASC typically audits every state appraiser board every one-to-two years, and receives regular reports concerning its regulatory and enforcement efforts. Failure of a state appraiser certifying and

licensing agency to recognize and enforce these requirements could result in the ASC refusing to recognize that state's certifications or licenses—effectively, a decertification of the state agency that would incapacitate the state's mortgage market. *Id.* § 3347(b).

The Dodd-Frank customary and reasonable fee provisions, including the methods of compliance found in the Interim Final Rules, took effect on April 1, 2011. Regardless of any state laws or regulations, AMCs were required by that date to comply with the customary and reasonable fee mandate.

### F. The Consumer Financial Protection Bureau Enacts TRID, Which Affects Prices Paid for Appraisals.

In November 2013, one of the financial regulators with responsibility for Dodd-Frank implementation, the Consumer Financial Protection Bureau, issued regulations requiring that lenders provide consumers with an integrated disclosure form combining the Loan Estimate and Closing Disclosure. These regulations for the Truth in Lending Act-Real Estate Settlement Practices Act Integrated Disclosure ("TRID"), required that if any changes were made to the listed fees beyond certain tolerances from the initial mortgage estimate, the mortgage lender would need to issue a new disclosure, which potentially could delay real estate closing.

Appraisal fees are in the "zero tolerance" category, such that the listed appraisal fee could not be increased without requiring the lender to issue a new revised TRID form. However, it is common during the appraisal process that additional factors (such as undisclosed or inaccurate information about the property) would complicate the appraisal and therefore require an increase to the actual appraisal fee.

To avoid the need for new disclosures (and the ensuing delays), many lenders and AMCs responded to TRID by increasing the appraisal prices listed on the disclosure. Similarly, many appraisers raised their appraisal fees so as to ensure their compensation per the initial TRID

disclosure covered the actual scope of work required of them. The TRID regulations took effect October 3, 2015.

### G. Recent Congressional Actions Further Validate the Strict Interpretation of the Customary and Reasonable Fee Mandate.

On May 24, 2018, President Trump signed into law P.L. 115-174, the Economic Growth, Regulatory Relief, and Consumer Protection Act, making numerous amendments to the Dodd-Frank Act, including to TILA Section 129E. This amendment to Dodd-Frank's appraisal independence provisions confirmed Congress' recognition that the "customary and reasonable" fee mandate was to be interpreted as a stringent constraint on negotiations between AMCs and appraisers. That amendment permits only one exception – to allow voluntary fee-free donations of appraisal services to charitable organizations to be construed as meeting "customary and reasonable" fee standards.[7] In the words of the new provision's sponsor, the amendment was necessary because "Dodd-Frank disallows this donated appraisal." 164 Cong. Rec. S1399, S1400 (daily ed. Mar. 6, 2018) (statement of Sen. Portman). Hence the amendment further refutes Complaint Counsel's assertion that the customary and reasonable appraisal fee requirement permits marketplace negotiations of fees or otherwise does not regulate price. Instead, the amendment reinforces that Congress enacted the mandate as an absolute requirement that AMCs must pay a customary and reasonable fee in all circumstances, as a safeguard against the hazards of too-low appraisal fees.

Similarly, in January 2018, the House Report on an equivalent amendment to TILA Section 129E(i) validated financial regulators' use of academic studies and fee surveys:

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[7] *See* The Economic Growth, Regulatory Relief, and Consumer Protection Act, Pub. L. 115-174, Section 102, "Safeguarding access to Habitat for Humanity homes" (modifying TILA Section 129E(i), 15 U.S.C. § 1639e(i)).

> As the prudential financial regulators seek to formulate these fees, Title XIV of Dodd-Frank requires them to consider objective third-party information, such as government agency fee schedules, academic studies, and independent private sector surveys. As the prudential regulators collect the necessary information to formulate customary and reasonable fees, Section 1472(i) [TILA 129E(i)] also directs relevant federal agencies to exclude fees that are connected to assignments ordered by appraisal management companies.

H. R. Rep. No. 115-528, at 1-2 (2018). By sponsoring an academic survey at a time when no such studies covering Louisiana existed, LREAB reasonably carried out the task that Congress anticipated a state agency with enforcement authority over customary and reasonable determinations would undertake.

### H. LREAB's Role in the Creation and Enforcement of the Dodd-Frank-related Amendments to the AMC Act

In response to Dodd-Frank, and at the request of Louisiana legislators, LREAB gathered and provided input to the legislative committees considering proposed text for what ultimately was enacted as La. R.S. 3415.15(A). Mr. Unangst obtained advice from sources that had been involved in the development of the appraiser independence sections of Dodd-Frank, including from the ASC and from executives of the Appraisal Institute, an association that awards professional designations to qualified appraisers based on education and experience. Cheryl Bella and Board members contacted state appraisal boards and appraiser associations around the country, and provided the Board with information concerning other states' efforts to implement the Dodd-Frank requirements. Mr. Unangst convened meetings among stakeholders affected by the Dodd-Frank mandates, including from appraisers, banks, realtors, and representatives of the Real Estate Valuation Advocacy Association ("REVAA"), a national trade association representing the interests of AMCs doing business in Louisiana. Mr. Unangst testified at a hearing on the bill before the Louisiana House Commerce Committee on May 1, 2012.

The Legislature amended the AMC Act in 2012 in several ways relevant to this proceeding. First, the amendments implemented the Dodd-Frank customary and reasonable fee mandate: "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 presumptions of compliance under federal law." La. R.S. § 37:3415.15(A).[8] Second, the Act required each AMC to certify annually to LREAB that it maintains five years of detailed records of each appraisal request and the fees paid to appraisers. La. R.S. § 37:3415.14. Third, the Act authorized LREAB to "adopt any rules and regulations in accordance with the Administrative Procedure Act necessary for the enforcement of this Chapter." La. R.S. §37:3415.21. Fourth, the AMC Act empowered LREAB to enforce its requirements, including to convene adjudicatory disciplinary hearings for violations of the Act. La. R.S. § 37:3415.19-.20. Specifically, the AMC Act requires the Board to "censure an appraisal management company, conditionally or unconditionally suspend, or revoke any license issued under this Chapter, levy fines or impose civil penalties" of up to $50,000 for:

> (1) Committing any act in violation of this chapter
>
> (2) Violating any rule or regulation adopted by the board in the interest of the public and consistent with the provisions of this Chapter.

La. R.S. 37:3415.19. The Legislature understood these requirements were necessary to comply with the Dodd-Frank Act, and to ensure that LREAB maintained its compliant status as the State's certifying and licensing agency with the ASC.

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[8] The Louisiana Legislature amended this section of the AMC Act in 2016 to specify the applicable federal laws and regulations, changing the final clause to: "consistent with the requirements of 15 U.S.C. 1639e and the final federal rules as provided for in the applicable provisions of 12 CFR Parts 34, 225, 226, 323, 1026, and 1222."

Although REVAA's representative, Mr. Robert Rieger, ostensibly had expressed AMC support for enactment of the bill before the legislative committees, almost immediately after passage REVAA and other groups representing large national AMCs contended that only the federal government or state attorney general could enforce the customary and reasonable fee mandate, and that, despite the express language of La. R.S. 37:3415.19 and .21 quoted above, the AMC Act gave LREAB no power to adopt rules or to enforce the mandate.

## I. LREAB Drafted Rule 31101 Consistent With Dodd-Frank and the AMC Act, and Promulgated it in Accordance with the Legislative and Executive Approvals Required by the Louisiana Administrative Procedures Act.

The Board understood that Louisiana was the fifth state to enact legislation under the Dodd-Frank appraisal independence requirements, and would be among the first to draft implementing rules. The Board convened a Rules Committee to obtain input from other states' appraisal boards, and from appraisers, lenders, AMCs, builders, realtors, and their representative associations, and to begin the drafting process. The Board ultimately drafted a comprehensive set of rules addressing: the scope and powers of the Board, including its licensing, disciplinary, enforcement, and adjudicatory authority; the content of AMC licenses and the licensing and renewal process; bonding requirements; requirements to verify appraiser qualifications, maintenance of records of fees, services, approved appraisers, appraiser payments; specified prohibited acts that would improperly influence the appraisal process; prohibited acts that would constitute licensing violations; and, in Rule 31101, an explanation of the methods by which AMCs could determine customary and reasonable fees for certain appraisal services, in accordance with federal law. LREAB committed more than a year of effort to this process, as described below.

Under the Louisiana APA, the Board initiated the process by publishing the initial draft of any proposed LREAB rule, and thereafter was required to publish any further amendments to that

draft, in the Louisiana Register. The final version as approved by the Legislature would also be published in the Louisiana Register. Before approving each proposed version of the Board rules for publication, the Louisiana Register reviewed evidence provided by Mr. Unangst showing that all regulatory prerequisites to publication had occurred. This approval included verification by the Louisiana Register that in promulgating the rules LREAB had properly complied with the requirements of the Louisiana APA, including that public comments were properly noticed and solicited, that any required hearings were held, and that the Legislative Fiscal Office had reviewed the rules and issued a Fiscal and Economic Impact Statement.

Each of the three publications of the proposed rule in the Louisiana Register was accompanied by a Fiscal and Economic Impact Statement (FEIS) reviewed and approved by the Louisiana Legislative Fiscal Office. Each FEIS statement reflected the judgment of the Legislative Fiscal Office that the proposed rule would have no impact on competition or employment. Mr. Unangst, having conferred directly with the Legislative Fiscal Office, understood the conclusion that there would be no impact on competition or employment to be based on the following factors. First, the Dodd-Frank Act and federal regulations, which were implemented through the AMC Act, required all AMCs to pay customary and reasonable fees for all covered transactions involving residential mortgage appraisals. The federal government and the Louisiana Legislature already would have anticipated and intended those impacts when determining, respectively, to enact Dodd-Frank and the Interim Final Rules, and the AMC Act. Therefore, any impact on competition would be attributed to those legislative mandates and not to any rule promulgated by the Board. Second, all fees were set by AMCs and residential appraisers in the market. LREAB's task, in response to complaints from appraisers, was to assure that AMCs used one of the prescribed three methods when calculating customary and reasonable fees.

LREAB shepherded the Board-proposed rules through three rounds of public comments. The first draft of the rule was published by the Louisiana Register in a "Notice of Intent" on November 20, 2012. After the first round of public comments and a public hearing on the draft, the Board amended the proposed rule. The Louisiana Register published a revised rule on February 20, 2013. Following each of the first and second rounds of comments and hearings, the Board amended the draft rule to reflect comments received that the Board deemed consistent with the public interest and the purposes of the AMC Act.

The Board approved a third draft of the rules. Mr. Unangst again conferred with the Louisiana Register and caused the further revised rules to be published in the Louisiana Register on June 20, 2013. Following a round of written comments on the third draft, LREAB held a public hearing on the rules on July 22, 2013. Representatives of REVAA and two of its members testified. The Board considered the written comments and oral comments of all witnesses, and by unanimous vote determined that the third version of the proposed rule should proceed.

On September 26, 2013, as prescribed by the Louisiana APA, the Board submitted a summary report describing the Board's decision to approve the implementing rules, including the customary and reasonable fee rule, to the Speaker of the House and the President of the Senate, for the purpose of exercising legislative oversight from the House and Senate Commerce Committees. The Report included descriptions of the rules, all public comments received by the Board, and the reasons supporting the Board's decision.

When LREAB submitted its report, Louisiana's part-time Legislature was not in session. Under the law in effect at that time, House and Senate legislative oversight subcommittees could determine to hold a hearing on the proposed rules, or could determine not to hold a hearing and allow the rules to take effect within 45 days. Mr. Unangst conferred with representatives of the

House Commerce Committee during the 45-day period and was informed that, after consideration of the report, no member requested additional information, no member of the subcommittee believed a hearing was necessary, and the Committee saw no reason why the rules as proposed should not go forward. The Senate Commerce Committee discussed the rules at a meeting on November 13, 2013. Mr. Unangst attended that meeting, as did REVAA representatives on behalf of AMCs who had lobbied committee members against adoption of the Board's proposed rules. The Committee Chairman noted that the House subcommittee had completed its work, and reminded the senators that a decision to not hold a hearing would allow the rules to take effect quickly, and that a decision to hold such a hearing would delay its adoption. That committee, being so advised, voted by a two-thirds majority to allow the rules to proceed.

Before publishing the final version of the rules, Mr. Unangst again had to demonstrate to the Louisiana Register the Board's compliance with the Louisiana APA, and that all necessary legislative approvals properly and timely were received from the Senate and House legislative oversight committees. The Louisiana Register so concluded, and the Board Rules, including Rule 31101, were published in the Louisiana Register on November 20, 2013, and became final and adopted. Then-Governor Bobby Jindal had the authority to disapprove the rule within 30 days thereafter. Mr. Unangst conferred with the Governor's staff concerning the Rules. The Governor allowed the Rules to take effect.

