

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION



COMMISSIONERS:

Joseph J. Simons, Chairman
Maureen K. Ohlhausen
Noah Joshua Phillips
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Rebecca Kelly Slaughter

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

)

RESPONDENT LOUISIANA REAL ESTATE APPRAISERS BOARD'S
SUPPLEMENTAL BRIEF IN OPPOSITION REGARDING
GOOD FAITH REGULATORY COMPLIANCE

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INTRODUCTION

This case marks the first time any federal enforcer has alleged that a state agency could be liable under the antitrust laws for doing precisely what Congress and a host of federal financial regulatory agencies require. In the Dodd-Frank Act,¹ Congress mandated that residential appraisers be paid a “customary and reasonable” (“C&R”) fee as a prudential measure to avert another collapse of the housing and lending markets, and imposed regulatory and enforcement obligations on state agencies that regulated appraisals. Without these federal obligations, Louisiana never would have enacted the “customary and reasonable” fee requirement in its state laws, or delegated to the Louisiana Real Estate Appraisers Board (“LREAB”) the obligation and authority to engage in the conduct so wrongly characterized in the Complaint. And without supervisory oversight and threat of sanctions from the federal Appraisal Subcommittee, LREAB would not have had to investigate complaints of appraisal management company (“AMC”) violations that the Complaint alleges to violate Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 41 *et seq.*

Remarkably, Complaint Counsel’s Supplemental Brief all but ignores the Dodd-Frank Act and implementing regulations that form the basis for LREAB’s defense of regulatory compliance. But the Commission cannot sweep aside this federal regulatory scheme, or undermine the public policy decisions made by Congress and the financial regulators. Dodd-Frank requires the residential mortgage market to: (1) base competition on factors reflecting the soundness of the appraisal, and (2) subordinate unfettered price negotiations between AMCs and appraisers to this prudential objective. As Federal Reserve Board Chairman Bernanke explained:

¹ Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111–203, title XIV, §§ 1472, 1473 (“Dodd-Frank”).

a central element of [Dodd-Frank] is the requirement that the Federal Reserve and the other financial regulatory agencies adopt a so-called macroprudential approach – that is, an approach that supplements traditional supervision and regulation . . . with explicit consideration of threats to the stability of the financial system as a whole.²

LREAB’s regulatory activities were consistent with Dodd-Frank, and there is no inherent conflict with federal antitrust law. The Complaint tries to create such a conflict by alleging that LREAB’s good-faith compliance with Dodd-Frank was “driven by [LREAB’s] apparent dissatisfaction with the free market.” Compl. ¶ 30. The Complaint, however, ignores that Dodd-Frank and federal regulations, not LREAB, constrain the “free market” by the “customary and reasonable” fee requirement – and LREAB cannot be liable for following Dodd-Frank’s mandate. These congressional and federal regulatory policy choices read consistently with the antitrust laws; indeed, that is why Dodd-Frank contains an antitrust savings clause.³

Rather than address this regulatory framework, Complaint Counsel’s Supplemental Brief attacks a series of strawman arguments that LREAB has never made. First, LREAB committed no “error of law”; it followed the law correctly. If there are disputes about LREAB’s compliance with federal requirements, or good faith, those are *issues of fact* for trial, not summary decision. Second, LREAB does not contend the defense applies to compliance with state law alone. LREAB’s monitoring and enforcement functions pertaining to AMCs are *regulated* by the federal financial agencies. Only because of Dodd-Frank and federal regulations did the State of Louisiana and LREAB undertake the conduct challenged in this suit. Third, arguments that the

² See Ben S. Bernanke, Chairman Federal Reserve Board, Address at the Federal Reserve Bank of Chicago 47th Annual Conference on Bank Structure and Competition: *Implementing a Macroprudential Approach to Supervision and Regulation*, at 1 (May 5, 2011), https://www.federalreserve.gov/news_events/speech/files/bernanke20110505a.pdf.

³ The interaction of Dodd-Frank’s market constraints and the antitrust savings clause is more fully addressed in LREAB’s Opposition to Complaint Counsel’s Motion for Partial Summary Decision on Respondent’s Fourth Affirmative Defense (“LREAB Opp.”) at 28-29. While an antitrust savings clause may prohibit a finding of an implied immunity, it does not modify the applicability of other defenses, such as good faith regulatory compliance. See *Texas Commercial Energy v. TXU Energy*, 2004 WL 1777597 (S.D. Tex. June 24, 2004), *aff’d*, 413 F.3d 503 (5th Cir. 2005).

good faith regulatory compliance defense applies only to private parties or has been superseded by changes in antitrust law applicable to telecommunications companies make for a thin soup given the Supreme Court’s acknowledgement of the defense and the policies it serves.

The FTC Act provides no mandate to undermine the prudential policy objectives of Congress and the federal financial regulators that underlie the Dodd-Frank post-financial crisis statutes and regulations.⁴ The Commission too should acknowledge that, in determining whether LREAB’s conduct was anticompetitive, “an industry’s regulated status is an important fact of market life, the impact of which on pricing and other competitive decisions is too obvious to be ignored.” *MCI Commc’ns Corp. v. AT&T*, 708 F.2d 1081, 1105-06 (7th Cir. 1983) (internal citations omitted), *cert. denied*, 464 U.S. 891 (1983). As the American Antitrust Institute recently opined, “[w]hen other regulators do tackle social problems with regulations that have the effect of restricting competition, and those tradeoffs reflect a reasoned balancing of interests, antitrust enforcers should be circumspect in challenging those tradeoffs.”⁵

For the reasons set forth in LREAB’s Opposition and below, the Commission should deny the Motion for Partial Summary Decision, and reaffirm both the contours of the good faith regulatory compliance defense and LREAB’s right to assert it.

⁴ Indeed, the Dodd-Frank Act expressly assigns to the federal financial regulatory agencies interpretive authority regarding the C&R requirements, 15 U.S.C. § 1639e(i), to which courts should defer; the Commission has no such interpretive authority. *See* 15 U.S.C. § 1604(h).

⁵ Comments of the American Antitrust Institute Prepared for the Antitrust Division Roundtable on Anticompetitive Regulations, May 31, 2018, at 2, <https://www.antitrustinstitute.org/sites/default/files/AI%20Comments%20for%20Third%20DOJ%20Regulatory%20Roundtable.pdf>.

I. LREAB'S REASONABLE AND GOOD FAITH CONDUCT COMPLIED WITH CONGRESSIONAL AND REGULATORY POLICY AND DIRECTIVES UNDER DODD-FRANK.

Congress and the financial regulators made policy determinations that the State and LREAB were neither free to disregard nor had an obligation to reevaluate. At all times, LREAB has acted reasonably and in good faith to carry out federal government directives regulating competition in the market for residential real estate appraisals.

1. *In establishing the requirement of C&R appraisal fees for AMCs, Congress made policy determinations to protect the residential mortgage market.*

Inflated residential real estate appraisals figured prominently among the primary causes of the 2007-2008 housing crisis. Congress responded in two sections of the Dodd-Frank Act: first, by amending the Truth in Lending Act (“TILA”), adding section 129E – the appraisal independence requirements; and second, by amending Financial Institutions Reform, Recovery, and Enforcement Act (“FIRREA”) to impose minimum requirements on states that certify and license appraisers to also register and regulate AMCs.

A central pillar of the appraisal independence requirements is the mandate that lenders and their agents (AMCs) pay customary and reasonable appraisal fees to licensed appraisers for covered transactions. 15 U.S.C. § 1639e(i). The language of that section provides that C&R fees should be based on objective data, and evinces an inherent distrust of rates paid to appraisers by AMCs as representative of what is “customary and reasonable.” *Id.* Federal regulations reinforced the intent of Congress and federal financial agencies that competition in the mortgage marketplace should be driven by the soundness of the appraisal, not by unfettered price competition for appraisals.

In adopting the C&R requirement, Congress made a legislative presumption that AMCs' payment of too-low appraiser fees would deter qualified appraisers from conducting residential mortgage appraisals. According to the May, 2009 House report:

Critics have also warned that the growth of AMCs may lead to a decline in appraisal quality. . . . [a representative of] the Appraisal Institute observed: "With many AMCs taking as much as 60 percent of the fee as their 'management' cost, many highly qualified appraisers are reluctant to perform mortgage appraisals for such entities." Because all appraisal fees are disclosed in a single line on closing documents, consumers and regulators currently lack the information needed to determine whether the growth of AMCs has led to low-cost, lower-quality appraisals.

H.R. Rep. No. 111-94, at 59- 60 (2009) (discussing predecessor legislation incorporated into Dodd-Frank). Based on this record, Congress adopted the C&R provision on the prudential assumption this concern was valid.

The Federal Reserve Board made a similar judgment:

According to some, appraisers willing to work for AMCs are often inexperienced in general or in the relevant geographic area *and produce poor quality appraisals, undermining consumers' well-being and creditors' safety and soundness.*

On the other hand, representatives of AMCs expressed concerns that, depending on how the term "customary and reasonable" rate is interpreted, requiring AMCs to compensate fee appraisers at a rate that is customary and reasonable may force them to raise overall costs charged to creditors—and ultimately to consumers—for appraisals ordered through AMCs

75 Fed. Reg. 66,554, 66,570 (Oct. 28, 2010) (emphasis added). Balancing these concerns, the Federal Reserve Board came down on the side of protecting the public policy interest in the integrity of residential real estate transactions by adopting rules governing customary and reasonable fees that restrict transaction-specific appraisal fees, as discussed in Section I.3. below.

2. *Dodd-Frank established minimum requirements for state regulatory supervision which were implemented by the federal financial regulatory agencies.*

In response to the 1980s savings and loan mortgage crisis, Congress, in 1989, enacted 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.