As shown on the following chart, the Board based the text of the customary and reasonable fee provisions of Rule 31101 on language taken directly from Dodd-Frank and the federal regulations. Text shown in **RED** signifies Dodd-Frank Act text as source for Rule 31101. Text shown in **BLUE** signifies text taken from the federal regulations.

| **LREAB Rule §31101. General Provisions; Customary and Reasonable Fees; Presumptions of Compliance** | **Dodd-Frank Act, 15 U.S.C. § 1639e(i)** |
|---|---|
| A. **Licensees 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** and as prescribed by R.S. 37:3415.15(A). For the purposes of this Chapter, market area shall be identified by zip code, parish, or metropolitan area.<br><br>**1. 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 appraisal management companies.**<br><br>**2.** The board, at its discretion, may establish a customary and reasonable rate of compensation schedule for use by any licensees electing to do so. | (1) In General. 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.**<br><br>**12 C.F.R. § 226.42(f)**<br><br>(3) A creditor and its agents shall be presumed to comply with paragraph (f)(1) if the creditor or its agents determine the amount of compensation paid to the fee appraiser by relying on information about rates that:<br><br>**(i) Is based on objective third-party information, including fee schedules, studies, and surveys prepared by independent third parties such as government agencies, academic institutions, and private research firms;**<br><br>(ii) Based on recent rates paid to a representative sample of providers of appraisal services in the geographic market of the property being appraised or the fee schedules of those providers; and<br><br>(iii) In the case of information based on fee schedules, studies, and surveys, such fee schedules, studies, or surveys, or the information derived therefrom, **excludes compensation paid to fee appraisers for appraisals ordered by appraisal management companies,** as defined in paragraph (f)(4)(iii) of this section. |

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| 3. Licensees electing to compensate fee appraisers on any basis other than an established fee schedule as described in Paragraphs 1 or 2 above **shall**, at a minimum, **review the factors listed in §31101.B.1-6** on each assignment made, **and make appropriate adjustments to recent rates paid in the relevant geographic market necessary to ensure that the amount of compensation is reasonable.**<br><br>B. A licensee shall maintain written documentation that describes or substantiates all methods, factors, variations, and differences used to determine the customary and reasonable fee for appraisal services conducted in the geographic market of the appraisal assignment. This documentation shall include, at a minimum, the following elements:<br>**1. the type of property for each appraisal performed;**<br>**2. the scope of work for each appraisal performed;**<br>**3. the time in which the appraisal services are required to be performed;**<br>**4. fee appraiser qualifications;**<br>**5. fee appraiser experience and professional record; and**<br>**6. fee appraiser work quality.** | (2) A creditor and its agents shall be presumed to comply with paragraph (f)(1) if—<br>(i) The creditor or its agents compensate the fee appraiser in an amount that is reasonably related to recent rates paid for comparable appraisal services performed in the geographic market of the property being appraised. In determining this amount, a creditor or its agents **shall review the factors below and make any adjustments to recent rates paid in the relevant geographic market necessary to ensure that the amount of compensation is reasonable:**<br><br>**(A) The type of property,**<br>**(B) The scope of work,**<br>**(C) The time in which the appraisal services are required to be performed,**<br>**(D) Fee appraiser qualifications,**<br>**(E) Fee appraiser experience and professional record, and**<br>**(F) Fee appraiser work quality;** |

Rule 31101 incorporates all three methods of compliance with the customary and reasonable fee obligation under federal law and regulations. As the heading of Rule 31101 indicates, the Rule states both general provisions for customary and reasonable fee requirements, and the presumptions of compliance. The chapeau of Section (A) restates the general customary and reasonable fee requirement., using language taken directly from Dodd-Frank. Section (A)(1)

provides the option per federal presumption (2) to use objective third party information, again taking the language directly from Dodd-Frank. Section (A)(3) sets forth the two additional alternative methods. An AMC can use the six-factor test of presumption (1). Or, as Section (A)(3) states, the six factors are to be considered "at a minimum." Thus any AMC may set fees by additional relevant factors, with no presumption of compliance, under the "all facts and circumstances" test.

Although federal regulations permit the use of a "government agency fee schedule," such as the Veterans Administration fee schedule, the Board has never "established a customary and reasonable rate of compensation schedule" as permitted by Section (A)(2). Inasmuch as the Board was one of the first states in the country to adopt a customary and reasonable fee rule pursuant to the federal mandate, and AMCs had complained that there was no cost-effective means of compliance with the draft Rule, the Board included Section (A)(2) in case such an option became necessary or advisable.

Rule 31101 includes two additional sections. Section (C) required licensees to maintain documentation of the methods and factors the AMC used to determine customary and reasonable fees. And Section (D) remedied potential coercion by withholding of appraiser fees by requiring AMCs to pay appraisers for work satisfactorily performed, within 30 days.

LREAB notified the ASC about its rules implementing the AMC Act, including Rule 31101. The ASC never indicated to LREAB that these rules did not comply with federal regulatory requirements.

### J. The Board Funds an Independent Survey in Response to AMC Complaints, With the Goal to Facilitate Prompt Compliance.

The federal customary and reasonable fee regulations became mandatory in April 2011, within a few months after passage of Dodd-Frank. The AMC Act amendments incorporating those

federal laws and rules became effective upon enactment in 2012. LREAB had noted the concerns expressed by AMCs to federal financial regulators during the Interim Final Rules promulgation process that no objective survey information existed for each of the 50 states that could be used to comply with the customary and reasonable fee requirement. LREAB received similar comments from AMCs doing business in Louisiana during the state legislative and regulatory deliberations.

LREAB saw its mission as securing compliance with Dodd-Frank, and so sought to efficiently address this compliance gap by funding a survey to be conducted by an independent academic institution. The Board retained Southeastern Louisiana University Business Research Center ("SLU") to conduct an objective and independent survey of recent rates paid for five different types of residential appraisals by lenders in the nine State geographic market areas.

As Mr. Holloway of SLU will testify, LREAB instructed SLU to produce a survey that would be acceptable for compliance with presumption (2) under the Dodd-Frank Act and rules. The SLU surveyed only lenders and appraisers, inasmuch as Dodd-Frank and federal rules concerning that presumption prohibit the use of rates paid by AMCs in compliant objective surveys. SLU completed its initial Survey in 2013, reflecting fees paid by lenders for appraisals over the prior 12 months. SLU produced additional annual surveys covering rates paid in 2013, 2014, and 2016. LREAB was not involved in the survey, and exercised no influence over any of these surveys. Where SLU had questions for LREAB, SLU presented options to LREAB that were consistent with accepted professional standards and methods. SLU asked LREAB to help encourage lenders and appraisers to respond to SLU's inquiries so as to obtain a broad data sample. LREAB paid approximately $7,000 for each survey. No private entities contributed funding for the survey.

SLU understood that its Survey was not a price schedule and was never intended to be mandatory. When LREAB first published the SLU Survey in June 2013, LREAB also published on its website and distributed a "Notice to Appraisal Management Companies" which advised AMCs that the SLU Survey "is provided as a courtesy to all licensees; however its use is not mandatory." CX0023-002.

The Board discussed at open meetings their intention to fund the survey. No one raised any objection. LREAB made the ASC aware of the SLU Survey and its intended uses, and later discussed renewal of the SLU survey at Board meetings attended by the Executive Director and Policy Managers of the ASC. LREAB never received any comments from the ASC suggesting that the Board's survey initiative was somehow improper.

Other states had funded similar surveys to assist in compliance with the Dodd-Frank requirements. The State of Kentucky retained SLU to perform a survey for use in its own state.

### K. LREAB Applied and Enforced the Customary and Reasonable Fee Requirements in Good Faith and in Accordance with its Understanding of Dodd-Frank and the Federal Rules, with the Goal to Attain AMC Compliance.

As noted above, federal law required LREAB, under penalty of de-certification by the ASC, to process and investigate complaints of violations of the customary and reasonable fee rule, and to report complaints and disciplinary actions to the ASC. 12 U.S.C. § 3347. Contrary to the assertions of Complaint Counsel (CC Br. 10), LREAB's obligations were not limited to ensuring that AMCs establish and comply with "processes and controls reasonably designed to" achieve compliance with TILA's customary and reasonable fee requirement. In fact, Congress directed that the ASC ensure that a state appraisal agency had an "effective regulatory program" regarding AMCs:

> In determining whether such a [state agency's regulatory] program is effective, the Appraisal Subcommittee shall include an analysis of … the registration of appraisal management companies … *the receiving and tracking of submitted complaints* against appraisers and appraisal management companies, *the investigation of complaints*, and *enforcement actions* against appraisers and appraisal management companies.

12 U.S. C. § 3347(a)(5) (emphasis added). Such complaints could include compliance with the customary and reasonable fee standards.

Pursuant to that mandate, and pursuant to the Dodd-Frank mandate incorporated in AMC Act section 37:3415.19, the Board's rules empowered the executive director of LREAB to "issue written authorization to investigate apparent violations" of the AMC Act. La. Admin. Code ("LAC") tit. 46 § 30900. LREAB enforced its rules in a complaint-driven process, such that "upon verified complaint in writing of any person" LREAB had the obligation and authority to "investigate the actions of a licensee." *Id.*

LREAB staff developed and followed a set of investigation protocols. Form letters and language were created to initiate and follow-up on an investigation. RX0180-008. The initial letter requested the AMC to "[p]lease provide all relevant information as to the *basis and methods* utilized by your firm in meeting the requirements of Louisiana law," specifically noting that this information could include evidence of presumptive compliance using a study or "evaluations of factors utilized in the establishment of your fee schedule, consistent with applicable federal interim rules and state law." *Id.* (emphasis added). The letter did *not* request any information concerning the fees actually paid by the AMC. *Id.* The initial letter informed the AMC that one or more written complaints had been received, and required the AMC to produce documents showing the method of compliance used by the AMC as provided by the AMC Act and Rule 31101. *Id.* Where such information demonstrated compliance, the investigation was closed. If the AMC could not

produce such information, or refused to do so, a follow-up letter was sent requiring production of additional and more detailed information.

Over the approximately three years prior to the initiation of the Part 2 investigation, LREAB received and investigated 49 different AMCs due to complaints of violations of various aspects of the AMC Act and Board rules, including: (1) late payments to the appraiser, LAC tit. 46 § 31101(D); (2) improper removal from an AMC panel, LAC tit. 46 § 30701(A)(4); (3) unlicensed activity in the State of Louisiana, La. R.S. 37:3415.3(A); (4) and failure to document or demonstrate customary and reasonable appraisal fee payments, La. R.S. 37:3415.15. Twelve (12) investigations concerned the customary and reasonable fee rule, and five (5) of those were closed because the complaining party withdrew the complaint. Most of those investigations were opened under the authority granted the Board by the AMC Act, before Rule 31101 took effect on November 20, 2013. Of the remaining seven (7), all but one were resolved by: (1) a finding in favor of the AMC, with the AMC providing sufficient evidence of compliance with the mandates of Dodd-Frank and La. R.S. § 37:3415.15; (2) the AMC's voluntary submittal of a compliance plan that was acceptable to the LREAB staff; or, (3) in the investigation concerning Coester VMS, a proposed settlement offer accepted by the Board. Only one – concerning iMortgage Services – proceeded to adjudication.

LREAB gave notice to the ASC (as required by federal law) concerning its enforcement of the customary and reasonable fee rule, and the ASC audited LREAB's investigational records during the pendency of several of these investigations. The ASC never once indicated to LREAB that these enforcement efforts did not fully comply with federal laws and regulations.

### L. LREAB Closed Investigations Where the AMC was Found in Compliance with the Six-Factor Presumption Method.

In September 2013, the Board opened a formal investigation into Real Estate Valuation Partners, LLC ("REVP") to investigate a potential violation of La. R.S. 37:3415.15. As part of the investigation, REVP provided a detailed description of how it applied presumption one, the six-factor method, including examples of its application of the six factors on specific appraisals. LREAB closed the investigation because sufficient documentation supported REVP's compliance with La. R.S.§ 37:3415.15.

LREAB also opened a formal investigation into Nations Valuation Services Inc. ("NVS") to investigate a potential violation of La. R.S. § 37:3415.15. NVS provided a detailed description of its application and usage of presumptive compliance under the six-factor method. The description provided both a "position statement on customary and reasonable compensation," and a sample with fee data to demonstrate compliance with La. R.S. § 37:3415.15. LREAB staff determined that NVS was in compliance with La. R.S. § 37:3415.15 because of their demonstration of reliance on the first presumption. However, as explained further below, when LREAB received notice of the FTC's Part 2 Investigation, LREAB put on hold all further enforcement of Rule 31101. Mr. Unangst formally closed the NVS investigation on August 17, 2017, in accordance with a Board Resolution.

### M. LREAB closed formal investigations after the AMC provided a proposal to ensure compliance with federal and Louisiana customary and reasonable fee requirements.

On May 1, 2013, LREAB opened a formal investigation into Accurate Appraisal Group, LLC ("AAG") to investigate a potential violation of La. R.S. § 37:3415.15. As part of that investigation, the Board requested "all relevant information as to the basis and methods utilized by your firm in meeting the requirements of Louisiana law." In response, AAG indicated that the

AMC "elected to follow the second presumption of compliance" using three independent fee surveys. Although none of these data and fee studies relied on by AAG complied with federal requirements, LREAB agreed to accept AAG's past good faith efforts but requested a prospective "corrective action plan" for the next 12 months. On July 1, 2013, AAG submitted a corrective action plan including use of the SLU survey. AAG acknowledged that they had relied upon out-of-scope fee studies, and that they had struggled to find current studies that satisfied the Dodd-Frank criteria. CX0475-006-007. They concluded: "The State of Louisiana and your board has assisted us by publishing the recent fee study prepared by Southeastern Louisiana University Business Research Center." *Id*. On July 9, 2013, LREAB accepted AAG's corrective action plan and closed the investigation. Soon after, AAG asked LREAB whether it could pay lower appraiser fees at the request of a particular lender client, despite the corrective action plan requirement to rely on the SLU Survey. LREAB agreed.

### N. The Board Accepted Coester VMS's Proffered Settlement under the Survey Method.

On September 26, 2013, the Board received a complaint regarding CoesterVMS compliance with the customary and reasonable fee requirement. Upon considering the complaint and accompanying documentation, on October 21, 2013, Robert Maynor, then Director of Investigations, requested that LREAB open a formal investigation against CoesterVMS. By letter dated November 5, 2013, an LREAB investigator asked Coester to "provide all relevant information as to the basis and methods utilized by your firm in meeting the requirements of Louisiana law. This information may include any third party fee studies and/or evaluations of factors utilized in establishment of your fee schedule, consistent with applicable federal interim rules and state law." RX0180-008. On November 15, 2013, Coester submitted a letter with insufficient information describing how they purported to comply with either of the presumptions

or with the "all facts and circumstances" test. LREAB sent a follow-up letter again seeking specific information showing how Coester purported to comply with the AMC Act customary and reasonable fee requirements. Coester's May 21, 2014 supplemental response was still insufficient to demonstrate whether and how Coester purported to comply with federal and state law.

On November 24, 2014 and April 30, 2015, LREAB sent notification to Coester that the Board would convene a hearing to determine whether Coester was in violation. The hearing notification included a complaint alleging that Coester failed to establish that it had complied with the AMC Act requirements for setting residential real estate appraiser fees.

On the eve of the hearing, in May 2015, Coester approached LREAB regarding a potential stipulation and order settling the matter in lieu of the hearing. During informal telephonic discussions between legal counsel for Coester and the Board, Coester asked to settle the Complaint administratively rather through adjudication. LREAB stated it was more interested in compliance than any punitive action, so agreed with that request. LREAB counsel said the settlement would need to include a compliance plan for one year. Coester proposed a prospective compliance plan relying on the SLU Survey; it did not propose to use any of the other methods recognized under the AMC Act. Coester and LREAB understood and anticipated that Coester could adjust any fee results shown in the SLU Survey based on the specific appraisal requirements.

Coester drafted and sent to the Board a proposed stipulation and order, whereby Coester agreed to pay the administrative costs of the proceeding, and specified that it would determine customary and reasonable fees for residential real estate appraisers in Louisiana using the SLU survey as its method of presumptive compliance for a 12-month period. On May 28, 2015, Coester and LREAB entered into the proposed Stipulation and Order.

At a meeting on June 5, 2015, the Board approved the Stipulation and Order. The Board confirmed Coester's interpretation that Coester's use of the term "fee schedule" in the Stipulation was intended to refer to the SLU Survey, which would meet presumption of compliance two. The Coester Stipulation and Order expired by its terms on June 5, 2016.

### O. The Board Found iMortgage Services Violated the Customary and Fee Requirement, and Accepted the Only Legally Sufficient Method of Compliance Proffered by iMortgage – using the Survey Presumption.

In 2014, LREAB received a complaint regarding iMortgage Services' compliance with Rule 31101. Upon considering the complaint and submitted documentation, LREAB opened a formal investigation into whether iMortgage may have been violating the customary and reasonable fee provisions of the AMC Act. By letter dated July 1, 2014, LREAB asked iMortgage to provide detailed information showing how their appraisal fees were determined in compliance with "the Federal Reserve Board's Interim Final Rule…in conjunction with" Rule 31101. After two requests for extension of time, iMortgage responded. LREAB would have been satisfied with any method of compliance recognized under federal law and regulations as incorporated into the AMC Act. However, iMortgage provided no evidence sufficient to demonstrate compliance with any prescribed method. Instead, iMortgage claimed that it relied on a survey from a large origination client, Flagstar Bank, showing fees on a county/parish basis for each state. However, iMortgage failed to produce the survey itself, and submitted no other evidence by which LREAB could assess whether the survey complied with federal and state laws and regulations, e.g., that it covered the proper geographic scope, reflected payments by lenders during the prescribed time period (the prior 12 months), and that it excluded fees paid by AMCs.

On September 16, 2015, LREAB sent iMortgage a Complaint alleging failure to establish compliance with the requirements for setting residential real estate appraiser fees, and notified

iMortgage of a hearing to determine whether iMortgage had violated the AMC Act. Although LREAB's letters had requested details concerning only those transactions subject to the customary and reasonable fee mandate, iMortgage had responded with details concerning more than 100 extraneous transactions. On December 8, 2015, LREAB and iMortgage, through a joint pre-hearing stipulation, limited the hearing to nine transactions concededly subject to the mandate within the time period covered by the Complaint.

At the hearing, conducted over more than 13 hours, iMortgage still submitted no evidence that it had complied with federal and state law in determining the fees paid to residential real estate appraisers for those nine transactions. iMortgage relied on the Flagstar Bank survey as its method of compliance, yet again failed to produce the survey itself or submit evidence to establish the survey was legally compliant. To the contrary, iMortgage witnesses testified that the lender acquired data for the survey from Clearbox LLC. It was well known in the industry and to several Board members that, as Ms. Trice's Declaration states, Clearbox data does not meet the evidentiary standards established for objective information under Dodd-Frank and federal regulations. iMortgage asserted that some of the fees were determined using a six-factor method, but did not produce any evidence showing compliance with that method either.

At the end of the hearing, the voting Board members unanimously found iMortgage violated the AMC Act, and stayed suspension of iMortgage's license for six months with the condition that iMortgage submit a compliance plan by March 21, 2016.[9] With one dissent from Board member James Purgerson, the Board required iMortgage to pay a $10,000 penalty and costs of adjudication.

[9] The Board Chairman, Roland Hall, did not vote on any matters before the Board except in case of a tie, out of his concern that the views of the Chairman should not carry more weight than any other Board members.

iMortgage petitioned LREAB for rehearing. The Board scheduled deliberation of the iMortgage rehearing petition on the agenda of its next regular meeting on February 10, 2016. The Board gave iMortgage notice of the meeting by email, and posted public notice of the meeting on the LREAB website and on the entrance to Board's offices. No iMortgage representative attended the meeting. The Board voted unanimously to deny the petition, and advised iMortgage of the Board's decision.

On February 26, 2016, iMortgage submitted to the Board a proposed compliance plan. The proffered plan proposed using the same lender survey that both LREAB staff and the Board had rejected as non-compliant, and again iMortgage refused to provide the Flagstar Bank survey to the Board. Further, iMortgage declined to describe any method or data that could serve as the basis for the six-factor or all facts and circumstances analysis. On March 10, 2016, the Board determined iMortgage's plan insufficient to comply with federal and state law.

The Board sent a letter requesting iMortgage to modify its compliance plan. Instead, iMortgage responded by proposing a different plan relying on use of the SLU Survey, which would meet presumption of compliance two per federal regulations incorporated in the AMC Act. At a March 21, 2016, regularly scheduled Board meeting, in accordance with the recommendations of LREAB staff, the Board approved iMortgage's second proposed compliance plan.

On March 10, 2016, iMortgage filed a Petition for Judicial Review of the Board's December 8, 2015 Order with the 19th Judicial District Court, Parish of East Baton Rouge, Louisiana, in accordance with the Louisiana APA. La. Const. Art. 5 § 16, La. R.S. 37:3415.20, and La. R.S. 49:964.

### P. In Response to the FTC, LREAB Halts Enforcement of the Customary and Reasonable Fee Requirement, and the State Attempts to Get the Board Back to Work Under State-Action Immunity.

After LREAB received the Civil Investigative Demand from the Commission, and understood that the Commission contended that LREAB's enforcement of Rule 31101 could violate federal antitrust law, LREAB put all pending enforcement of the AMC Act on hold. At that time, LREAB had obtained initial documentation from AMCs that showed presumptive compliance with the customary and reasonable fee requirements; but given the FTC's allegations, LREAB waited to close those investigations pending additional guidance. The Commission issued the Complaint on May 30, 2017.

Louisiana Governor John Bel Edwards, reacting to the Commission's Complaint, issued on July 11, 2017, Executive Order 17-16, entitled *Supervision of the Louisiana Real Estate Appraisers Board Regulation of Appraisal Management Companies*. RX0254. The Executive Order explains that:

- the federal Dodd-Frank Act established requirements for appraisal independence, including the customary and reasonable fee requirement;
- the Louisiana Legislature recognized this federal mandate as the reason to enact La. R.S. § 37:3415.15(A) in the 2012 AMC Act amendments; and
- the Board, consistent with the authority granted by the AMC Act, properly promulgated rules to implement these amended AMC Act requirements.

But, in light of the questions raised by the Commission concerning the applicability of antitrust law challenges to LREAB actions, that "may prevent the LREAB from faithfully executing mandates under the Dodd Frank Act and Louisiana law," the Executive Order took action to shore up existing supervision of the Board by:

- First, assigning the Louisiana Commissioner of Administration or his designee the duty to review, and the authority to adopt, modify, or reject, any customary and reasonable fee regulation promulgated by the Board;
- Second, requiring all Board enforcement of its customary and reasonable fee rule, including initiation, settlement, or determinations of complaints against AMCs, to be reviewed and approved, modified, or rejected, by an independent Administrative Law Judge from the Louisiana Division of Administrative Law.

The Board met on July 17, 2017, and unanimously passed a Resolution requiring the Executive Director, Mr. Unangst, to take the following actions: (1) present the Board with a proposed customary and reasonable fee rule for submission to the Commissioner of Administration, resulting in the repeal and replacement of prior Rule 31101; (2) negotiate a contract with the Division of Administrative Law for ALJ oversight over enforcement efforts of the Board; (3) terminate all pending investigations, having been advised of LREAB staff's findings that those AMCs had complied with the AMC Act customary and reasonable fee requirement; (4) not initiate any additional enforcement actions relating to that requirement until a replacement rule was in effect; and (5) seek settlement or resolution of any decrees, orders, or compliance plans, relating to alleged or adjudicated violations of the customary and reasonable fee requirements, that had not expired by their terms. The Board made the Resolution available on its public website, Resolution,http://www.reab.state.la.us/forms/Board%20Resolution%20to%20Readopt%20311 .pdf (July 17, 2017). Mr. Unangst complied with the Board Resolution.

Mr. Unangst and the Board then took steps to repromulgate the rule under the requirements of the Louisiana APA and the Governor's Executive Order. LREAB obtained approval of the draft Notice of Intent from the Commissioner of Administration and the Louisiana Legislative Fiscal

Office; caused the publication of the Notice of Intent in the Louisiana Register on August 20, 2017; received and reviewed written public comments; held a public hearing; sent the APA-required report to the Speaker of the House and the President of the Senate; confirmed with the Chairmen of the House and Senate Commerce Committees that no Committee members considered an oversight hearing to be necessary; and, received the analysis and opinion from the designee of the Commissioner of Administration that the proposed rule promoted State policies "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." Based on these actions, and supervision by the Executive branch and the Legislature, LREAB initiated publication of the Rule in the Louisiana Register.

Although the one-year term of the iMortgage compliance plan had expired by its terms, iMortgage had appealed the Board's finding of a violation of the AMC Act to the court for the 19th Judicial District of Louisiana. Pursuant to Resolution paragraph 4, LREAB notified iMortgage that it had vacated the Board's December 8, 2015 determination of violation, and thereafter returned the amount of the fine and administrative costs assessed by the Board. LREAB further notified counsel for iMortgage that neither the conduct of iMortgage occurring prior to the promulgation of the replacement Rule 31101, nor the existence of the past enforcement proceeding by the Board, nor any facts adduced in that past proceeding, could be the subject of or be introduced as evidence in any future enforcement action by the LREAB against iMortgage or its successors or assigns under Replacement Rule 31101.

Upon publication of replacement Rule 31101 in the Louisiana Register on November 20, 2017, the new rule took effect and the State repealed prior Rule 31101.

On November 20, 2017, LREAB held a public meeting to explain its actions and provide guidance to licensees. LREAB presented at the meeting its "Statement of Policy by the Louisiana Real Estate Appraisers Board upon Adoption of Replacement Rule 31101," and posted it to LREAB's website. RX0270. The Statement of Policy explains how LREAB interpreted and enforced Rule 31101 in the past, and how any conduct occurring prior to the adoption of the replacement rule will not be considered in any future enforcement action.

The Statement describes the supervisory authority of the Division of Administrative Law judge with respect to any prospective enforcement actions to be taken by the Board, in accordance with the requirements of Executive Order 17-16. The ALJ will be required to review and authorize LREAB to initiate each informal or formal enforcement action, and each proposed informal resolution, settlement, or dismissal of an enforcement action. The purpose of these reviews is to assure that each proposed action would serve Louisiana state policies to protect the integrity of mortgage appraisals.