LREAB was the pre-existing state appraiser certifying and licensing agency in Louisiana created in 1987, and whose first task was to bring the state into compliance with FIRREA. La. R.S. 37:3393. The initial 2009 Appraisal Management Company Licensing and Regulation Act (“AMC Act”), La. R.S. 37:3415, incorporated AMC certification requirements, and delegated to LREAB the authority and obligation to enact regulations to implement the AMC Act and to enforce it. Following the enactment of Dodd-Frank, the Legislature amended the AMC Act to include the C&R fee requirement, requiring that such payments be made “consistent with federal presumptions of compliance” (as explained *infra* at Section II.3).

Dodd-Frank added Section 1124 to FIRREA that requires the federal banking agencies and the Federal Housing Finance Agency *to issue rules that require AMCs to register with state appraiser certifying and licensing agencies* according to minimum criteria set by those agencies.⁶ Those “minimum criteria” expressly include ensuring AMC compliance with the appraiser independence provisions of the new TILA section 129E. 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.

Relying on the oversight framework in amended FIRREA, LREAB adopted regulations in 2013 to comply with the AMC Act amendments, including Rule 31101 addressing payment of

⁶ 15 U.S.C. § 3353.

C&R fees,⁷ importing key language from Dodd-Frank and the interim federal rules.⁸ The federal financial regulatory agencies' minimum requirements further confirmed the reasonableness of judgments LREAB made in adopting its rules. LREAB's rules ensured that, in accordance with federal mandates, LREAB not only licenses AMCs, but also has the power to investigate complaints and discipline AMCs in violation of 15 U.S.C. § 1639e(a-i), including Dodd-Frank's C&R requirement. La. Adm. Code tit. 46, §§ 30900, 30901, 31101. To serve the public interest and carry out these necessary functions, and as predicated upon the federal financial regulatory agencies' minimum requirements (80 Fed. Reg. 32,658, 666-67 (June 9, 2015)), LREAB requires that AMCs maintain an appropriate level of recordkeeping that details their processes and procedures for complying with federal and state law requirements. La. Adm. Code tit. 46, §§ 30501, 31101(B), (C).

In April 2014, the federal financial regulatory agencies issued a proposed rule confirming that the state appraiser certifying and licensing agency must (1) license AMCs, (2) regulate AMCs in accordance with the TILA appraisal independence requirements, and (3) have the ability to conduct investigations and discipline AMCs "that violate applicable appraisal related, laws, regulations, or orders." 79 Fed. Reg. 19,521, 19,527 (Apr. 9, 2014). These regulations further require state appraisal licensing agencies to have rules mandating that AMCs "Establish and comply with processes and controls reasonably designed to ensure that the AMC conducts its appraisal management services in accordance with the requirements of section 129E(a) through (i) of the Truth in Lending Act, 15 U.S.C. 1639e(a) through (i), and regulations thereunder." 79 Fed. Reg. at 19,536.

⁷ La. Admin. Code tit. 46, § 31101.

⁸ See Comparison of Louisiana Law and Regulations to Federal Law and Regulations (attached hereto as Ex. 39).

On June 9, 2015, the federal financial regulatory agencies issued the final rule incorporating these minimum requirements. 80 Fed. Reg. at 32,658. The final rule left the interim rule provisions largely unchanged, and was identically codified in the Code of Federal Regulations for each regulatory agency.⁹ These proposed and final minimum requirements confirmed the reasonableness of LREAB’s enforcement and record-keeping approach.

3. *The Federal Reserve Board’s interim final rule also sets out presumptions and a catch-all method that AMCs could use to establish compliance with C&R requirements.*

Dodd-Frank required the Federal Reserve Board to promulgate, within 90 days, the Interim Final Rules (“IFR”) concerning compliance with TILA 129E(i)’s C&R mandate. 75 Fed. Reg. at 66,554. In response, the Federal Reserve Board established three methods of compliance with the Dodd-Frank C&R requirement:

- (1) Presumption 1 – 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 – usage of objective third-party information, including independent surveys and fee schedules based on appraisal fees paid by lenders to a representative sample in the relevant geographic market;¹⁰ and,

⁹ See 12 C.F.R. pt. 34 (Department of Treasury); 12 C.F.R. pt. 323 (Federal Deposit Insurance Corporation); 12 C.F.R. pt. 1026 (Bureau of Consumer Financial Protection); and 12 C.F.R. pt. 1222 (Federal Housing Finance Agency).

¹⁰ In its comments on this requirement, the Federal Reserve Board stated that it was not aware of any existing studies that met these requirements, nor did it provide further guidance on how these requirements could be met; AMCs had voiced the same complaint. LREAB sought to address this gap by funding a survey by an independent academic institution, the Southeastern Louisiana University Business Center. 75 Fed. Reg. at 66,570.

(3) Presumption 3 – an “all facts and circumstances” test where the two presumptions were not applicable.¹¹

75 Fed. Reg. at 66,569, 66,574. Additional regulatory provisions require that the methods used to determine C&R fees must ignore transaction-specific fees paid to appraisers in favor of a 12-month snapshot of “recent rates,” as well as ignore AMC data when relying on objective and independent surveys. *See id.* at 66,554, 66,565, 66,569.

The Federal Reserve Board explained its determination that fees resulting from negotiations between an appraiser and an AMC could *undermine* its objective to ensure sufficient incentives for qualified appraisers to provide appraisal services for residential mortgages:

In the Board’s view, a fee appraiser’s agreement that a fee is “customary and reasonable” is insufficient to establish that the fee meets the statutory “customary and reasonable” standard. *Objective factors or information such as that set forth in § 226.42(f)(2) and (f)(3) . . . generally should support the creditor’s or agent’s determination of the appropriate amount of compensation to pay a fee appraiser for a particular appraisal assignment.* In theory, the fact that an appraiser is willing to accept a particular fee for an appraisal assignment may bear on whether the fee is customary, reasonable, or both. However, *an 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.* In addition, the Board understands that some AMCs have begun requiring fee appraisers to agree that the fee is “customary and reasonable” as a condition of obtaining the appraisal assignment. In these situations, the Board believes that *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.*¹²

Additionally, the Federal Reserve Board’s Official Comment 42(f)(1)-5 expressly constrains negotiated volume discounts: The C&R requirement “does not prohibit a fee

¹¹ The C&R provisions, including the three methods of compliance found in the IFR, took effect on April 1, 2011. Regardless of any state regulations, AMCs were required to have systems and procedures in place to meet this requirement by that date. *Id.* at 66,554.

¹² *Id.* at 66,571 (emphasis added).

appraiser and a creditor (or its agent) from agreeing to compensation based on transaction volume, *so long* as the compensation is customary and reasonable.” *Id.* (emphasis added).

As Louisiana’s appraiser certifying and licensing agency, LREAB was empowered by the State of Louisiana to promulgate a rule requiring payment of customary and reasonable appraiser fees in accordance with Dodd-Frank and the IFR. As described at length in LREAB’s Opposition, subsequent to passage of the 2012 AMC Act amendments, LREAB began a year-long rulemaking process that culminated in the promulgation of Rule 31101 on November 20, 2013. On its face, Rule 31101 as promulgated in 2013 (and as repromulgated in 2017) is wholly consistent with federal requirements. It provides the same three methods of compliance detailed in the IFR – (1) the six factors to adjust recent rates in a relevant geographic area; (2) objective third-party information, including academic fee studies; and (3) an all-facts-and-circumstances compliance method. LREAB Opp. at 12; *see also* La. Admin. Code tit. 46, § 31101.¹³ As required by Dodd-Frank, IFR presumption 2, and the AMC Act, Rule 31101 also excludes fees paid by AMCs for use in any “objective third-party information.”

4. *Dodd-Frank granted additional supervision authority to the ASC over each State appraiser certifying and licensing agency.*

Dodd-Frank’s amendments to FIRREA also empowered the ASC to monitor and supervise state appraisal licensing agencies’ regulation of AMCs.¹⁴ The ASC must ensure that the state appraiser certifying and licensing agency’s AMC rules and regulations: (1) are consistent with federal law; (2) allow for complaints and investigations for potential violations of federal law; (3) grant the authority to discipline violators; (4) are effective; and (5) require the

¹³ Rule 31101 also grants the Board the authority to implement a non-mandatory fee schedule, but LREAB has not nor intends to establish such a fee schedule. LREAB Opp. at 12, n.16.

¹⁴ See 79 Fed. Reg. 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.”).

agency to report AMC complaints and disciplinary actions to the ASC. 12 U.S.C. § 3347(a)(1-5) (attached hereto as Ex. 40); *see also* ASC Revised Policy Statement, 83 Fed. Reg. 9,144, 9,156 (Mar. 5, 2018).

Further, the “ASC shall have the authority to impose sanctions” against any state agency “that fails to have an effective appraiser regulatory program,” which includes the federal requirements of tracking, investigating, and remedying AMC violations of federal requirements. *See* Ex. 40; *see also* 83 Fed. Reg. at 9159 (“Title XI grants the ASC authority to impose sanctions on a State that fails to have an effective Appraiser or AMC Program.”). According to the ASC, “effective enforcement” of AMC regulations must be “consistent and equitable,” meaning “absent specific documented facts or circumstances, substantially similar cases within a State should result in similar dispositions.” 83 Fed. Reg. at 9158.

LREAB’s rules met the federal financial regulatory agencies’ minimum requirements of supervision and enforcement of AMCs. *See* Section II.2 *supra*. In addition, LREAB’s processes and procedures ensured it has an “effective appraiser regulatory program” over licensed AMCs in the State of Louisiana. LREAB rules ensure “effective, consistent, equitable, and well-documented” mechanisms for responding to complaints concerning AMCs, including potential violations of C&R fees. LREAB Opp. at 25. Further, LREAB’s Executive Director conferred with the Executive Director of the ASC to ensure LREAB’s actions comported with the ASC’s regulations and interpretation of federal law. *Id.* at 9-10. In February 2018, the ASC sent LREAB an inquiry concerning its “AMC Statute and Regulation,” to ensure LREAB had an effective regulatory regime as required by federal law and regulations.¹⁵

¹⁵ See Feb. 7, 2018 Letter from ASC to LREAB (attached hereto as Ex. 41).