Finally, the Statement informed the public that the Board would not again fund the SLU Survey, and that it would take the survey down from its website. The Statement recounted the reasons why the Board had funded the SLU Survey with the intention to facilitate compliance with a new federal requirement, and repeated the language of the Board's notice accompanying the survey: "This study is provided as a courtesy to all licensees; however, its use is not mandatory." The Board took this action because the Complaint in this proceeding asserts that the Board's acceptance of AMC-proposed settlements to comply with the AMC Act based on the SLU Survey was intended to effectively fix, maintain, or stabilize prices for AMC payments for residential appraisal services. The Board categorically rejected that characterization, but – consistent with

the Governor's intent for LREAB to resume its statutorily-mandated regulatory duties – preferred to eliminate the source of any such continuing accusations.

Notwithstanding, because use of the SLU Survey would comply with the customary and reasonable fee mandate presumption two under the federal Interim Final Rules under Dodd-Frank, as incorporated into the AMC Act, the Statement informed AMCs that their use of the SLU Survey, or any survey, would be subject to the conditions under the federal rules and Rule 31101 for presumptive compliance. This would apply through the end of 2017, at which time the survey data would no longer reflect "recent rates" per federal regulations. The Statement concluded by reminding AMCs that in any enforcement action, their use of the SLU Survey or other third-party information would be subject to review by an ALJ.

On November 27, 2017, LREAB moved to dismiss the Complaint based on its defense of state action immunity. The two-member Commission denied the motion and dismissed LREAB's state-action immunity defenses. In response, the Louisiana Senate unanimously adopted a resolution recounting the history of legislative supervision over LREAB's promulgation of Rule 31101 in 2013 and 2017, and concluding that "the Legislature of Louisiana hereby affirms that the promulgation and repromulgation of La. Admin Code 46:31101 were the sovereign acts of the state of Louisiana and its Legislature." Senate Concurrent Resolution No. 117 (May 14, 2018), https://www.legis.la.gov/legis/ViewDocument.aspx?d=1096438. LREAB filed a Complaint with the U.S. District Court for the Middle District of Louisiana under the federal Administrative Procedures Act to review and reverse the Commission's erroneous dismissal of LREAB's state-action immunity affirmative defenses. That Court stayed this proceeding, finding that LREAB had made the requisite strong showing that it was likely to prevail on the merits of its Complaint.

*La. Real Estate Appraisers Bd. v. FTC*, Civil Action No. 19-CV-00214-BAJ-RLB. (M.D. La. July 29, 2019).

The Fifth Circuit reversed that stay order on jurisdictional grounds. LREAB filed a petition for certiorari, with twenty-three states filing an amicus brief supporting LREAB. On April 5, the Supreme Court denied the petition.

Since the date LREAB received notice of the Part 2 investigation, LREAB has neither initiated nor brought any further enforcement actions under Rule 31101, and will not do so until resolution of this proceeding.

## ARGUMENT

## I. COMPLAINT COUNSEL CANNOT MEET ITS BURDEN TO ESTABLISH THAT ANY CHANGE IN APPRAISAL FEES WAS CAUSED BY A VIOLATION OF FTC ACT SECTION 5.

### A. Complaint Counsel Cannot Meet Their Burden of Proof under the Rule of Reason.

The evidence will show that Complaint Counsel cannot prove a substantial anticompetitive effect from LREAB's good faith efforts to enforce the customary and reasonable fee mandate. First, Complaint Counsel have failed to properly define the relevant market, which must include lenders that procure appraisals directly from appraisers, as well as AMCs that procure appraisals on the lenders' behalf. The same appraisers provide the covered appraisals to lenders and AMCs. Lenders can take back the appraisal function in-house if AMCs raise their fees for procuring appraisals; indeed, prior to the Home Valuation Code of Conduct, lenders typically performed those functions themselves. And Dodd-Frank and federal regulations show that lenders must be included in the relevant market by stating that the fees paid by lenders to appraisers can be used to determine customary and reasonable fees by survey, whereas AMC fees cannot. 15 U.S.C. § 1639e(i); 12 C.F.R. § 226.42(f)(3). As a result, their proffered evidence will pertain only to *part*

of the relevant market (AMC purchasers of real estate appraisals) and will exclude evidence of other relevant purchasers (lenders).

Second, Complaint Counsel will present no evidence to show that any changes in appraisal fees were "substantial." Complaint Counsel's analysis concerns just 9 of the approximately 140 AMCs then licensed by LREAB, and they cannot show that these AMCs were representative of the market as a whole.

Third, Complaint Counsel cannot show that any increase in prices was caused by the challenged conduct, rather than these AMCs' need to bring their methodologies into compliance with Dodd-Frank and the AMC Act. Congress and federal regulators understood that the customary and reasonable fee mandate would require AMCs to change their pricing methods, and that those changes would cause a salutary increase in appraisal fees as antidote to abuses that helped cause the financial meltdown. *Supra* at 24-26. The evidence will show that several of the 9 AMCs had not complied with the customary and reasonable fee mandate before adopting the SLU Survey, and thus any rise in fees was directly attributable to regulatory compliance. In this regard, any increase in fees from using a survey also has to be balanced against the lower cost of using the survey rather than the more fact and time-intensive six-factor or all facts and circumstances methods. Indeed, the lower cost of compliance using the SLU Survey rather than these other methods may have been a rational business choice for these AMCs.

Finally, none of Complaint Counsel's evidence shows any harm, in the form of higher appraisal fees or otherwise, to ***consumers***. The AMC is not an end-user of the appraisal. Acting as agent, it procures the appraisal for the lender to assess mortgage risk, and for the use of the home buyer. The only impact on the AMC is the amount of profit retained by the AMC, and the

AMC had the ability to select from among the various compliant methods the method that resulted in the highest profit.

As the next sections will show, even if Complaint Counsel could establish a prima facie case, LREAB will easily meet its burden to show that any impact on price was procompetitive. LREAB had the authority and obligation, in response to submissions of colorable written complaints, to ensure that every AMC complied with the customary and reasonable fee mandate. Without these federal obligations, Louisiana never would have enacted the "customary and reasonable" fee requirement in its state laws, or delegated to the Board the obligation and authority to engage in the alleged conduct. And without supervisory oversight and threat of sanctions from the federal Appraisal Subcommittee, LREAB would not have had to investigate complaints of AMC violations or to sanction any AMC that failed to comply with the customary and reasonable fee mandate. Further, the evidence will show that the Board's conduct aims to promote State policies to protect the supply of qualified real estate appraisers in Louisiana. RX0254-001. A shortage would have detrimental effects on the real estate market, including slowing the pace of real estate transactions, and causing inaccurate real estate valuations to fester in the Louisiana real estate market.

Congress and the State of Louisiana thus chose to promote competition in the market for home mortgages – based on *sound* appraisals – and implemented the customary and reasonable fee mechanism as a prudential tool to prevent the financial system from accumulating unnecessary risk from unsound appraisals. *Cf. Phonetele*, 664 F.2d at 727 n.31 (federal policy "must be understood with reference to the grave historical crises caused by the absence of regulation in those industries." (citing *United States. v. Nat. Ass'n of Sec. Dealers, Inc.,* 422 U.S. 694, 705-11 (1975)). Congress and the State of Louisiana have thus made the policymaking judgment that these

rationales are procompetitive, and Complaint Counsel cannot overrule those choices. *See Mid-Texas Commc'ns Sys. v. AT&T*, 615 F.2d at 1378 (antitrust laws "are not so inflexible as to deny consideration of government regulation").

Such enforcement is protected under the good faith regulatory compliance defense. Moreover, any price increases due to regulatory compliance would be procompetitive, as it would preserve a market where all AMCs are compliant and competing on a level playing field. Complaint Counsel's per se arguments all but ignore the impact of mandatory federal regulation on prices paid by AMCs, and the reasons why these regulatory requirements make per se analysis inapplicable to this case.

In light of LREAB's showing, Complaint Counsel can have no legally sufficient response. There is no alternative to compliance with a federal mandate. The Board engaged in the allegedly "unfair" conduct to safeguard appraisal integrity; to protect the soundness of the Louisiana residential real estate market; and to ensure a reliable supply of quality appraisers in Louisiana.

### B. Complaint Counsel has not Shown that AMCs That Raised Appraisal Fees Were Previously Compliant with the AMC Act.

All AMCs that operate within Louisiana must comply with both TILA 129(E)(i) and the Louisiana AMC Act's customary and reasonable fee requirements. The AMC Act, which incorporates the federal customary and reasonable requirement into Louisiana law, demands that all "appraisal management company[ies] shall compensate appraisers at a rate that is customary and reasonable for appraisals being performed…" La. R.S. § 37:3415.15(A). Therefore, to prove LREAB's conduct raised appraisal fee rates to AMCs within the relevant market, Complaint Counsel must first demonstrate to this Court that these AMCs operating in Louisiana complied with the federal and state customary and reasonable mandate. Complaint Counsel cannot meet their burden, and by failing to do so, they cannot assert that any increase in appraisals fees paid by

an AMC operating in Louisiana was caused by unlawful conduct by LREAB, instead of the AMC's efforts to come into compliance with the federal and state law.

At trial, each AMC witness will have to concede that they understood all AMCs licensed in Louisiana must comply with both Dodd-Frank and the AMC Act's customary and reasonable fee requirements. However, the testimony from both LREAB witnesses and various AMCs will demonstrate that, at the time LREAB undertook its enforcement actions in Louisiana, several of those AMCs failed to comply with the customary and reasonable fee requirement by using methods accepted as compliant by Congress and federal financial regulators.

Complaint Counsel disregards all evidence of AMCs' non-compliance with either Dodd-Frank or the AMC Act, and the effects of these laws on the AMC's payment of appraisal fees in Louisiana. Indeed, while their economic analysis purports to have controlled "for various factors," their model does not even consider whether any of the 9 AMCs they analyzed (or any AMC licensed in Louisiana) complied with the federal and state customary and reasonable mandate—either prior to or after they allegedly increased their appraisal fee payments. CC Br. 26-27. In failing to account for this essential variable, Complaint Counsel cannot establish their theory that any alleged increase in appraisal fees paid by AMCs was caused by unlawful conduct by LREAB, *and not* an AMC ensuring compliance with the federal and state customary and reasonable fee mandate.

The evidence will show additional flaws in Complaint Counsel's analysis, including an unreliably small sample size (9 of the approximately 140 AMCs then licensed in Louisiana), and reliance on average fees for particular types of appraisals without accounting for the differences in fees paid in different geographic regions of the state. Notwithstanding, even that analysis shows that a substantial percentage of appraisal fees paid by these selected AMCs fell below the medians

shown in the SLU Survey—even for AMCs that had agreed to use the SLU Survey for one year as the means of compliance – thus refuting any contention of "price-fixing" to the SLU Survey.

Finally, an AMC's increase in appraisal fees in an effort to comply with the Dodd-Frank and AMC Act requirements cannot be deemed "unfair" under the FTC Act. 15 U.S.C. § 45(a)(1). The customary and reasonable fee mandate ensures that both lenders and AMCs utilize qualified appraisers in an effort to eliminate "poor quality appraisals, [that undermined] consumers' well-being and creditors' safety and soundness." 75 Fed. Reg. at 66,570. In particular, the customary and reasonable fee requirement seeks to halt the prior practice of lenders and AMCs pressuring inexperienced appraisers who were often willing to accept lower appraisal fees and quick appraisal turnarounds for promises of more assignments. Compliance with the customary and reasonable mandate, which may raise the AMC's fees paid to an appraiser, eliminates these ill effects in the market and promotes the public interest.

### C. AMC Acceptance of One of Several Available Voluntary Means of Compliance Does Not Constitute the Coercion Necessary to a Finding of an "Unfair Method."

The history of LREAB's enforcement of the customary and reasonable fee mandate demonstrates that LREAB accepted any method of compliance permitted by Dodd-Frank and the federal rules. For example, LREAB staff found that some AMCs had complied with the presumption one six-factor method, and closed the investigations. Summary of Evidence II.K, *supra*. All AMCs that LREAB found to be out of compliance had the option to submit a prospective corrective action plan under any of the three methods. At least one AMC that elected to use the SLU Survey told LREAB that they were unable to use the six-factor method at that time, but anticipated they would be able to do so by the time the compliance plan expired in 12 months.

And when LREAB released the SLU Survey, LREAB explicitly told the market: "This study is being provided as a courtesy to all licensees; however, its use is not mandatory." CX-0023-002.

Prior to Dodd-Frank, AMCs had no requirement to pay customary and reasonable fees, and generally had no mechanism in place to hire appraisers other than a desire to pay the lowest fee for the needed turnaround time. Dodd-Frank was passed July 21, 2010; the Interim Final Regulations were issued three months later; and by April 1, 2011, all AMCs were required to develop and implement systems to comply with the customary and reasonable fee requirement. As LREAB found in discussions with stakeholders some two years later, few if any AMCs serving Louisiana had the information and infrastructure needed to comply with the six-factor method or an all facts and circumstances test adopted by federal regulators; and there still were no readily-available surveys compliant with Dodd-Frank other than the higher VA appraisal fee schedule. Thus, those AMCs were faced with three choices: risk non-compliance with Dodd-Frank and the AMC Act, which many AMCs in fact chose; develop internal systems to apply either the six-factor presumption or an all facts and circumstances test; or, use the VA schedule or survey compliant with Dodd-Frank.[10] Thus, for many AMCs, use of the SLU Survey for some period of time was more convenient and less time-and-effort intensive, and a rational business decision.

It is true that LREAB staff accepted compliance plans relying on the survey presumption, and that the Board accepted Coester's settlement compliance plan and iMortgage's compliance plan to use the SLU survey. *They had to*. Federal law and the AMC Act allow the use of such

[10] Of course, any AMC or AMC trade association could have created its own survey rather than use the SLU Survey. They did not. And had they done so, the results of their survey would not have been meaningfully different from the academic SLU Survey results. Instead, certain AMCs and REVAA chose to contest LREAB's right to enforce the customary and reasonable fee mandate.

surveys as presumptive compliance. LREAB could not insist that these AMCs use another method. But, at all times, it was the AMC's choice – not LREAB's.

Moreover, Complaint Counsel's case fails as a matter of logic. Had LREAB truly intended to engage in the "price-fixing" conduct of which they are wrongly accused, they would have publicized the first enforcement effort against Accurate Group in the press or its website, or at a Board meeting. Instead, LREAB staff kept the enforcement effort informal with no publicity. If price-fixing were the Board's goal, LREAB also would not have given Accurate Group permission to deviate from its corrective action plan. And the Board's findings of AMC compliance using other methods, and the limitation of all corrective plans to one year, recognizes that every AMC had the freedom to use procedures sufficient to comply by any federally-accepted method. Any AMC that chose instead to comply using the SLU Survey did so of their own volition, not from any coercion by LREAB. Such conduct demonstrates the Board's purpose to encourage compliance, not set pricing.

Even the documents cited in Complaint Counsel's pretrial brief refute their claim. For example, the email from Mr. Unangst to Mr. Holloway discusses AMCs "converting" to compliant methods, including a "cost-plus" method (reflecting "all facts and circumstances"); and notes that comments from AMCs demonstrated the value of the SLU Survey in achieving compliance. For that reason, Mr. Unangst concluded, "stakeholders" – which includes AMCs (like Accurate Group), appraisers, lenders, and realtors – "could not be more pleased with the results" of Mr. Holloway's effort. CX3013-001. Similarly, Mr. Unangst's exchange with Mr. Schiffman of REVAA articulated his belief that since the survey and all other methods are to be based on "recent rates" data, they all should arrive at roughly the same result. After discussing the survey and six-factor presumption options, Mr. Unangst states: "It is our belief that an AMC utilizing sound

methodology and analytics coupled with accurate market data should result in C&R [customary and reasonable] fees that reasonably reflect what we see in the federal VA schedule and our own University data." CX3236-001. Indeed, even for those AMCs who used the SLU Survey, fees would have been adjusted up or down to reflect the complexity and requirements of the assignment – as demonstrated by the data from the 9 AMCs.

In sum, each AMC had the choice of how to comply with Dodd-Frank's customary and reasonable fee mandate under the AMC Act, and had the obligation to do so regardless of whether they were subjected to an enforcement action by LREAB. Any "coercion" was caused by the obligation to comply with regulatory mandates, not by any action of the Board.

### D. The Board Members Reached Independent Decisions, and Did Not Engage in Collusive Conduct.

The Board Members reached their decisions independently, from different perspectives, based on their own evaluations of the facts and law. First, for example, James Purgerson and Michael Graham will testify that they voted to find iMortgage in violation of Rule 31101 because iMortgage failed to prove its defense of compliance with the customary and reasonable fee requirement by a preponderance of the evidence. iMortgage asserted it relied on a survey provided to them by Flagstar Bank, but refused to adduce that survey into evidence. Moreover, iMortgage admitted to facts showing that the survey could not have been compliant – the survey was based on data provided by Joan Trice's company Clearbox LLC, which included AMC fees and reflected national data. Mr. Purgerson will testify, based on his experience as a banker reviewing appraisals, the $250 fee iMortgage paid for a rural appraisal where the appraiser had to drive more than 100 miles in each direction could not have been determined by any customary and reasonable method. Mr. Graham also will testify that iMortgage conceded that they did not rely on the Flagstar survey for all fees at issue, but did not establish their use of any other permitted method of compliance

for those fees. Mr. Purgerson further will testify that while he voted to find iMortgage in violation of the AMC Act, he nevertheless voted against imposing any monetary fine on iMortgage, given that it was its first enforcement action. Because Mr. Purgerson works for a bank and Mr. Graham appraises commercial properties, neither of them stood to benefit from any ruling against iMortgage. They were simply fulfilling their duties to the public as Board members.

Second, a clear majority of Board members could not have obtained any personal benefit from their votes with respect to adopting Rule 31101, approving the Coester settlement, or finding iMortgage in violation. At all relevant times, the majority of Board members did not perform any residential appraisals. Several performed no appraisals at all, even among the "licensed" appraiser members. And commercial property appraisal fees (which typically run into the thousands of dollars) could not have been affected by either the level or the method of setting fees for residential appraisals. These members' votes reflected only their intention to perform their duty to uphold the integrity of the residential mortgage appraisal process in accordance with federal and state law and their mandate as Board members. Moreover, Roland Hall, a residential appraiser and at relevant times Chairman of the Board, did not vote except when necessary to break a tie. Because all decisions regarding the customary and reasonable fee requirement, including acceptance of the Coester settlement and the finding of violation by iMortgage, were unanimous, Mr. Hall never voted on any Board decision having to do with enforcement of the AMC Act.

Finally, Mr. Unangst will testify that, based on his experience with the Board as Executive Director, the Board members take seriously their duty to act in the public interest, rather than in the private interests of themselves or the industry categories from which they have been appointed. Mr. Unangst may testify as to occasions where members voted in the public interest and against

the interests of their professional category, and that he cannot recall any occasion where members voted in their or their group's economic interest over the best interests of the public.

### E. Any Higher Prices Are Directly Linked to Federal and State Customary and Reasonable Requirements and Voluntary Acts by AMCs Do Not Amount to an Antitrust Violation Under the FTC Act.

In an antitrust case, it is axiomatic that a finding of liability requires proof of causation. *See Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977) (holding that an antitrust injury must be "causally linked to an illegal presence in the market" and that the injury "reflect[s] the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation"). Moreover, there can be no antitrust injury where competitive harm is actually attributed to laws or regulations. *RSA Media., Inc. v. AK Media Grp., Inc.*, 260 F.3d 10, 15 (1st Cir. 2001) (no causation where a state's "regulatory scheme" excluded competition in the billboard market); *In re Canadian Imp. Antitrust Litig.*, 470 F.3d 785, 792 (8th Cir. 2006) (the "chain of causation" is "too speculative" to allege harm of higher prices where the conduct was prohibited by federal law); 2 Areeda and Hovenkamp, Antitrust Law § 338 (5th ed. 2020) (no causation where "a force other than the antitrust violation fully accounts for the plaintiff's injury").

Complaint Counsel has failed to prove a chain of causation separated from federal and state law that mandates payment of customary and reasonable appraisal fees. The evidence will show that changes in appraisal fees paid by AMCs were a direct result of the AMCs' decisions to comply with Dodd Frank's customary and reasonable fee mandate or, in the alternative, their efforts to skirt review and fly under the regulatory radar. In fact, the evidence will show a causal link to increased compliance with Dodd-Frank's and the AMC Act's customary and reasonable fee mandate, as well as to ordinary market forces such as the dwindling available supply of qualified appraisers, not an antitrust injury that specifically emanates from LREAB's conduct. The resulting

increase in appraisal fees over the relevant period is further reflected in the United States Department of Veteran Affairs ("VA") Appraisal Fee Schedules. While entirely ignored by both Complaint Counsel and their expert, from 2009 to 2019, there was a $100 increase in fees paid to appraisers in Louisiana for VA appraisals of a single-family residence.[11]

In addition to Complaint Counsel's failure to prove a causal link between the alleged conduct and price increases other than from federal and state law requirements, an AMC's voluntary act is irrelevant to an antitrust analysis. Specifically, Complaint Counsel alleges that, upon learning of the Board's enforcement of the AMC Act against Coester and iMortgage in the trade press, other AMCs independently "decided" to change their appraisal fees to avoid enforcement under the AMC Act. Complaint ¶ 48. Voluntary and independent actions by AMCs operating in Louisiana do not amount to either coercion or evidence of causation of an antitrust violation. It is anticipated that individuals or companies would independently act to comply with federal or state law when such laws are being enforced. News stories that the Internal Revenue Service will be increasing auditing capacity to crack down on federal tax cheats will likely cause more tax filers to independently change their behavior, such as by foregoing questionable deductions. Similarly, AMCs' voluntary and independent reactions to news of lawful enforcement of the AMC Act does not amount to evidence of a violation of Section 5 of the FTC Act.

[11] In 2009, the VA appraisal fee in Louisiana for a 1004 "Single Family" home were $400, but as of December 1, 2019, the appraisal fee is now $500 for a 1004 appraisal. U.S. Dep't of Veteran Affs., Appraisal Fees and Timeliness for the Houston Regional Loan Center, Effective December 1, 2019, https://www.benefits.va.gov/homeloans/documents/docs/houston_fee.pdf (last visited Apr. 9, 2021). Such government agency schedules expressly meet Dodd-Frank presumption two.

## II. LREAB WILL ESTABLISH ITS DEFENSE OF GOOD FAITH REGULATORY COMPLIANCE.

At all times, LREAB has acted reasonably and in good faith to carry out federal government directives, and State implementation thereof, regulating competition in the market for residential real estate appraisals. Congress and the financial regulators made policy determinations that the State and LREAB could neither disregard nor reevaluate. LREAB's Answer therefore raised as its Fourth Affirmative Defense that "LREAB has acted in good faith to comply with a federal regulatory mandate." Answer of Louisiana Real Estate Appraisers Board to the Complaint at 12. The defense of good faith regulatory compliance requires proof that: (1) at the time of the alleged anticompetitive acts, (2) an entity subject to a regulatory scheme, (3) had a reasonable basis to conclude that its actions were necessitated by concrete factual imperatives, (4) recognized as legitimate by the regulatory authority. *See* Op. and Order at 5-6. LREAB will meet each element of the test. Additionally, a defendant asserting an affirmative defense of good faith regulatory compliance must show, subjectively, that its action was taken because of the regulatory obligations rather than business considerations. LREAB will likewise meet this requirement.

### A. LREAB is a State Agency Subject to Dual Regulatory Schemes.

The Louisiana legislature delegated to LREAB, a state regulatory authority, the duty to regulate the appraisal process, and LREAB has been at all relevant times subject to state regulation under Louisiana law. *See* CC Br. 6-8 n.11. As described in Summary of Evidence II.C-E, *supra*, the federal financial regulatory agencies require LREAB, as the state's appraiser certifying and licensing agency, to investigate every complaint related to AMC violations of the customary and reasonable fee requirements of Dodd-Frank and the AMC Act, and the ASC supervises, and regularly audits LREAB, for compliance with these minimum requirements.

Complaint Counsel wrongly contends (CC Br. 10) that LREAB had to ensure that AMCs establish and comply only with "processes and controls reasonably designed to" achieve compliance with TILA's customary and reasonable fee requirement. Rather, the federally-imposed minimum state requirements also expressly obligated the state of Louisiana to ensure, through the AMC Act, that LREAB had "the legal authority and mechanisms" *to investigate violations* of the customary and reasonable fee mandate; *discipline AMCs* that violated the mandate; and *report AMC violations* and agency enforcement actions to the ASC. 12 C.F.R. § 323.11.

Complaint Counsel likewise concede that the ASC is "responsible for monitoring state programs for the regulation of appraisers," including, explicitly, "AMC-supervision programs established by States." CC Br. 6 n. 10. That fits LREAB's promulgation and enforcement of Rule 31101 to a T. Elements (1) and (2) of the good faith regulatory compliance defense are thus satisfied.

### B. LREAB had a Reasonable Basis to Conclude that its Actions were Necessitated by Concrete Factual Imperatives.

The "actions" of LREAB challenged in this case are the promulgation of Rule 31101 and enforcement of the Dodd-Frank customary and reasonable fee mandate. CC Br. 2. LREAB meets the "reasonable basis" test of Element (3) because in undertaking both promulgation and enforcement, it acted to fulfill regulatory obligations imposed upon it by federal law and regulations, and State law implementing those federal mandates. LREAB neither promulgated nor enforced any provision affecting appraisal fees prior to the enactment of the AMC Act; indeed, LREAB had nothing to do with appraisal fees prior to being directed to enforce the customary and reasonable fee by Dodd-Frank and the federal financial regulatory agencies, and the Louisiana Legislature.