5. *Recent Congressional actions have further validated the reasonableness of LREAB's conduct.*

On May 24, 2018, President Trump signed into law Public Law 115-174, the Economic Growth, Regulatory Relief, and Consumer Protect Act, making numerous amendments to the Dodd-Frank Act. The amendment to the appraisal independence provisions of TILA 129E 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 reasonable exception – to allow voluntary donations of appraisal services to charitable organizations which were to be construed as meeting "customary and reasonable" fee standards.¹⁶ 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 C&R appraisal fee regulations permit "free market" negotiations of fees, and instead demonstrates that Congress enacted the C&R mandate as an absolute requirement that AMCs must pay a C&R 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 Section 129E(i) of TILA, validated LREAB's sponsorship and use of an academic study:

As the prudential financial regulators seek to formulate these fees,¹⁷ 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

¹⁶ See The Economic Growth, Regulatory Relief, and Consumer Protection Act, Pub. L. 115-174, Section 102, "Safeguarding access to Habitat for Humanity homes" (modifying Section 129E(i) of the Truth in Lending Act, 15 U.S.C. § 1639e(i), which establishes the customary and reasonable ("C&R") appraisal fee requirement by adding new section 129E(i)(2)(B)) (attached hereto as Ex. 42) (enrolled version).

¹⁷ Federal financial agencies nominally have the power to review C&R fees for "federally regulated" AMCs, which are AMCs that are affiliated with a financial institution. However, federally regulated financial institutions have the option of registering with a state appraiser board and becoming subject to its rules implementing the prudential financial institutions' regulations; federally regulated AMCs have done so in Louisiana, making them subject to LREAB's C&R rules.

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) (attached hereto as Ex. 43). 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 C&R determinations would undertake.

II. GOOD FAITH REGULATORY COMPLIANCE, STATE ACTION IMMUNITY, AND IMPLIED IMMUNITY ARE THREE DISTINCT DEFENSES.

Antitrust laws should not impair the achievement of other regulatory goals set by Congress. “Antitrust condemnation of conduct that properly implements policies lawfully adopted by the regulators would be repugnant to the regulatory regime.” IA P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 246a, at 435 (4th ed. 2013); 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.”).

Accordingly, compelling state agencies to comply with the prudential statutory mandates of Dodd-Frank while risking antitrust liability and attendant treble damages would undermine the congressional purpose behind each respective regulatory scheme.

Phonetel I clearly explains the three defenses that may arise when compliance with other regulations is implicated by an antitrust suit: good faith regulatory compliance, state action immunity, and implied immunity.¹⁸ Different policy reasons animate each of these distinct defenses, and the elements of each do not overlap.

¹⁸ *Phonetel, Inc. v. AT&T*, 664 F.2d 716, 739 n.60 (9th Cir. 1981) (“*Phonetel I*”).

1. **Good faith regulatory compliance** is a complete, fact-based defense to antitrust liability for actions by a regulated entity, *i.e.*, “conduct that properly implements policies lawfully adopted by the regulators.” Areeda & Hovenkamp ¶ 246a. The required elements 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.” *Phonetel I*, 664 F.2d at 737-38; *see also MCI Commc’ns*, 708 F.2d at 1138. Thus, the defense does not require that the regulatory scheme conflict with the antitrust laws. Although the regulatory compliance defense first arose in the context of telecommunications companies – as quintessential federally-regulated monopolies – it since has been successfully invoked in diverse contexts involving the securities laws,¹⁹ labor unions,²⁰ and health insurance regulation.²¹ Further, the challenged conduct need not be specifically delineated by the regulator or subject to regulatory approval. *See Phonetel I*, 664 F.2d at 742 (applying defense to conduct affected some seven years later by a separate FCC policy decision); *Phonetel v. AT&T*, 889 F.2d 224, 230 (9th Cir. 1989). Rather, the regulatory compliance defense requires a showing of both objective and subjective reasonableness by the entity undertaking the challenged conduct. *S. Pacific Commc’ns Co. v. AT&T*, 740 F.2d 980, 1010 (D.C. Cir. 1984) (noting requirement of “both reasonableness and good faith”).

Even where a party does not successfully assert good faith regulatory compliance as a complete defense, regulatory compliance also is pertinent to determining whether there has been a restraint of trade at all and, if so, whether the restraint is reasonable under the rule of reason.

¹⁹ *Silver v. New York Stock Exch.*, 373 U.S. 341, 366 (1963).

²⁰ *Mautz & Oren, Inc. v. Teamsters, Chauffeurs, and Helpers Union, Loc. No. 279*, 882 F.2d 1117, 1124 & n.14 (7th Cir. 1989).

²¹ *Nat'l Gerimedical Hosp. and Gerontology Ctr. v. Blue Cross of Kansas City*, 452 U.S. 378, 393 n.19 (1981).

See Nat'l Gerimedical, 452 U.S. at 393 n.19; *Illinois ex rel Burris v. Panhandle E. Pipe Line Co.*, 935 F.2d 1469, 1484 n.14 (7th Cir. 1991).

2. **State-action immunity** provides a complete legal defense based on the identity of the actor as well as the conduct. Actions of a state or directed by a state are not subject to federal antitrust law. *See Parker v. Brown*, 317 U.S. 341, 351 (1943) (“The Sherman Act . . . gives no hint that it was intended to restrain state action or official action directed by a state.”).²² This immunity from suit arises out of principles of federalism and the sovereign right of states to regulate commerce within their borders. *N. C. State Bd. of Dental Exam'rs v. FTC*, 135 S. Ct. 1102, 1104 (2015). State-action immunity also attaches to non-sovereign state actors controlled by market participants where the state (1) has clearly articulated its policy to displace competition, and (2) actively supervises the conduct. *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105-06 (1980).

3. **Implied immunity** provides a complete legal defense where a later-enacted regulatory scheme irreconcilably conflicts with antitrust law, such that courts infer congressional intent to displace the antitrust laws and to permit the conduct compliant with the separate regulatory scheme. *Phonetele I*, 664 F.2d at 726-27. The federal regulations at issue must evince a clear repugnancy between the laws. *See United States v. Nat'l Ass'n of Sec. Dealers*, 422 U.S. 694, 734-35 (1975) (finding clear repugnancy where regulatory regime permitted resale price maintenance forbidden by the antitrust laws). The required elements of an implied immunity defense are: (1) the existence of regulatory authority; (2) supervision by the regulatory entity over the conduct; (3) evidence of “conflicting guidance;” between the regulation and the

²² LREAB asserts it is a state actor under *Parker v. Brown*, and has appealed the Commission’s dismissal of its state-action immunity defenses. Petition for Review, *LREAB v. FTC*, No. 18-60291 (5th Cir. Apr. 19, 2018).

antitrust laws; and (4) that the conduct lies squarely within the area covered by the regulatory regime. *See Credit Suisse Sec. (USA) LLC v. Billing*, 551 U.S. 264, 275-76 (2007).

III. LREAB'S RESPONSES TO SUPPLEMENTAL QUESTIONS POSED BY THE COMMISSION

Question 1: *How do the elements of the regulatory compliance defense differ from those applicable to implied immunity from the antitrust laws?*

Answer: The good faith regulatory compliance defense and implied immunity are separate inquiries. The good faith regulatory compliance defense provides a complete factual defense “where the defendant can establish that at the time the various anticompetitive acts alleged [] 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 . . .”

Phonetel I, 664 F.2d at 737-38. In contrast, implied immunity is a complete legal defense rendering conduct otherwise subject to the antitrust laws immune from antitrust liability. The element central to implied immunity is “a convincing showing of a clear repugnancy between the antitrust laws and the regulatory system.” *Phonetel I*, 664 F.2d at 726 (*citing Nat'l Ass'n of Sec. Dealers*, 422 U.S. at 719-20). No showing of conflict is necessary for good faith regulatory compliance. LREAB asserts the good faith regulatory compliance defense, but does not claim implied immunity.

Discussion: The good faith regulatory compliance defense – what the *Phonetel I* court called the “justification of regulatory necessity” – provides a complete fact-based defense to an antitrust violation, where the allegedly anticompetitive actions resulted from reasonable good faith compliance with non-antitrust regulations that affected competition in the relevant market. In *Phonetel I*, AT&T was required under the Communications Act of 1934 to file tariffs with the FCC describing its practices and regulations. It filed such a tariff permitting only indirect

interconnection of ancillary devices to its network. The FCC took seven years to issue guidance on interconnection, and ultimately required direct connection of ancillary devices to AT&T's network. Plaintiffs had challenged AT&T's practice during the intervening seven years under the antitrust laws. The court held that a regulated entity could assert as a defense that its actions were justified by the constraints of the regulatory scheme under which it operated, and found AT&T's conduct met the elements of that defense. *Id.* 664 F.2d at 720-43.

The policy goal underlying good faith regulatory compliance is to avoid “punish[ing] regulated firms for trying to act consistent with” regulatory policies. Areeda & Hovenkamp, ¶ 246a. There are both subjective and objective aspects of the defense. *See Section I.1 supra; see also S. Pacific Commc’ns*, 740 F.2d 980. There is no requirement under the regulatory compliance defense that the conduct at issue be “actively supervised” or subject to transaction-specific scrutiny. *See Phonetel I*, 664 F.2d at 737 (outlining elements of good faith regulatory compliance). The FCC, in *Phonetel I*, did not undertake such transaction-by-transaction oversight or active supervision over AT&T’s conduct. *Id.* at 733 (“The FCC does not expressly approve or adopt as agency policy the content of every tariff it permits to become effective.”). Hence, Complaint Counsel’s arguments to the contrary attempt to improperly import into the regulatory compliance defense elements applicable *only* to implied immunity or state action.²³ However, even if transaction-specific oversight were required for the regulatory compliance defense, the ASC’s recent Final Policy Statement encompasses review of specific agency enforcement decisions, including those by LREAB.²⁴

²³ These arguments have already been fully refuted by LREAB. *See* LREAB Opp. at 14-25.