First, under Title XI of FIRREA, Congress in 1989 tasked state appraiser agencies to license and supervise appraisers to ensure sound real estate appraisals, and Louisiana tasked LREAB with the responsibility of complying with the FIRREA mandates. Next, as discussed in Summary of Evidence II.C-E, *supra*, Dodd-Frank and its federal implementing regulations, through the federal financial regulatory agencies and under ASC monitoring and supervision, imposed on each state's pre-existing state appraiser licensing agency the obligation to enforce the customary and reasonable fee mandate consistent with federal law, regulations, and presumptions. Complaint Counsel's argument that "nothing in Dodd-Frank suggests that states must delegate pricing authority to a panel of appraisers," CC Br. 33, is simply incorrect. Under federal law, enforcement of the customary and reasonable fee requirements *had* to be undertaken by the pre-existing state licensing authority—LREAB. 12 U.S.C. § 3353(a). Complaint Counsel's suggestions about other ways the State of Louisiana might have gone about implementing Dodd-Frank's requirements, *see* CC Br. 34, are not just contrary to what Dodd-Frank and the federal financial agencies literally require, they demonstrate that the real umbrage taken by Complaint Counsel is with the State of Louisiana's sovereign decision in 1989 to delegate authority over real estate appraisal regulation to a state board. That is not an antitrust violation.

Second, the Louisiana AMC Act authorizes LREAB to implement state law in compliance with Dodd-Frank and the federal regulations. *See* Summary of Evidence II.H, *supra*. Complaint Counsel attempts to shirk this fact by suggesting that only federal regulatory regimes can provide a basis for the good faith regulatory compliance defense. No court has ever held that, nor did the Commission so hold in denying Complaint Counsel's motion for partial summary decision on this issue. Just like the California regulation overlaying the conduct in *Phonetele*, the AMC Act is "a state regulation that is in many ways an appendage of the dominant federal regulatory program."

*Phonetele*, 664 F.2d at 739 n.60. LREAB was authorized by the Louisiana Legislature to promulgate a rule in accordance with the Louisiana APA to enforce, *inter alia*, the AMC Act implementation of the federal customary and reasonable fee requirement, in accordance with Dodd-Frank and the federal financial regulations, including the presumptions of compliance. *See* Summary of Evidence II.H, *supra*. Complaint Counsel cannot credibly assert that LREAB's promulgation and enforcement of the customary and reasonable fee mandate was not required by federal law and authorized by Louisiana law.

LREAB undertook these obligations in good faith. As set forth in Summary of Evidence II.I, LREAB worked assiduously to ensure compliance with these federal and state law requirements. It reviewed the federal laws and regulations cited in AMC Act. It affirmatively sought out and received input from other states, the ASC, and industry representatives and stakeholders. It strictly followed the APA requirements when promulgating Rule 31101, including receiving multiple rounds of stakeholder input. LREAB designed the text of Rule 31101 to follow the provisions of Dodd-Frank, and borrowed language directly from that statute and the implementing federal regulations. The Louisiana legislative subcommittees and two Governors consistently have affirmed that Rule 31101 promoted state policy. LREAB therefore had a good faith basis to conclude that it was necessitated to do so by concrete factual imperatives. All these points demonstrate LREAB's reasonableness and good faith.

LREAB's enforcement of the AMC Act was also a good faith effort to comply with both federal and state requirements. As explained in Summary of Evidence II.C, *supra*, LREAB is *required* by the federal financial regulatory agencies, and supervised by the ASC, to ensure that AMCs comply with the customary and reasonable fee requirement. LREAB undertook this obligation in good faith. LREAB applied the Rule consistent with its understanding of the federal

law requirements incorporated into state law, which establish minimum (not maximum) requirements for state supervision of AMCs. LREAB also informed the ASC about their use of the SLU survey and their enforcement actions. As explained earlier, the ASC regulations also required LREAB to investigate every complaint it received about AMC compliance with the customary and reasonable fee requirement. If LREAB was found out of compliance, they risked decertification or degradation by the ASC. Summary of Evidence II.E, *supra*. The ASC attended LREAB meetings from time-to-time, and audited LREAB's records to ensure that LREAB remained compliant with ASC requirements. The ASC never indicated that these rulemaking or enforcement actions by LREAB were inconsistent with its regulatory obligations. *See* Summary of Evidence II.I-K.

Complaint Counsel's argument that the defense of good faith regulatory compliance does not apply to LREAB's promulgation of Rule 31101 and enforcement of the customary and reasonable fee mandate essentially boils down to a contention that the Board's Rule is more restrictive than the federal regulation, and therefore not "necessitated" by Dodd-Frank. CC Br. 32-33. First of all, this is factually incorrect. As discussed in Summary of Evidence II.H-I, *supra*, Rule 31101 incorporated both alternative presumptions of compliance contained in the Interim Final Rule, plus the overall "all facts and circumstances" test. Rule 31101 also gave the Board the *additional but unused* option to establish a customary and reasonable rate of compensation schedule for voluntary use by any AMC that elected to do so. In response to AMC concerns that the six-factor method was administratively too difficult and expensive, LREAB commissioned SLU, an independent third-party, to survey customary and reasonable appraisal fees paid by lenders that would facilitate AMC compliance using the alternative presumption two. LREAB consistently told the marketplace that use of this SLU survey to show compliance with the mandate

was voluntary. The evidence will show that LREAB, in practice, allowed AMCs to use any compliant method, and that any AMC that chose to use the survey method made its own choice.

### C. LREAB's Actions Have Been Recognized as Legitimate by the Regulatory Authorities.

Element (4) of the good faith regulatory compliance defense is satisfied here because the imperatives implemented by LREAB are recognized as legitimate by Congress, federal regulations, and the ASC, as well as by the State of Louisiana. As summarized in Summary of Evidence II.H-J, *supra*, House and Senate committees and the Governor approved LREAB's Rule 31101 in accordance with the Louisiana APA. The ASC never gave LREAB any indication that its actions, including publishing the survey and promulgating and enforcing its Rule, did not comply with LREAB's obligations under federal regulations implementing Dodd-Frank. The legislative subcommittees, two Governors, two Executive Orders, the Senate Concurrent Resolution, and letters from the Commissioner of Administration and its Designee, all concur that the Board's Rule promoted State policy.

No facts in the record suggest that LREAB made an "error of law" in either promulgating Rule 31101 or enforcing the customary and reasonable fee mandate. To the contrary, all record facts support that LREAB's interpretations of federal customary and reasonable requirements have borne out to be correct—in other words, were objectively reasonable at the time they were undertaken. Indeed, the proposed and final "minimum state requirements" contained in Section 1124 of FIRREA expressly require that state appraiser certifying and licensing agencies ensure AMC compliance with the appraiser independence provision of TILA section 129E, *see* Summary of Evidence II.C, *supra*, further validating LREAB's enforcement actions. While Complaint Counsel apparently intend to argue at trial that Congress intended Dodd-Frank's customary and reasonable fee requirement to prevent AMCs from paying too much for appraisals, CC Br. 13-14,

rather than undercompensating appraisers, they are unique in this interpretation of the law. No other stakeholders in the marketplace have agreed with that position, besides the AMCs who have opposed the customary and reasonable fee requirement at every federal and state level opportunity, and who have a financial incentive to cut corners on appraisal fees and pocket the difference between what they receive from the lender and pay the appraiser. And it runs contrary to evidence presented to federal legislators and regulators and LREAB that AMCs sought to obtain appraisals at the lowest price and fastest turnaround, with little regard for recent rates in the geographic market or the geographic competence of the appraiser. Had LREAB ever received any complaint from an AMC that they were being pressured to pay rates above customary and reasonable fees, ASC regulations required LREAB to investigate it, and they would have done so. But to LREAB's knowledge, in the Louisiana market appraisers were being forced to accept fees that were non-compliant and too low; they received no evidence of AMCs being forced to pay fees that were non-compliant and too high.

If an antitrust issue arises from a regulated entity – here LREAB – undertaking actions in a good faith effort to comply with its obligations under a regulatory regime, and all of the pertinent regulatory authorities have recognized its actions as legitimate and correct, the issue is not with LREAB, but the regulatory regime itself. Complaint Counsel's position in this case certainly contains shades of disagreement with the State of Louisiana's implementation of the Dodd-Frank requirements, but those are indeed state law issues, and LREAB cannot disobey the acts of the Louisiana legislature that implement the federal Dodd-Frank mandates.

Even if LREAB's regulatory efforts were now to be found imperfect, that alone would not negate LREAB's good faith belief that it was acting out of a regulatory imperative. "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." (emphasis added). *Phonetele,* 64 F.2d at 737-738. As long as the good faith reasonable belief test is satisfied at the time of the action, it does not matter if that belief were to be re-assessed at a later date, *e.g.*, after federal regulators revised a statutory interpretation, or the actions were second-guessed by an enforcer. *Id.* Complaint Counsel's belief that LREAB's required implementation of federal and state regulatory regimes should have been done differently, many years after the fact, does not make it an antitrust violation.

### D. LREAB's Actions were Undertaken Because of Regulatory Obligations Rather than Business Considerations.

As LREAB witnesses will attest, LREAB endeavored in good faith to perform their public duties faithfully. When trying to implement new and untested federal laws and regulations, the Board sought advice from federal regulators and other states, boards, and experts. When promulgating its rules, LREAB assiduously followed all requisite administrative procedures. And given that a clear majority of Board members, at all times, never performed residential appraisals, only a minority of Board members could ever have had a financial stake in the customary and reasonable fee mandate. But given the decimation of Louisiana's housing industry because of Hurricane Katrina and the 2008 financial debacle, and the oaths they swore as public servants to protect the public interest, all Board members had a stake in ensuring the integrity of the residential mortgage market by enforcing the Dodd-Frank mandates.

Complaint Counsel attempt to contradict this showing by noting that some appraisers cited the Board's rules and surveys in an effort to obtain compensation they believed to be customary and reasonable, and that some stray comments expressed cynicism that AMCs could be trusted to self-regulate. Neither argument succeeds. First, the actions of individual appraisers cannot be

attributed to the Board. Second, several AMCs were, in fact, found by LREAB to lack any sort of compliance protocols consistent with the customary and reasonable fee requirements of Dodd-Frank and the AMC Act. Congress would not have called for state regulation of fees paid to appraisers by AMCs if there were not genuine concerns about how inadequate appraiser compensation harmed appraisal integrity. So in light of certain AMCs' disingenuous and facially erroneous arguments concerning the Board's authority, perhaps such cynicism was justified. But Complaint Counsel's arguments shed little light on subjective regulatory intent.

### E. There is No "Injunction" Exemption to a Defense of Good Faith Regulatory Compliance.

Despite having moved for partial summary decision on LREAB's right to assert an affirmative defense of good faith regulatory compliance in this matter, undergoing a full round of briefing on the issue, a full round of supplemental briefing then requested by the Commission, and losing their motion, Complaint Counsel apparently will seek to argue at trial, for the first time, that the defense of good faith regulatory compliance cannot apply in government enforcement actions seeking prospective injunctive relief. CC Br. 35. No court has ever held that to be the case, and the Commission's ruling shows it does not apply in this proceeding. The Commission can only award prospective relief under Section 5(a)(2), "to prevent" unfair methods of competition. If the defense cannot apply to prospective injunctive relief, the Commission would not have held that LREAB could successfully invoke its good faith regulatory compliance as a complete shield to antitrust liability in this matter. Thus, the Commission has decided that there is no limitation on a defense of good faith regulatory compliance for government enforcement actions seeking injunctive relief.

Moreover, allowing for an injunction would undermine the essence of the good faith regulatory compliance defense. If LREAB implemented the requirements of Dodd-Frank and the

federal financial regulatory agencies correctly – as the ASC, two Governors, the legislative subcommittees, a unanimous Senate, and the Commissioner of Administration of Louisiana all have said – any antitrust issue lies with the regulatory regime itself rather than the actions of LREAB. An injunction in this situation would prevent LREAB from following federal and state mandates that are wholly beyond its control. As the case law holds, if a regulated entity acted out of a good faith belief that its actions were necessary to meet concrete factual imperatives recognized as legitimate by the regulatory authority "*then its actions did not violate the antitrust laws*." *Phonetele*, 664 F.2d at 737-738 (emphasis added). With no antitrust violation comes no injunctive relief. There is no special carve-out under this legal precedent for the Federal Trade Commission.

## CONCLUSION

LREAB respectfully submits that the evidence will show that LREAB did not engage in the alleged conduct, and that its actions at all times were taken in good faith furtherance of its obligation to enforce the customary and reasonable fee mandate imposed by Dodd-Frank in accordance with federal financial agency regulations. Judgment should be rendered in favor of LREAB.

Date: April 9, 2021

Respectfully submitted,

*/s/ W. Stephen Cannon*
W. Stephen Cannon
Seth D. Greenstein
Allison F. Sheedy
Richard O. Levine
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*Counsel for Respondent,*
*Louisiana Real Estate Appraisers Board*

# CX0023-002

LOUISIANA
REAL ESTATE APPRAISERS BOARD

**NOTICE TO APPRAISAL MANAGEMENT COMPANIES**
**June 11, 2013**

The Louisiana Real Estate Appraisers Board recently commissioned an independent appraisal fee study by the Southeastern Louisiana University Business Research Center. The study was completed in accordance with the Louisiana Appraisal Management Company Licensing and Regulation Act and is consistent with the presumptions of compliance put forth by the federal Dodd-Frank Act and the Federal Reserve Board's Interim Final Rule on Valuation Independence. It is the intent of the board to provide annual updates to the study, so as to continuously conform to the Interim Final Rule.