²⁴ Appraisal Subcommittee of the Federal Financial Institutions Examination Council, Revised Policy Statement 10(B)(3), 83 Fed. Reg. 9144, 9158 (Mar. 5, 2018). See discussion at II.4 *supra*.

In contrast, an implied immunity is a complete legal defense, rendering conduct otherwise subject to the antitrust laws immune from antitrust liability. The linchpin of the defense is “a convincing showing of a clear repugnancy between the antitrust laws and the regulatory system.” *Phonetel I*, 664 F.2d at 726 (*citing Nat'l Ass'n of Sec. Dealers*, 422 U.S. at 719-20). Clear repugnancy implies congressional intent that the later-enacted and more specific statutory framework should take precedence over the antitrust laws. As noted in *Phonetel I*, there is no universal doctrine of implied immunity; each case is shaped by considerations of the industry involved. *Id.* at 729. In “some cases,” *Phonetel I* would deem a regulatory mandate sufficient in the presence of three elements: “First, explicit congressional approval of the ultimate anticompetitive effect of the challenged conduct; second, explicit authorization by Congress to an agency or private entity to order the challenged anticompetitive conduct; and third, no inconsistency between the challenged conduct and an express policy of the governing agency.” *Id.* at 731-32.

This case does not involve an implied immunity, as there is no “clear repugnancy” between Dodd-Frank and the antitrust laws. Congress and the federal financial regulators made the prudential policy decision to promote the integrity of the residential mortgage marketplace by requiring them to be based on sound appraisals. These regulators implemented C&R appraisal fee regulations so appraisers would compete based on quality and competency, rather than permitting AMCs to engage in bottom-fishing based on price alone.²⁵ Complaint Counsel may view the public interest as being promoted solely by price competition among appraisers for transaction-specific mortgage appraisals offered to AMCs. However, this is not the market framework established by Congress in Dodd-Frank or by the federal financial regulators in their

²⁵ See Section I.1 *supra*.

interim and final minimum requirements. Federal law and regulations constrain the definition of C&R and of the market in which C&R fees are to be determined. Failing to give “appraisal independence” its full meaning would allow antitrust laws to eviscerate prudential policy choices Congress has already made. Avoidance of such conflicts is the precise circumstance that the good faith regulatory compliance defense is designed to address.

Despite Complaint Counsel’s novel suggestions that *Phonetel I* has been overruled, and that the validity of the regulatory compliance defense has been “call[ed] into question” due to expansion of the implied immunity doctrine, CC Supp. Br. at 8,²⁶ there is no support for either proposition in the case upon which they rely. To the contrary, in *Billing*, the Supreme Court affirmatively cites to the *Phonetel I* decision as part of its larger holding that courts must undertake a comparative analysis where regulatory compliance intersects with the antitrust law that will “vary from statute to statute, depending on the relation between the antitrust laws and the regulatory program set forth in the particular statute, and the relation of the specific conduct at issue to both sets of laws.” *Billing*, 551 U.S. at 271. Moreover, as distinct policies animate each doctrine, there is no good reason to believe that expansion by courts of implied immunity diminishes the independent defense that reasonable good faith compliance with a regulatory scheme does not violate the antitrust laws.

Question 2: What are the consequences of successful application of the regulatory compliance defense? Does successful invocation of the defense universally bar antitrust liability or can it represent a factor to be considered as part of a rule of reason inquiry?

Answer: Successful application of the good faith regulatory compliance defense disproves the alleged antitrust violation as a question of fact. Here, a successful assertion of the defense would require the fact-finder to rule that no violation occurred, and grant judgment in

²⁶ Complaint Counsel’s Supplemental Brief in Support of its Motion for Partial Summary Decision Dismissing Respondent’s Fourth Affirmative Defense (June 11, 2018) (“CC Supp. Br.”).

favor of LREAB. However, even if the defense cannot be successfully invoked in full, an antitrust tribunal must consider the regulatory framework to determine, first, whether a restraint of trade exists at all. If the tribunal finds a restraint of trade, it then considers the regulatory framework under the rule of reason. In the rule of reason analysis, the regulatory framework is relevant to questions including, but not limited to: (1) the reasonableness of the alleged restraint in light of Congress' reasoned policy determinations, and (2) the definition of the relevant market(s) and/or whether the defendant has market power.

Discussion: Proof of good faith regulatory compliance establishes the factual basis to defeat liability for an unreasonable restraint of trade.²⁷ Hence, LREAB agrees with Complaint Counsel that successful application of the regulatory compliance defense would defeat liability and require a “dismissal of the Complaint.” CC Supp. Br. at 8. Under the defense, the extensive regulatory requirements placed on LREAB by Dodd-Frank and its implementing regulations, as well as ongoing monitoring of LREAB programs by the ASC, are highly relevant to whether there can be an antitrust violation.

Even where all elements of the defense cannot be established, the fact of regulation, and its effect on the contours of and conduct in the market, must be separately considered. Here, Congress has chosen to promote competition in the market for home mortgages – based on *sound* appraisals – and has implemented the customary and reasonable fee mechanism as a prudential tool to prevent the financial system from accumulating unnecessary risk from unsound appraisals. Compliance with regulation may not properly be considered a restraint of trade; or it may not be deemed an “unreasonable” restraint as part of a rule of reason analysis. *See Mid-Texas Commc 'ns Sys. v. AT&T*, 615 F.2d 1372, 1378 (5th Cir. 1980) (holding that antitrust laws

²⁷ LREAB Opp. at 14-15.

“are not so inflexible as to deny consideration of government regulation”); *Illinois ex rel. Hartigan v. Panhandle E. Pipe Line Co.*, 730 F. Supp. 826, 933 (C.D. Ill. 1990) (“Where antitrust claims arise in the context of a regulated industry, the antitrust defendant is entitled to raise and have considered its ‘good faith adherence to regulatory obligations’ as an antitrust defense.”) (emphasis supplied) (*citing MCI Commc’ns*, 708 F.2d at 1109–10).

An entity’s good faith compliance with a regulatory scheme may respond to pertinent questions, including (1) whether the challenged conduct constitutes a restraint of trade, (2) the proper definition of the relevant market and/or whether a firm has market power, and (3) whether the alleged restraint is unreasonable under the circumstances, including what, if any, justifications Congress has established via its reasoned policy choices. *See e.g., United States v. Phila. Nat'l Bank*, 374 U.S. 321, 367 n.44 (1963) (regulation relevant to market definition for banking because “[e]ntry is, of course, wholly a matter of governmental grace”); *Panhandle E. Pipe Line*, 935 F.2d at 1484 n.14 (existence of affirmative regulatory obligations is a factor to be considered in a rule of reason analysis); *Phonetel I*, 664 F.2d at 737 (AT&T’s “status as a regulated common carrier” is relevant to question of market structure). The tribunal analyzes the restraint under the rule of reason, and not under a *per se* or quick look inquiry, because “the proper role of antitrust courts is to accommodate the peculiar circumstances under which regulated entities operate.” *Id.* at 742. The tribunal’s fact-intensive burden-shifting for this inquiry makes reasonableness the appropriate touchstone. *Cf. id.* at 740-43 (permitting, in absence of implied immunity, the “interposing of a substantive justification” for the challenged conduct which, but for the regulatory setting, would have otherwise been deemed *per se* illegal) (*citing Silver*, 373 U.S. at 360-61, 365); *Jacobi v. Bache & Co.*, 520 F.2d 1231 (2d Cir. 1975) (Friendly, J.) (same); *Mid-Texas Commc’ns Sys.*, 615 F.2d at 1381 (finding that “to the extent

that [Bell] based its decision here on articulable concerns relating to the public interest as defined in [the statute, it was] entitled to a measure of protection from the effects of the antitrust laws” and adopting an objective reasonableness standard); *IT&T v. General 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.”).²⁸

A court utilizes the rule of reason to avoid bludgeoning a complicated regulatory regime with the hammer of federal antitrust law—a concern especially pertinent to the present case. *See Jacobi*, 520 F.2d at 1236 (“Interposition of the antitrust laws in such a way as to make the rule governing the distribution of the special service charge a per se violation . . . ‘would preclude and prevent the operation of the Exchange Act as intended by Congress and as effectuated through SEC regulatory activity.’”) (*quoting Silver*, 373 U.S. at 357). Hence, regulatory structure is relevant under the rule of reason, but it is not limited to questions of market definition or market power, as Complaint Counsel suggests, *see CC Supp. Br. at 10*. Rather, a tribunal also considers the justifications Congress has enacted through reasoned policymaking. LREAB’s challenged conduct is intertwined with its implementation of Dodd-Frank and these prudential concerns.²⁹ *Phonetel I*, 664 F.2d at 727 & n.31 (“The Court has been exceptionally reluctant to allow via the antitrust laws any tampering with the regulatory framework that might threaten the recurrence of similar harm”) (internal citation omitted).

²⁸ Complaint Counsel incorrectly relies on *International Telephone and Telegraph Co.* (“*IT&T*”) for the proposition that the defense exists only as a subspecies of implied immunity. First, the case has been overruled on other grounds. *California v. Am. Stores Co.*, 495 U.S. 271, 283 (1990) (Clayton Act authorizes divestiture as equitable relief in private suits). Further, *IT&T*’s reasoning implying that a good faith regulatory compliance defense does not exist is no longer good law in light of *Phonetel I & II* in the Ninth Circuit, along with authorities in other circuits. *E.g., Mid-Texas Commc’ns Sys.*, 615 F.2d 1372. However, *Phonetel I* cites *IT&T* with approval for the proposition that regulation is highly relevant under the rule of reason, which LREAB’s brief repeats here.