This study is provided as a courtesy to all licensees; however, its use is not mandatory. Any licensee that elects to use the data provided by the study will be considered in presumptive compliance with LA R.S. 37:3415.15, which is relative to customary and reasonable fees.

The study is entitled *Louisiana Residential Real Estate Appraisal Fees: 2012* and can be found on the board website at www.reab.state.la.us.

Bruce Unangst
Executive Director

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# CX0475-006—
# CX0475-007

ACCURATE
GROUP

Inc. 5000
TOP 25
REAL ESTATE



July 1, 2013

Re: Case 2013-412 LREAB

Dear Mr. Bolton,

This letter is in response to your correspondence dated June 17, 2013, regarding deficiencies in the data and fee studies that the Accurate Title Group, LLC submitted in regards to a possible violation of the customary and reasonable fee provisions of Louisiana RS 37:3415.15.

Our goal is to achieve full compliance with Louisiana Real Estate Appraisers Board interpretation of the laws of the State of Louisiana. To achieve full compliance, your letter requires us to address the following issues or take the following action:

1. ***Action 1 – Fee Studies***

   We appreciate your acceptance of our reliance on the a la Mode and Working RE Magazine data for meeting the requirements of presumption of the Federal Interim Rules. We acknowledge that the available fee studies are aged and we have struggled to identify more current well documented fee studies at the state and local level throughout the country.

   The State of Louisiana and your board has assisted us by publishing the recent fee study prepared by Southeastern Louisiana University Business Research Center. As we indicated in Item #3 below we intend to adopt this new fee survey for all appraisals in Louisiana effective July 15, 2013.

2. ***Action 2 – Order # 1086488-1***

   Regarding the email documenting our handling of Order # 1086488-1, we are unclear as to whether this email documents an apparent violation of law regarding our methodology in complying with customary and reasonable fee provisions of Louisiana State RS 37:3415.15.

   Compliance with customary and reasonable fee regulation is difficult due to ambiguity, numerous interpretations of the regulations and the recent implementation of these rules.

   Notwithstanding a lack of clarity regarding a violation of law, the enclosed email documents a violation of our own appraisal management procedures and represents an example of unacceptable communication with an appraiser which we do not accept or tolerate.

   Therefore, Management will conduct department wide training to review this specific incident as well as review and redistribute Accurate Title Group's policy on customary and reasonable fee provisions to all employees.

We have also instructed and mandated to all employees that only management and/or vendor management are permitted to engage appraisal vendors in fee discussions. Inquiries must be forwarded to and processed by vendor management.

3. ***Action 3 – Compliance Procedures***

Regarding our corrective action plan, the following changes will be made to achieve full compliance with Louisiana Law.

a. Effective July 15, 2013, we will fully adopt the Southeastern Louisiana University Business Research Center fee study as conclusive evidence as customary and reasonable fee provisions in Louisiana. We have informed all Louisiana appraisers on our panel of this action and have established system controls to ensure that appraisers are not paid a deviation from the survey. We are advising our lender clients of the fee survey and are working with those clients to modify pricing where necessary to ensure compliance with the recently published survey.
b. We have modified permissions to the Accurate operating system so only management and vendor management can modify appraiser fees.
c. We have modified minimum fee requirements on the Accurate Vendor website to adhere to the State's recently published survey to ensure appraisers cannot lower their fees below the established minimums.

Please know that our primary objective is full compliance with all Louisiana Law regarding appraisal management. We appreciate your patience and understanding as we work to better comprehend the evolving regulatory framework in your state and throughout the country. Please feel free to contact us if you have additional questions or would like to discuss this matter in detail.

Respectfully,

Paul Doman
President & CEO
Accurate Title Group, LLC
216-672-3601
pdoman@accurategroup.com



Marty J. Gilmore
Controlling Person
Accurate Title Group, LLC
216.672.3618
mgilmore@accurategroup.com

# CX3013-001

**From:** Herb Holloway <herbert.holloway@selu.edu>
**Sent:** Monday, January 6, 2014 4:34 PM
**To:** William Joubert <wjoubert@selu.edu>
**Cc:** ajamal@selu.edu
**Subject:** Fwd: RE: Fee Survey

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Bill,

Thought you would like to see Bruce Unangst's comments about the report we did for them last year.

We will be starting on the annual update shortly.

Herb

-------- Original Message --------
**Subject:**RE: Fee Survey
**Date:**Mon, 6 Jan 2014 15:25:35 -0600
**From:**Bruce Unangst <BUnangst@lrec.state.la.us>
**To:**Herb Holloway <Herb.Holloway@selu.edu>

Herb,
The fee survey has been recognized throughout the country as the best of its kind! We have posted online for use by any AMC wishing to use as a presumption of compliance with our C & R law and rules, and we point AMC's to this schedule for their consideration in setting their own policies. The schedule is also being used by La. appraisers as a guide to setting their own fee schedules. Our new rules addressing the C & R fee issue became effective upon final publication in the La. Register on 11/20/2012. Since that time we have anecdotal evidence of some AMC's converting to a "cost plus" business model, and one major national AMC announcing they were changing the way they calculate C & R fees, which appears to be the result of our new rules and published fee schedule. An overall increase in fees paid to La. appraisers has been reported to us. Overall, the LREAB and our in state stakeholders could not be more pleased with the results.

I was going to contact you anyway, as it is time to update the survey conducted last year. I don't believe we will see any changes in C & R fees, but Federal Interim Rules define "current fees paid" to those paid in the last 12 months. Therefore, we need to finalize plans to update. Here's to a great 2014!
Bruce

---

**From:** Herb Holloway [mailto:herbert.holloway@selu.edu]
**Sent:** Monday, January 06, 2014 3:09 PM
**To:** Bruce Unangst
**Subject:** Fee Survey

Bruce,

Just curious if the appraisal fee survey has actually been used by LREAB to this point, and how the AMC community has responded.

I received a call a while back from an AMC wanting to see the data from the survey (I referred them to you), so I assumed it must be having some impact.

# CX3236-001

REVAA
Real Estate Valuation Advocacy Association

**Mark Schiffman <mark.schiffman@revaa.org>**

## Follow-up on Discussion

**Bruce Unangst** <bunangst@lrec.state.la.us> Thu, Dec 17, 2015 at 2:46 PM
To: Mark Schiffman <mark.schiffman@revaa.org>

Mark,

I absolutely understand the concerns of your membership about proprietary information being made available to the general public. I consulted our attorney and have verified that specific language exists in our Public Records Act that would allow our entering into written confidentiality agreements to protect trade secret and proprietary info when conducting investigative inquiries. We would simply need a written request from the specific AMC requesting certain information be protected as being proprietary. As long as the request was reasonable, and would not violate the spirit and intent of our PRA, I believe this is a common sense solution.

With regard to "market participants" comprising a Board majority, please know that no Board member in La. Is privy to any information regarding any ongoing investigation. We have one certified appraiser on staff who is precluded from active market participation by virtue of his position. Of the ten (10) authorized seats on our Board, there are currently only three (3) certified residential appraisers who are active in the residential appraisal business. We have two (2) members employed by banks and nominated by the La. Bankers Association, and an additional member who holds a residential certification but is employed in risk management for a La. Bank. One (1) seat is specifically set aside for an AMC representative. The balance are "Certified General Appraisers" who to my knowledge do little if any residential appraising. Further, our Board is subject to legislative and Executive oversight that is consistent with FTC guidelines.

Regarding the problem of a lender requiring an AMC to use their fee schedule but unwilling to provide information and/or back up methodology to us, I don't see a simple or painless solution. Our Board could always promulgate a rule precluding an AMC from using a lender fee study/schedule unless the schedule and its back up methodology was available for review, however, I believe there has got to be a reasonable solution short of another rule.

At this point, La. Does not mandate or set individual and specific C & R fees. As a courtesy and safe harbor, our Board engages Southeastern La. University Business Center to conduct an annual survey of lenders and appraisers as to the C & R fees in their market area. However, our rules set forth how an AMC might select another independent 3rd party survey to rely upon. Should an AMC choose not to use an independent 3rd party survey, an AMC would be required to evaluate the six (6) factors identified in the rules on each assignment in arriving at the C & R fee for each assignment. It is our belief that an AMC utilizing sound methodology and analytics coupled with accurate market data should result in C & R fees that reasonably reflect what we see in the federal VA schedule and our own University data. When trying to identify what is or isn't a C & R fee on any specific assignment, I'm reminded of what one of our Supreme Court Justices responded when asked to define pornography. He simply stated that he would know it when he saw it! Uncertainty is our mutual enemy and I believe further open dialog with your organization on this subject is both healthy and overdue.

What is not in the public discourse is the fact we have quietly opened, investigated, resolved, and closed eight (8) AMC investigations on this issue in the recent past without formal hearings, public proceedings or fanfare. With

# RX0180-008

BOBBY JINDAL
GOVERNOR

State of Louisiana
**LOUISIANA REAL ESTATE APPRAISERS BOARD**

November 5, 2013

Coester Appraisal Management Group
7361 Calhoun Place
Rockville MD 20855

Attention: Brian Coaster
Case# 2013-2070

Dear Mr. Coaster:

It has come to our attention that Coester Appraisal Management Group, may be in violation of the customary and reasonable fee provisions of Louisiana RS 37:3415.15.

Please provide all relevant information as to the basis and methods utilized by your firm in meeting the requirements of Louisiana law. This information may include any third party fee studies and/or evaluations of factors utilized in establishment of your fee schedule, consistent with applicable federal interim rules and state law.

Accordingly, you are instructed to furnish the above information within seven (7) working days of your receipt of this letter. An electronic response with any supportive documentation, followed by mailing of hard copies of the information furnished is acceptable.

Thank you for your cooperation in this matter.

Sincerely,

Tad Bolton
Appraisal Compliance Investigator
tbolton@lrec.state.la.us
(225) 925-1923 248

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# RX0254

# State of Louisiana

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

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

**WHEREAS,** the Louisiana Real Estate Appraisers Board ("the LREAB") protects Louisiana consumers and mortgage lenders by licensing residential appraisers and regulating the integrity of the residential appraisal process;

**WHEREAS,** the federal Dodd-Frank Wall Street Reform and Consumer Protection Act established requirements for appraisal independence, including requirements that lenders and their agents pay "customary and reasonable" fees for residential mortgage appraisals, and mandating that the same state agency that regulates appraisers must require that appraisals ordered by appraisal management companies ("AMCs") be conducted pursuant to the appraisal independence standards established in Truth In Lending Act section 129E;

**WHEREAS,** the legislature has recognized this federal requirement in enacting La. R.S. 37:3415.15(A) of the Louisiana Appraisal Management Company Licensing and Regulation Act, requiring that: "an appraisal management company shall compensate appraisers at a rate that is customary and reasonable for appraisals being performed in the market area of the property being appraised, consistent with the requirements of 15 U.S.C. 1639E [TILA section 129E] and the final federal rules as provided for in the applicable provisions of 12 CFR Parts 34, 225, 226, 323, 1026, and 1222";

**WHEREAS,** on November 20, 2013, consistent with the authority described by La. R.S. 37:3415.21 and the procedure for rule adoption described by La. R.S. 49:953 of the Administrative Procedure Act, the LREAB published in the *Louisiana Register* final rules implementing La. R.S. 37:3415.15(A), Louisiana Administrative Code Title 46, section 31101; and

**WHEREAS,** questions concerning the scope of the U.S. Supreme Court decision in *N.C. State Bd. of Dental Exam'rs v. FTC*, 135 S. Ct. 1101 (2015), raise the possibility of federal antitrust law challenges to state board actions affecting prices, which may prevent the LREAB from faithfully executing mandates under the Dodd-Frank Act and Louisiana law under La. R.S. 37:3415.15.

**NOW THEREFORE, I, JOHN BEL EDWARDS,** Governor of the State of Louisiana, by virtue of the authority vested by the Constitution and laws of the State of Louisiana, do hereby order and direct as follows:

**SECTION 1:** Prior to finalization of a settlement with or the filing of an administrative complaint against an AMC regarding compliance with the customary and reasonable fee requirements of La. R.S. 37:3415.15(A), such proposed action and the record thereof shall be submitted to the Division of Administrative Law (DAL) for approval, rejection, or modification within 30 days of the submission. Such review is to ensure fundamental fairness and that the proposed action serves Louisiana's policy of protecting the integrity of residential mortgage appraisals by requiring that fees paid by AMCs for such an appraisal are customary and reasonable. The LREAB shall enter into a contract with the DAL within ninety (90) days of this order to establish the procedure for this review.

**SECTION 2:** The LREAB is directed 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 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 serves 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 to be customary and reasonable. The Commissioner (or his designee) may extend the 30-day review period upon a determination that such extension is needed.