²⁹ See Section II *supra*.

Question 3: Do any differences between the facts in this proceeding and those in telecommunications litigation, where regulatory compliance considerations have received the most extensive treatment, suggest differences in the availability or application of a federal regulatory compliance defense?

Answer: No case limits the defense to the telecommunications industry, and the policy rationale for the defense extends to any prudential regulation. Before deregulation, telecommunications firms were subject to extensive federal and state regulation, and therefore those firms litigated the defense. LREAB similarly is subject to extensive state and federal regulations, and so the defense applies equally here.

Discussion: The regulatory compliance defense is not pigeonholed to conduct in the telecommunications industry.³⁰ *See, e.g., Panhandle E. Pipe Line*, 935 F.2d at 1488 (recognizing the application of the regulatory compliance defense for a pipeline company that distributed natural gas). Nor is it invoked only where complex technical issues are involved. *Id.* (applicability of contractual versus tariff provisions). Instead, the regulatory compliance defense “arise[s]in the context of a regulated industry” where a defendant can “point to a regulatory basis for its challenged conduct that is reasonable in the sense of being ‘concrete, articulable and recognized as legitimate.’” *Panhandle E. Pipe Line*, 730 F. Supp. at 933 (*quoting MCI Commc’ns*, 708 F.2d at 1009-10). The availability of the regulatory compliance defense is therefore predicated only on a party’s reasonable good faith efforts to comply with a defined federal regulatory scheme. Any differences in the application of the defense would be due to the *factual* nature of the statutory and regulatory obligations, and the effect of such regulation and conduct on the respective markets. *See Phonetel I*, 664 F.2d at 743 (noting that the factfinder should determine if the “actions were justified by the constraints of the *regulatory scheme in which they operated.*”) (emphasis added).

³⁰ See also LREAB Opp. at 16 for further discussion of this point.

The pertinent facts concerning attempted regulatory compliance in the telecommunications cases and this case are analogous. In those cases, the telecommunications companies took actions they believed in good faith complied with regulatory requirements in the absence of direct supervision by the regulator. The companies justified restraints on competition based on regulatory protections against harm to the network from interconnection of third party equipment. *See S. Pacific Commc’ns*, 740 F.2d at 1009-10. Furthermore, the FCC had authority to determine whether those companies’ actions were consistent with federal law and regulation, but provided scant guidance and delayed timely action. *See MCI Commc’ns*, 708 F.2d at 1130, 1133 (noting that the FCC delay in providing guidance and noting the FCC’s 1971 decision on interconnection was “extremely opaque”). Much like the telecommunication cases, the facts here demonstrate that LREAB, with limited guidance, attempted in good faith to meet the factual imperatives and requirements of Dodd-Frank and federal regulations. Indeed, in promulgating the IFR in October 2010, the Federal Reserve, after noting the then-current absence of such studies, stated: “The Board also requests comment on what additional guidance may be needed regarding third-party rate information on which a creditor and its agents may appropriately rely to qualify for the presumption of compliance.”³¹ Eight years later, additional guidance has yet to be issued. LREAB’s actions therefore fall squarely under the regulatory compliance defense as defined and applied in the telecommunications cases. And LREAB’s status – both as a regulated entity and an agency of the State – strengthens its claim to a fact-based justification based on regulatory compliance.

In attempting to distinguish the telecommunications cases, Complaint Counsel conflates the requirements of the three separate defenses, ignores the concrete factual imperatives of

³¹ 75 Fed. Reg. at 66,574.

Dodd-Frank and subsequent federal regulations, and engages in a faulty factual comparison between *Phonetel I* and this case. CC Supp. Br. at 10, 12-13. First, Complaint Counsel’s reliance on facts pertinent to state action, *e.g.*, the existence of “market participants” and “active supervision,” are irrelevant to the facts necessary to the regulatory compliance defense. *See Phonetel I*, 664 F.2d at 736-37 (finding facts relating to the state action defense [which the court denied] immaterial to a regulatory compliance defense [which it affirmed]).

Second, Complaint Counsel mistakenly views the market through only the lens of antitrust law, while ignoring the requirements of TILA, FIRREA, and prudential federal regulations. CC Supp. Br. at 13. Congress intended “customary and reasonable” to have a definite and stringent meaning. Through Dodd-Frank and the subsequent federal regulations, Congress and federal regulators made clear that “competition” must be interpreted within the confines of “C&R,” and the public interest of ensuring home-buyer access to high quality, accurate residential appraisals rather than the lowest-negotiated price. While the “marketplace within a specific geographic area is the “primary determiner” for customary and reasonable fees, that marketplace is *defined by and subject to the constraints dictated* in Dodd-Frank and federal regulations. LREAB Opp. at 13, 26-27 (emphasis added).³²

LREAB further rebuts Complaint Counsel’s chart by reference to the following facts:

1. As Louisiana’s appraiser certifying and licensing agency, LREAB is regulated by the federal financial regulatory agencies as set out in their regulations and official interpretations thereto. The ASC biannually audits LREAB’s compliance with FIRREA, with authority to review complaint files pertaining to AMCs. LREAB Opp. at 6-8, 22.³³

³² Importantly, AMCs must pay a customary and reasonable fee for the appraisal “performed in the geographic market of the property being appraised.” 12 C.F.R. § 226.42(f)(1). This provision further *restricts competition* by inhibiting AMCs from setting nationwide or regional appraiser rates. In fact, the IFR went as far as to cite the Department of Justice and Federal Trade Commission’s 2010 Horizontal Merger Guidelines for the proposition that “the facts and circumstances” of certain geographic markets may require fees to be dictated in geographic areas as narrow as metropolitan statistical areas or state counties. 75 Fed. Reg. 66,554, 66,564, 66,571 n.39.

³³ See Ex. 41.

2. LREAB never set a fee schedule. *Id.* at 12 n.16.
3. As the state appraiser certifying and licensing agency, LREAB is required under federal law to license and regulate AMCs, including ensuring AMCs use a proper method to determine C&R payments for covered transactions. *Id.* at 28-29. This regulatory conduct is not “rate-setting.” Moreover, as the regulator overseen by the ASC, LREAB cannot “forebear” from this regulatory requirement. *See id.* at 25.
4. A “less anticompetitive alternative” has no relevance to the regulatory compliance defense. The federal requirements only allow “three methods by which an AMC can comply with the C&R mandate,” all of which are permitted under Rule 31101 since its promulgation in 2013 and repromulgation in 2017. *Id.* at 12.
5. In accordance with federal law, the ASC has the authority to monitor, supervise, review, and sanction LREAB’s investigatory conduct under Rule 31101. *Id.* at 6-8, 19 n.24.

Complaint Counsel incorrectly asserts that the regulatory compliance defense should apply to “refusal to deal claims *only*.” CC Supp. Br. at 14 (emphasis added). Similarly, Complaint Counsel urges the Commission to ignore decades of case law affirming the regulatory compliance defense because the “liability theories advanced in the telecom cases likely would be judged invalid today.” *Id.*³⁴ *Phonetele I* held that the regulatory compliance defense “may be taken into account in ascertaining liability for the section 1, section 2, and tying allegations.” *Id.*, 664 F.2d at 742. And as recently as 2007, the Supreme Court reaffirmed the defense, citing *Phonetele I* for statute-specific analysis that courts must undertake. *See Billing*, 551 U.S. at 271.

Question 4: How should the extant regulatory compliance case law be read in conjunction with more recent Supreme Court authority establishing the requirements of the state action defense? Can these two strands of case law be successfully harmonized, or are they in conflict today?

Answer: There is no conflict between the state-action immunity inquiry and the good faith regulatory compliance defense. The inquiries are separate – a defendant could invoke either or both. State-action immunity prevents application of the antitrust laws to particular

³⁴ LREAB takes no position as to whether the “liability theories employed in the 1980s telecom cases are today highly suspect.” CC Supp. Br. at 15.

defendants in deference to federalism and state sovereignty. In contrast, the good faith regulatory compliance defense is a factual inquiry that prevents “punish[ing] regulated firms for trying to act consistent with” regulatory policies. Areeda & Hovenkamp ¶ 246a. Here, LREAB is both a state agency and subject to extensive federal regulation. Accordingly, LREAB’s Answer raised independent defenses of state-action immunity and good faith regulatory compliance.

Discussion: The doctrines of state-action immunity and good faith regulatory compliance are distinct and in harmony. The elements of state-action immunity are irrelevant for purposes of applying the good faith regulatory compliance defense. The state action doctrine is a legal principle under which federal antitrust laws cannot apply *to the defendant* because federal antitrust laws cannot regulate the sovereign actions of states. There may or may not be a state regulation at issue,³⁵ as the fundamental question for purposes of state-action immunity remains whether the defendant was sovereign, or acting as an agent of a sovereign. *N.C. Dental*, 135 S. Ct. at 1110 (“An entity may not invoke *Parker* immunity unless the actions in question are an exercise of the State’s sovereign power.”). An entity ineligible for state-action immunity is not, by that finding, liable under Section 5 of the FTC Act; there still must be proof of an antitrust violation, which is a separate analytical question.

The good faith regulatory compliance defense is a fact-based justification that provides an affirmative defense for regulated entities as to whether there was *an antitrust violation*. It does not, therefore, undercut *N.C. Dental*, as Complaint Counsel suggests. Indeed, LREAB is in a somewhat unique position because it is both an entity subject to federal regulation, and a

³⁵ In this regard, Complaint Counsel’s explanation that state-action immunity is implicated when state regulation is at issue, and regulatory compliance is implicated when federal regulation is at issue, CC Supp. Br. at 16, is both an oversimplification and inaccurate.

regulator – a state agency – by virtue of the State of Louisiana’s delegation of enforcement authority consistent with federal requirements.

No facts in the record suggest LREAB made an “error of law.” To the contrary, all record facts support that LREAB’s interpretations of federal C&R requirements have borne out to be correct—in other words, were objectively reasonable. The requirement of objective reasonableness to invoke the regulatory compliance defense likewise prevents any conflict with the state action doctrine, as it is not just an entity’s subjective belief about what the law requires that carries the day.

Complaint Counsel’s contention that “a state agency cannot show that it was required to regulate in conformity with a federal statute,” CC Supp. Br. at 16, goes too far.³⁶ First, Louisiana’s 2009 adoption of its AMC Act, predicated the 2010 Dodd-Frank Act. Thus, having made the decision to regulate AMCs, Dodd-Frank’s “minimum state requirements” were automatically imposed on LREAB. Moreover, the notion that states “are not required to participate in the Dodd-Frank program” CC Supp. Br. at 13, and hence that LREAB’s actions were voluntary, fails to consider the public policy interest of Louisiana. Moreover, the notion that states “are not required to participate in the Dodd-Frank program,” CC Supp. Br. at 13, and hence that LREAB’s actions were voluntary, fails to consider the public policy interest of Louisiana in ensuring that AMCs licensed in Louisiana would not be excluded from participating in a significant segment of the market. If Louisiana does not participate in the appraisal registration program, AMCs could not participate in “federally-related” transactions (essentially transactions in which a mortgage loan remains on the books of a financial institution or affiliate).

³⁶ In an obvious attempt to have it both ways, Complaint Counsel characterizes LREAB as a state agency for this proposition (*e.g.*, inability to be directed by Congress), yet as a “private party” for purposes of other arguments (*e.g.*, private conduct is not exempt from federal law by virtue of complying with state law).

While only a subset of mortgages, a lead AMC trade association told federal regulators that the failure of a state to have registration could essentially bar them from all residential appraisals; and that trade association supported the 2012 AMC Act amendments as well.³⁷ It thus disregards the substantial penalty in place for states who do not regulate AMCs.

Complaint Counsel's suggestion in their original Motion, that "Appraisal management services may still be provided for federally related transactions in non-participating States by individual appraisers, by AMCs that are below the minimum statutory panel size threshold, and as noted, by Federally regulated AMCs," CC Mot. at 5,³⁸ offers no solution – as it would exclude from the Louisiana market precisely the AMCs Complaint Counsel alleges were harmed by adoption and enforcement of Rule 31101. In effect, Complaint Counsel suggests that the Commission destroy competition in the market for Louisiana residential appraisal management services in order to save it, or more precisely, to save it from the potential for price-affecting C&R fee rulemaking and enforcement by LREAB. That sham solution also undermines completely Complaint Counsel's market definition, which excludes residential appraisal services not sold to AMCs.

Question 5: How would a defense based on "compliance in good faith with . . . state regulation" relate to the state action and preemption doctrines?

Answer: State-action immunity applies to actions of and at the direction of state law and regulation. The good faith compliance defense relies on federal regulation, including state regulation undertaken pursuant to federal mandates. Where there only exist state regulatory requirements, the antitrust tribunal applies its ordinary inquiries with respect to preemption,

³⁷ See *Comments of Real Estate Valuation Advocacy Association* to the federal financial regulatory agencies, June 9, 2014, at 2. LREAB Opp., Aff. of James J. Kovacs, Exhibit 37; Aff. Of Bruce Unangst ¶ 29.

³⁸ Complaint Counsel's Motion for Partial Summary Decision Dismissing Respondent's Fourth Affirmative Defense (Feb. 2, 2018).

Parker immunity, and the rule of reason considering regulatory context. Here, Dodd-Frank and the Louisiana AMC Act constitute a single, intertwined and complementary regulatory regime, and LREAB is subject to federal regulators' investigatory, supervisory, and disciplinary powers. Thus, the Commission's question is hypothetical in the present case.

Discussion: Without citation to LREAB's briefing, Complaint Counsel asserts that “[a]ccording to LREAB, good faith compliance with a state statute should be exempt from antitrust liability to the same degree as is good faith compliance with federal regulation.” CC Supp. Br. at 21. This assertion misrepresents LREAB's position. LREAB's position is that LREAB must comply with state *and federal* mandates. LREAB does not ask, like the respondent in *N.C. Dental*, that the Commission “recognize a defense, separate and apart from the state action defense, based on a state agency's enforcement of a state statute.” *In re N.C. Bd. of Dental Exam 'rs*, 152 F.T.C. 640, 2011 WL 11798463, at *26 (Dec. 2, 2011).

As discussed in Section II *supra*, federal and Louisiana state law create a single, integrated regulatory regime over the residential appraisal market, and LREAB is subject to both state and federal oversight to implement it. Just like the California regulation overlaying the conduct in *Phonetel I*, the AMC Act is part and parcel of a federal regulatory program. *Phonetel I*, 665 F.2d at 739 n.60.

The hypothetical implicit in the Commission's question – good faith compliance with state law *alone* – is inapplicable here. In such a hypothetical, the antitrust tribunal would apply its ordinary preemption analysis, asking “whether there exists an irreconcilable conflict between the federal and state regulatory schemes.” *Rice v. Norman Williams Co.*, 458 U.S. 654, 659 (1982). A state law is “preempted facially by federal antitrust law if it authorizes a per se violation of section 1 of the Sherman Act, but not if it must be analyzed under the rule of

reason,” because the rule of reason requires “an examination of the circumstances underlying a particular economic practice, and therefore does not lend itself to a conclusion that a statute is facially inconsistent with federal antitrust laws.” *Chamber of Commerce v. Seattle*, 890 F.3d 769, 780 (9th Cir. 2018) (quoting *Rice*, 458 U.S. at 661). Here, there is no preemption of state law, because there is no conflict. Louisiana’s AMC Act implements federal requirements by its express terms, and is simply a contemplated and wholly-consistent “appendage of the dominant federal regulatory program.” *Phonetel I*, 664 F.2d at 739 n.60.

CONCLUSION

The Commission should confirm the vitality of the good faith regulatory compliance defense, and its applicability to LREAB in this case. Complaint Counsel’s Motion for Partial Summary Decision should be denied.

Dated: June 25, 2018

Respectfully submitted,

/s/ W. Stephen Cannon

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Real Estate Appraisers Board*

Exhibit 39

**Comparison of the Language of Louisiana's
Appraisal Management Company Act and LREAB Rule 31101 to
Dodd-Frank Act and Federal Financial Agency Regulations**

LOUISIANA LAW AND REGULATIONS	FEDERAL LAW AND REGULATIONS
<p>Louisiana AMC Act, La. RS 37:3415.15(A)</p> <p>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 and the final federal rules as provided for in the applicable provisions of 12 CFR Parts 34, 225, 226, 323, 1026, and 1222.</p>	<p>Dodd-Frank Act, 15 U.S.C. § 1639e(i)</p> <p>(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.</p>

RED = Dodd-Frank Act text as source for Louisiana AMC Act and Rule 31101
BLUE = Federal regulations text as source for Louisiana Rule 31101

<p>LREAB Rule §31101. General Provisions; Customary and Reasonable Fees; Presumptions of Compliance</p> <p>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.</p> <p>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.</p> <p>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.</p>	<p>12 C.F.R. § 226.42(f)</p> <p>(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:</p> <ul style="list-style-type: none"> (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; (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 (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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RED = Dodd-Frank Act text as source for Louisiana AMC Act and Rule 31101

BLUE = Federal regulations text as source for Louisiana Rule 31101

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.**

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:

- 1. the type of property for each appraisal performed;**
- 2. the scope of work for each appraisal performed;**
- 3. the time in which the appraisal services are required to be performed;**
- 4. fee appraiser qualifications;**
- 5. fee appraiser experience and professional record; and**
- 6. fee appraiser work quality.**

C. Licensees shall maintain records of all methods, factors, variations, and differences used to determine the customary and reasonable rate of compensation paid for each appraisal assignment in the geographic market of the property being appraised, in accordance with Section §30501.C.

(2) A creditor and its agents shall be presumed to comply with paragraph (f)(1) if—
(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:**

- (A) The type of property,**
- (B) The scope of work,**
- (C) The time in which the appraisal services are required to be performed,**
- (D) Fee appraiser qualifications,**
- (E) Fee appraiser experience and professional record, and**
- (F) Fee appraiser work quality;**

Exhibit 40

12 U.S.C.A. § 3347

§ 3347. Monitoring of State appraiser certifying and licensing agencies

[Currentness](#)

(a) In general

The Appraisal Subcommittee shall monitor each State appraiser certifying and licensing agency for the purposes of determining whether such agency--

- (1) has policies, practices, funding, staffing, and procedures that are consistent with this chapter;
- (2) processes complaints and completes investigations in a reasonable time period;
- (3) appropriately disciplines sanctioned appraisers and appraisal management companies;
- (4) maintains an effective regulatory program; and
- (5) reports complaints and disciplinary actions on a timely basis to the national registries on appraisers and appraisal management companies maintained by the Appraisal Subcommittee.

The Appraisal Subcommittee shall have the authority to remove a State licensed or certified appraiser or a registered appraisal management company from a national registry on an interim basis, not to exceed 90 days, pending State agency action on licensing, certification, registration, and disciplinary proceedings. The Appraisal Subcommittee and all agencies, instrumentalities, and Federally recognized entities under this chapter shall not recognize appraiser certifications and licenses from States whose appraisal policies, practices, funding, staffing, or procedures are found to be inconsistent with this chapter. The Appraisal Subcommittee shall have the authority to impose sanctions, as described in this section, against a State agency that fails to have an effective appraiser regulatory program. In determining whether such a program is effective, the Appraisal Subcommittee shall include an analysis of the licensing and certification of appraisers, the registration of appraisal management companies, the issuance of temporary licenses and certifications for appraisers, 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. The Appraisal Subcommittee shall have the authority to impose interim actions and suspensions against a State agency as an alternative to, or in advance of, the derecognition of a State agency.