**SECTION 3:** This Order is effective upon signature and shall continue in effect unless amended, terminated, or rescinded by the Governor.

**IN WITNESS WHEREOF,** I have set my hand officially and caused to be affixed the Great Seal of Louisiana at the Capitol, in the City of Baton Rouge, on this 11th day of July, 2017.

**GOVERNOR OF LOUISIANA**

**ATTEST BY**
**THE GOVERNOR**

**SECRETARY OF STATE**

# RX0270

JOHN BEL EDWARDS
GOVERNOR

State of Louisiana
LOUISIANA REAL ESTATE APPRAISERS BOARD

# STATEMENT OF POLICY BY THE LOUISIANA REAL ESTATE APPRAISERS BOARD UPON ADOPTION OF REPLACEMENT RULE 31101

On November 20, 2017, the Board published in the Louisiana Register the text of Rule 31101 as a replacement for the Board's prior rule requiring Appraisal Management Companies ("AMCs") to pay "customary and reasonable" fees for residential appraisals. The text of the replacement Rule 31101 is the same as the text of the prior rule. However, pursuant to Governor John Bel Edwards's Executive Order Number 17-16 (July 11, 2017), the process leading to adoption of the rule included additional supervisory steps by the Commissioner of Administration as well as the State Legislature; and the process for future enforcement of the Rule will be subject to supervision by an Administrative Law Judge of the Louisiana Division of Administrative Law.

Given these events and procedural changes, the Board believes it would assist all stakeholders (including lenders, AMCs, and appraisers) to explain how the Board interprets and will enforce Rule 31101.

## 1. Repeal of Prior Rule 31101, and Adoption of Replacement Rule 31101

The Governor's July 11 Executive Order required the Board to submit to the Commissioner of Administration (or his designee) for approval, rejection, or modification within 30 days any proposed regulation related to AMC compliance with the customary and reasonable fee requirement of La. R.S. 37:3415.15(A), with its rulemaking record, to ensure that the proposed regulation serves Louisiana's public policy to protect the integrity of residential mortgage appraisals by requiring that the fees paid by AMCs for an appraisal are to be customary and reasonable.

On July 17, 2017, the Board met and adopted a Resolution requiring the Executive Director to submit such a proposed rulemaking and regulation to Board by July 31. On July 31, the Board unanimously passed a motion to propose replacing prior Rule 31101 with a new rule having the same text as the prior rule. The Executive Director submitted the proposed rule and the history of promulgation of the prior rule to the Commissioner of Administration, who approved publication of the new Rule in a Notice of Intent in the Louisiana Register. That Notice of Intent to re-adopt Rule 31101 was published by the Louisiana Register on August 20, setting a September 8 return date for written comments and a potential public hearing for September 27. The Board received 77 written stakeholder comments, including letters from the Louisiana Bankers Association, the Louisiana Home Builders Association, Louisiana REALTORS, and the

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JOHN BEL EDWARDS
GOVERNOR

Appraisal Institute in support of the proposed rule; one letter from the Real Estate Valuation Advocacy Association (REVAA) expressing concerns with and suggesting amendments to the proposed rule; and short supportive comments via email from more than 70 individual appraisers and appraisal businesses in Louisiana. The Board held a public hearing to receive additional comments on September 27.

Following the hearing, the Board forwarded the proposed Rule along with the full record of promulgation of the Rule to the Commissioner of Administration and to the Louisiana Senate and House Commerce Committees having oversight responsibility over the activities of the Board in accordance with the Administrative Procedures Act.

On November 9, 2017, the Division of Administration issued a written decision approving the proposed re-adoption of Rule 31101. The November 9, 2017 letter determined that 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."

The Louisiana Senate and House Commerce Committee oversight subcommittees each informed the Board of their decision that it was unnecessary to hold hearings concerning the proposed Rule, and that the promulgation of the Rule should therefore proceed.

Upon its publication in the Louisiana Register on November 20, 2017, Rule 31101 has been adopted.

## 2. Board Guidance for Interpretation of Rule 31101

Louisiana's Appraisal Management Company Licensing and Regulation Act (the "AMC Law"), particularly La. R.S. 37:3415, requires AMCs to compensate appraisers at a rate that is customary and reasonable for residential real estate appraisals being performed in the market area of the property being appraised, consistent with the requirements of 15 U.S.C. §1639e and the final federal rules as provided for in the applicable provisions of 12 CFR Parts 34, 225, 226, 323, 1026, and 1222. Rule 31101 implements those requirements.

The following sets forth the Board's interpretation of Rule 31101. Inasmuch as the text of the Replacement Rule 31101 is the same as the prior Rule, the Board believes that this interpretation is consistent with how the prior rule was interpreted by the Board, and so this Guidance may also serve to answer any questions about how the Board has interpreted the prior Rule in practice.

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LOUISIANA REAL ESTATE APPRAISERS BOARD

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GOVERNOR

PLEASE NOTE: While the following represents the interpretation that will be applied by the Board, the text of Rule 31101 governs AMC compliance, and the Board and AMCs ultimately will be bound by the interpretation of Rule 31101 by an administrative law judge or a court of competent jurisdiction.

Rule 31101 provides four methods by which AMCs may comply with the AMC Law requirements. As in the Federal Reserve's Interim Final Regulations implementing the Dodd-Frank Act (TILA 129E), an AMC is entitled to a presumption of compliance—

- Under Rule paragraph (A)(1) where the AMC relies on evidence of recent rates established by objective third-party information, such as government fee schedules, academic studies, or independent private sector surveys (excluding fees for appraisal services paid by AMCs); or
- Under Rule paragraph (A)(3) and (B) of the Rule where the AMC can document that its fees were based on, at minimum, the six enumerated factors, applied to recent fees in the relevant geographic market.

A third method of compliance under Rule paragraph (A)(3) enables the AMC to demonstrate that its fees are "customary and reasonable" under all applicable facts and circumstances, including other factors in addition to the six factors listed in Rule paragraph (B)(1)-(6), applied to recent fees in the relevant geographic market.

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. The relevant market area is identified by zip code, parish, or metropolitan area.

The Board had applied these three methods in investigations conducted under the prior Rule, and notes that AMCs had relied on at least one of each of these methods to comply with the "customary and reasonable" requirement. In such investigations, the AMC is required to state which of the above methods it employed to comply with Rule 31101with respect to a particular fee, and to provide evidence showing how it applied the selected method.

The Rule provides that the Board, at its discretion, may establish a schedule of customary and reasonable fees as a fourth option for AMCs to comply. The Board had not established such a schedule under prior Rule 31101, and has no present intention to establish such a schedule under replacement Rule 31101.

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Statements by the Federal Reserve Board provide additional interpretive guidance as to customary and reasonable fees. For example, the introduction to the FRB final Interim Rules state that "the marketplace should be the primary determiner of the value of [residential] appraisal services, and hence the customary and reasonable rate of compensation for fee appraisers." 75 Fed. Reg. 66554, 66569 (Oct. 28, 2010). The FRB further explains that, to reflect the marketplace in fees paid for particular appraisals, "recent rates for appraisal services in the relevant geographic market" (*i.e.*, "customary" fees) are to be adjusted "as necessary to account for factors in addition to geographic market that affect the level of compensation appropriate in a given transaction" (*i.e.*, "reasonable"). *Id.*; Supplement I to Part 1026, Official Interpretations, 12 C.F.R. 1026.42(f)(2)(i)(2) (2017). "Recent rates" are those paid for the same type of services within the preceding twelve (12) months in the geographic market.

### 3. Guidance for Enforcement of Rule 31101

The Board investigates compliance with the Rule based on documented complaints of offers or payments below what the complainant believes to be a customary and reasonable fee for the requested services in that market area, and may investigate or randomly audit compliance in the absence of a complaint.

The Board's general policies with respect to enforcement are as follows:

A. The Board's primary goal is that AMCs comply with the AMC Law and Rule 31101.
B. The Board strives to enforce the customary and reasonable fee requirement on a non-discriminatory basis.
C. AMCs found in non-compliance will be required to submit an effective plan to come into compliance. This was the primary focus under prior Rule 31101, and will remain the principal objective under replacement Rule 31101.
D. 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. Examples would include where an AMC cannot document use of any of the three methods to demonstrate that the fees it paid were customary and reasonable; or where an AMC fails to follow through with representations it had made in response to an enforcement action; or in the case of repeated violations.
E. 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

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will become more common in addition to requirements for remedial action to achieve compliance.

Under the Executive Order, the Board's enforcement efforts henceforth will be supervised and reviewed by an independent Administrative Law Judge ("ALJ") appointed under a contract between the Board and the Division of Administrative Law effective July 1, 2017. 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. The Board will adopt and implement the ALJ's determination. An AMC may appeal the decision to the 19th Judicial Circuit Court, as today.

**4. Statement of Policies with Respect to Actions under Prior Rule 31101**

The Board states below its policies with respect to any investigations or enforcement actions taken under prior Rule 31101.

A. With the November 20, 2017 publication of replacement Rule 31101, prior Rule 31101 has been repealed. Prior Rule 31101 cannot and will not be the basis of any further enforcement action by the Board.
B. As of November 20, 2017, there are no pending enforcement actions before the Board under either prior Rule 31101 or replacement Rule 31101.
C. 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.
D. 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.
E. 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.

**5. Statement of Board Policy as to the SLU Survey**

JOHN BEL EDWARDS
GOVERNOR

State of Louisiana
LOUISIANA REAL ESTATE APPRAISERS BOARD

As noted in Section 2 above, Rule 31101 provides three current methods by which AMCs can comply with the "customary and reasonable" fee obligation, and one of those methods relies on the use of objective third-party information, such as government agency fee schedules, academic studies, and independent private sector surveys. The Board neither requires nor prohibits AMC use of objective third-party information, and AMCs that use such information are not precluded from demonstrating, by reference to the six-factor analysis, why adjustments to particular findings in such studies or surveys would be "reasonable" for a particular transaction.

Since 2013, the Board has paid for an annual independent survey by Southeastern Louisiana University of fees paid by lenders for various types of residential appraisals in the relevant geographic markets of the State of Louisiana over the prior year. The Board's intention in funding and making publicly available this SLU Survey was to assist AMC compliance with the law by providing information that might qualify as an objective academic study for purposes of the presumption under prior Rule 31101(A)(1), as well as the Dodd-Frank Act and the Federal Reserve Board Interim Final Rules. The Board posted the survey along with the notice: "This study is provided as a courtesy to all licensees; however, its use is not mandatory."

Under prior Rule 31101, AMCs that used the SLU survey as permitted under the Dodd-Frank Act and prior Rule 31101 were entitled to the benefit of the (A)(1) presumption. In some investigations, AMCs voluntarily agreed to bring themselves into compliance under the presumption using the SLU Survey, for a limited time not to exceed one year. Because use of the SLU Survey prior to the investigation would have entitled that AMC to the benefit of the presumption, the Board was willing to accept that representation in resolution of the investigation as well.

Some have questioned the Board's use of the SLU Survey. A complaint filed against the Board by the Federal Trade Commission suggests that the Board's effort to assist AMCs' compliance instead was an attempt to fix, maintain, or stabilize prices for AMC payments for residential appraisal services. The Board categorically rejects that characterization; but such aspersions and allegations have impeded the Board's efforts to fulfill its regulatory responsibilities under the AMC Act. The Board remains mindful that Governor Edwards issued his Executive Order in large measure to obviate federal antitrust law questions that "may prevent the LREAB from faithfully executing mandates under the Dodd-Frank Act and Louisiana law."

The Board therefore has decided not to fund the SLU Survey in the future, and will remove the survey from the Board's website. Use by any AMC of any survey, including the SLU Survey, under replacement Rule 31101 will continue to be subject to the conditions for use of any objective

JOHN BEL EDWARDS
GOVERNOR

State of Louisiana
LOUISIANA REAL ESTATE APPRAISERS BOARD

third-party information that qualifies for the presumption under the federal rules and Rule 31101. Please note that the most recent SLU Survey studied fees paid in 2016 and, consistent with the requirement to study "recent rates," the SLU Survey no longer will meet those conditions after December 31, 2017. Per Section 3 above, in connection with an enforcement action (including informal resolutions, settlements, or hearings), any AMC's use of objective third-party information, including the SLU Survey, will be subject to ALJ review.

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## CERTIFICATE OF ELECTRONIC FILING

I hereby certify that on April 9, 2021, I filed the foregoing document electronically using the FTC's E-Filing System and served the following via email:

April Tabor
Acting Secretary
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ElectronicFilings@ftc.gov

The Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Ave., NW, Rm. H-110
Washington, DC 20580

I also certify that I delivered via electronic mail a copy of the foregoing document to:

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*Counsel Supporting the Complaint*

**DATED**: April 9, 2021

/s/ *Seth D. Greenstein*

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## CERTIFICATE FOR ELECTRONIC FILING

I certify that the electronic copy sent to the Secretary of the Commission is a true and correct copy of the paper original and that I possess a paper original of the signed document that is available for review by the parties and the adjudicator.

**DATED**: April 9, 2021

/s/ *Seth D. Greenstein*

Seth D. Greenstein
CONSTANTINE CANNON LLP