(b) Disapproval by Appraisal Subcommittee

The Federal financial institutions,¹ regulatory agencies, the Federal National Mortgage Association, the Federal Home Loan Mortgage Corporation, and the Resolution Trust Corporation shall accept certifications and licenses awarded by a State appraiser certifying the licensing agency unless the Appraisal Subcommittee issues a written finding that--

- (1) the State agency fails to recognize and enforce the standards, requirements, and procedures prescribed pursuant to this chapter;
- (2) the State agency is not granted authority or sufficient funding by the State which is adequate to permit the agency to carry out its functions under this chapter; or
- (3) decisions concerning appraisal standards, appraiser qualifications and supervision of appraiser practices are not made in a manner that carries out the purposes of this chapter.

(c) Rejection of State certifications and licenses

(1) Opportunity to be heard or correct conditions

Before refusing to recognize a State's appraiser certifications or licenses, the Appraisal Subcommittee shall provide that State's certifying and licensing agency a written notice of its intention not to recognize the State's certified or licensed appraisers and ample opportunity to provide rebuttal information or to correct the conditions causing the refusal.

(2) Adoption of procedures

The Appraisal Subcommittee shall adopt written procedures for taking actions described in this section.

(3) Judicial review

A decision of the subcommittee under this section shall be subject to judicial review.

CREDIT(S)

([Pub.L. 101-73, Title XI, § 1118](#), Aug. 9, 1989, 103 Stat. 515; [Pub.L. 111-203, Title XIV, § 1473\(k\)](#), July 21, 2010, 124 Stat. 2196.)

Footnotes

¹ So in original. The comma probably should not appear.

12 U.S.C.A. § 3347, 12 USCA § 3347

Current through P.L. 115-185.

Exhibit 41

Appraisal Subcommittee
Federal Financial Institutions Examination Council

February 7, 2018

Via E-mail

Mr. Bruce Unangst, Executive Director
Louisiana Real Estate Appraisers Board
P O Box 14785
Baton Rouge, LA 70898-4785
bunangst@lrec.state.la.us

Dear Mr. Unangst:

Pursuant to Title XI of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, as amended (Title XI), we have scheduled a Compliance Review of Louisiana real estate appraiser regulatory program (Program) for April 18-20, 2018. The Review is an essential part of our ongoing efforts to fulfill our obligation under § 1118(a) of Title XI to ensure State compliance. The Review process involves analyzing your statutes, regulations, policies, and procedures to determine your Program's compliance with Title XI.

Neal Fenochietti and Jenny Tidwell, Appraisal Subcommittee (ASC) Policy Managers, will conduct the Review. We understand that the Louisiana Real Estate Appraisers Board is the State agency with administrative, regulatory, and/or enforcement authority for the Program. The Review will be held at 9071 Interline Avenue, Baton Rouge, LA 70809. The Policy Managers will begin the Review at 9:00 AM and will start with an opening conference at 9:30 AM to discuss your Program and our Review process. Please coordinate with your appropriate Program representatives to ensure their attendance at this opening conference and that they will be available to answer questions, if requested, during the course of the review. The Policy Managers will conclude the on-site Review with an exit conference that will be scheduled during the Review. At the exit conference, the Policy Managers will discuss their Preliminary Review observations. It is important that appropriate Program representatives attend this conference. Part of the Review process will involve observing the Real Estate Appraisal Board meeting, including executive session, on April 20, 2018.

For the majority of their time on site, the Policy Managers will review selected files and records for the period under Review (February 2016, through the present). Please provide a space sufficient for two people to review the selected files in an area that won't interfere with the daily operations of the office. Please have available for their review complete files of: (1) all appraiser-related complaints; (2) approved and disapproved education courses, and providers or instructors; and (3) approved and disapproved resident, temporary practice and reciprocal applications. If you have any questions regarding the availability of any of these records or questions regarding our authority to review such records, please notify us at your earliest convenience before the Review.

Please email the materials requested below to Neal@asc.gov and Jenny@asc.gov. These materials should be current as of March 26, 2018, and submitted no later than April 2, 2018.

- A complaint log (in a sortable format) identifying the case number, respondent, complainant, opening and closing date, status, and method of disposition which includes the following:
 - All open complaints **regardless of the date filed** including complaints referred to other governmental departments, divisions, offices, and any private third-party processors; and
 - All complaints that have been closed since February 2016;
 - Provide an explanation for any open cases the State wants considered exempt from the 12-month processing time for special documented circumstances;¹
- Sortable list of temporary practice permit applications received during the Review period identifying the applicant, date application was received, date of issuance, and date of expiration, if any;
- Sortable list of all newly issued, upgraded and/or reinstated credentials issued during the Review period;
- Sortable list of individuals who received a trainee credential and of trainees renewing their credential;
- Sortable list of approved supervisory appraisers (if applicable);
- List of all approved real estate appraiser-related education course offerings for qualifying and continuing education;
- If you conduct audits of the required continuing education for renewing credentials, please provide a sortable list of credentials audited and the results for each;
- Current real estate appraiser-related statutes, regulations, and written policies/procedures;
- Any draft or proposed real estate appraiser-related statutes and regulations;
- Policy for safeguarding the National Registry;
- Copies of any audits or Sunset reviews of the Program conducted by another State entity within the last four years;
- Blank copies of current real estate appraiser applications (including those for resident licensure /certification, temporary practice, reciprocity, and education provider/instructor approval);
- Blank copies of any checklists/forms used while processing applications, education and/or investigations;
- Sample copies of each type of credential issued (including temporary practice);
- Official Real Estate Appraiser Board/Commission and committee meeting minutes, including executive session minutes, issued during the Review period;
- An organizational chart, including names, official titles, phone numbers, email addresses and percentage of time spent on the Program of all employees involved in, or part of the management of Program;
- Copies of the current and prior year budget for your Program; and
- Your responses to the attached questionnaire and AMC Statute and Regulation worksheet.

Please contact Neal Fenochietti at (202) 834-0485 with any questions you may have regarding the Review.

Sincerely,



Denise Graves
Deputy Executive Director

Attachment

cc: Ms. Anne Brassett, Program Administrator, abassett@lrec.state.la.us

¹ Special documented circumstances are those extenuating circumstances (fully documented) beyond the control of the State agency that delays normal processing of a complaint such as: complaints involving a criminal investigation by a law enforcement agency when the investigative agency requests that the State refrain from proceeding; final disposition that has been appealed to a higher court; documented medical condition of the respondent; ancillary civil litigation; and complex fraud cases that involve multiple individuals and reports. Such special documented circumstances also include those periods when State rules require referral of a complaint to another State entity for review and the State agency is precluded from further processing of the complaint until it is returned. In that circumstance, the State agency should document the required referral and the time period during which the complaint was not under its control or authority.

AMC Pre-formal Review Worksheet Only

State:	Louisiana			
Are AMC statutes in place?				
Cite:				
Are AMC regulations in place?				
Cite:				
Is the State electing/continuing to participate in the registration and supervision of AMCs?				
Title XI/Final Rule (Minimum Requirements for Participating States)	Plain English question	Yes/No	If yes, cite.	Other Comments
TITLE XI				
§ 1109. Roster of State certified or licensed appraisers; authority to collect and transmit fees [12 U.S.C. 3338]				
(a) In general. Each State with an appraiser certifying and licensing agency whose certifications and licenses comply with this title, shall— (3) transmit reports on a timely basis of supervisory activities involving appraisal management companies or other third-party providers of appraisals and appraisal management services, including investigations initiated and disciplinary actions taken; and	Does the State have the authority to transmit reports to the ASC, including reports of investigations and disciplinary actions involving AMCs?			Compliance with reporting requirements is subject to notification regarding what will be required, the availability of the AMC Registry and the procedures for doing so.
(4) collect— (B) from an appraisal management company that either has registered with a State appraiser certifying and licensing agency in accordance with this title	Does the State have the authority to collect and transmit to the ASC annual registry fees from State Registered AMC's?			Compliance with requirements for collection and transmission of AMC registry fees is subject to ASC rulemaking, notification regarding the availability of the AMC Registry and the procedures for doing so.
or operates as a subsidiary of a federally regulated financial institution, an annual registry fee.	Does the State have the authority to collect and transmit to the ASC annual registry fees from AMC's that are subsidiaries of federally regulated financial institutions exempt from State registration?			Compliance with requirements for collection and transmission of AMC registry fees is subject to ASC rulemaking, notification regarding the availability of the AMC Registry and the procedures for doing so.

AMC Pre-formal Review Worksheet Only

(11) Appraisal Management Company.— The term ‘appraisal management company’ means, in connection with valuing properties collateralizing mortgage loans or mortgages incorporated into a securitization, any external third party authorized either by a creditor of a consumer credit transaction secured by a consumer’s principal dwelling or by an underwriter of or other principal in the secondary mortgage markets,	Does the scope of the State's definition of an AMC include real property transactions involving consumer credit secured by a consumer's principal dwelling?			
that oversees a network or panel of more than 15 certified or licensed appraisers in a State or 25 or more nationally within a given year—	Does the scope of the State's definition of an AMC include the threshold network or panel size?			States may have a more expansive definition of AMC thereby encompassing State regulation of AMCs that are not within the federal definition. If so, the State must ensure such non-federally recognized AMCs are identified as such in the State database. Only those AMCs that meet the federal definition are eligible to be on the AMC Registry.
(A) to recruit, select, and retain appraisers; (B) to contract with licensed and certified appraisers to perform appraisal assignments; (C) to manage the process of having an appraisal performed, including providing administrative duties such as receiving appraisal orders and appraisal reports, submitting completed appraisal reports to creditors and underwriters, collecting fees from creditors and underwriters for services provided, and reimbursing appraisers for services performed; or (D) to review and verify the work of appraisers.	Does the State definition of appraisal management company contain all the services listed in Title XI?			

AMC Pre-formal Review Worksheet Only

(1) register with and be subject to supervision by a State appraiser certifying and licensing agency in each State in which such company operates;	Does the State have the authority to register and supervise appraisal management companies?			
(2) verify that only licensed or certified appraisers are used for federally related transactions;	Does the State require that AMC's engage only State certified or State licensed appraisers for Federally related transactions?			
(3) require that appraisals coordinated by an appraisal management company comply with the Uniform Standards of Professional Appraisal Practice; and	Does the State require that an AMC's appraiser's comply with USPAP?			
(4) require that appraisals are conducted independently and free from inappropriate influence and coercion pursuant to the appraisal independence standards established under section 129E of the Truth in Lending Act.	Does the State require an AMC's appraiser's compliance with the appraisal independence standards of TILA?			
(c) Federally Regulated Financial Institutions.— An appraisal management company that is a subsidiary owned and controlled by a financial institution regulated by a Federal financial institution regulatory agency shall not be required to register with a State.	Does the State exempt AMC's that are subsidiaries of a federally regulated financial institutions from State registration requirements?			
(d) Registration Limitations.—An appraisal management company shall not be registered by a State or included on the national registry if such company, in whole or in part, directly or indirectly, is owned by any person who has had an appraiser license or certificate refused, denied, cancelled, surrendered in lieu of revocation, or revoked in any State. Additionally,	Does the State have the authority to deny registration of an AMC that is owned by a person whose appraiser license or certificate has been refused, denied, cancelled, surrendered, or revoked in any State?			

AMC Pre-formal Review Worksheet Only

each person that owns more than 10 percent of an appraisal management company shall be of good moral character, as determined by the State appraiser certifying and licensing agency,	Does the State require that any person who owns more than 10% of an AMC is of good moral character?			
and shall submit to a background investigation carried out by the State appraiser certifying and licensing agency.	Has the State determined what will be required for background investigations of any person that owns more than 10% of an AMC?			
<p>(e) Appraiser panel means a network, list or roster of licensed or certified appraisers approved by an AMC to perform appraisals as independent contractors for the AMC. Appraisers on an AMC's "appraiser panel" under this part include both appraisers accepted by the AMC for consideration for future appraisal assignments in covered transactions or for secondary mortgage market participants in connection with covered transactions and appraisers engaged by the AMC to perform one or more appraisals in covered transactions or for secondary mortgage market participants in connection with covered transactions. An appraiser is an independent contractor for purposes of this subpart if the appraiser is treated as an independent contractor by the AMC for purposes of Federal income taxation.</p>				
<p>(a) Establish and maintain within the State appraiser certifying and licensing agency a licensing program that is subject to the limitations set forth in § 34.214 and with the legal authority and mechanisms to:</p>				
(1) Review and approve or deny an AMC's application for initial registration;	Does the State have the authority to review and approve or deny AMC initial registration applications?			
(2) review and renew or refuse to renew an AMC's registration periodically;	Does the State have the authority to review and renew or refuse renewal applications?			

AMC Pre-formal Review Worksheet Only

(3) examine the books and records of an AMC operating in the State and require the AMC to submit reports, information, and documents to the State;	Does the State have the authority to examine the records of an AMC?		
(4) verify that the appraisers on the AMC's appraiser panel hold valid State certifications or licenses, as applicable;	Does the State have the authority to verify that an appraiser working for an AMC holds a State certification or license?		
(5) conduct investigations of AMCs to assess potential violations of applicable appraisal-related laws, regulations, or orders;	Does the State have the authority to conduct an investigation of an AMC?		
(6) discipline, suspend, terminate, and refuse to renew the registration of an AMC that violates applicable appraisal-related laws, regulations, or orders; and	Does the State have the authority to discipline an AMC?		
(7) report to the ASC 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.	Does the State have the authority to report disciplinary and enforcement actions to the National Registry?		Compliance for providing and remitting information is subject to notification regarding the availability of the AMC Registry and the procedures for doing so.
(b) Impose requirements on AMCs that are not owned and controlled by an insured depository institution and not regulated by a Federal financial institutions 39:44regulatory agency to:			
(1) Register with and be subject to supervision by the State appraiser certifying and licensing agency;	Does the State impose registration/supervision on AMCs?		
(2) Engage only State-certified or State-licensed appraisers for Federally related transactions in conformity with any Federally related transaction regulations;	Does the State impose mandatory use of credentialed appraisers for FRTs on AMCs?		

AMC Pre-formal Review Worksheet Only

(3) Establish and comply with processes and controls reasonably designed to ensure that the AMC, in engaging an appraiser, selects an appraiser who is independent of the transaction and who has the requisite education, expertise, and experience necessary to competently complete the appraisal assignment for the particular market and property type;	Does the State impose this requirement on AMCs?			
(4) Direct the appraiser to perform the assignment in accordance with USPAP; and	Does the State impose this requirement on AMCs?			
(5) Establish and comply with processes and controls reasonably designed to ensure that the AMC conducts its appraisal management services in accordance with the requirements of section 129E(a) through (i) of the Truth in Lending Act, 15 U.S.C. 1639e(a) through (i), and regulations thereunder.	Does the State impose this requirement on AMCs?			

Exhibit 42

One Hundred Fifteenth Congress
of the
United States of America

AT THE SECOND SESSION

*Begun and held at the City of Washington on Wednesday,
the third day of January, two thousand and eighteen*

An Act

To promote economic growth, provide tailored regulatory relief, and enhance consumer protections, and for other purposes.

*Be it enacted by the Senate and House of Representatives of
the United States of America in Congress assembled,*

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

(a) **SHORT TITLE.**—This Act may be cited as the “Economic Growth, Regulatory Relief, and Consumer Protection Act”.

(b) **TABLE OF CONTENTS.**—The table of contents for this Act is as follows:

- Sec. 1. Short title; table of contents.
Sec. 2. Definitions.

TITLE I—IMPROVING CONSUMER ACCESS TO MORTGAGE CREDIT

- Sec. 101. Minimum standards for residential mortgage loans.
Sec. 102. Safeguarding access to habitat for humanity homes.
Sec. 103. Exemption from appraisals of real property located in rural areas.
Sec. 104. Home Mortgage Disclosure Act adjustment and study.
Sec. 105. Credit union residential loans.
Sec. 106. Eliminating barriers to jobs for loan originators.
Sec. 107. Protecting access to manufactured homes.
Sec. 108. Escrow requirements relating to certain consumer credit transactions.
Sec. 109. No wait for lower mortgage rates.

TITLE II—REGULATORY RELIEF AND PROTECTING CONSUMER ACCESS TO CREDIT

- Sec. 201. Capital simplification for qualifying community banks.
Sec. 202. Limited exception for reciprocal deposits.
Sec. 203. Community bank relief.
Sec. 204. Removing naming restrictions.
Sec. 205. Short form call reports.
Sec. 206. Option for Federal savings associations to operate as covered savings associations.
Sec. 207. Small bank holding company policy statement.
Sec. 208. Application of the Expedited Funds Availability Act.
Sec. 209. Small public housing agencies.
Sec. 210. Examination cycle.
Sec. 211. International insurance capital standards accountability.
Sec. 212. Budget transparency for the NCUA.
Sec. 213. Making online banking initiation legal and easy.
Sec. 214. Promoting construction and development on Main Street.
Sec. 215. Reducing identity fraud.
Sec. 216. Treasury report on risks of cyber threats.
Sec. 217. Discretionary surplus funds.

TITLE III—PROTECTIONS FOR VETERANS, CONSUMERS, AND HOMEOWNERS

- Sec. 301. Protecting consumers' credit.
Sec. 302. Protecting veterans' credit.
Sec. 303. Immunity from suit for disclosure of financial exploitation of senior citizens.

Sec. 304. Restoration of the Protecting Tenants at Foreclosure Act of 2009.
Sec. 305. Remediating lead and asbestos hazards.
Sec. 306. Family self-sufficiency program.
Sec. 307. Property Assessed Clean Energy financing.
Sec. 308. GAO report on consumer reporting agencies.
Sec. 309. Protecting veterans from predatory lending.
Sec. 310. Credit score competition.
Sec. 311. GAO report on Puerto Rico foreclosures.
Sec. 312. Report on children's lead-based paint hazard prevention and abatement.
Sec. 313. Foreclosure relief and extension for servicemembers.

TITLE IV—TAILORING REGULATIONS FOR CERTAIN BANK HOLDING COMPANIES

Sec. 401. Enhanced supervision and prudential standards for certain bank holding companies.
Sec. 402. Supplementary leverage ratio for custodial banks.
Sec. 403. Treatment of certain municipal obligations.

TITLE V—ENCOURAGING CAPITAL FORMATION

Sec. 501. National securities exchange regulatory parity.
Sec. 502. SEC study on algorithmic trading.
Sec. 503. Annual review of government-business forum on capital formation.
Sec. 504. Supporting America's innovators.
Sec. 505. Securities and Exchange Commission overpayment credit.
Sec. 506. U.S. territories investor protection.
Sec. 507. Encouraging employee ownership.
Sec. 508. Improving access to capital.
Sec. 509. Parity for closed-end companies regarding offering and proxy rules.

TITLE VI—PROTECTIONS FOR STUDENT BORROWERS

Sec. 601. Protections in the event of death or bankruptcy.
Sec. 602. Rehabilitation of private education loans.
Sec. 603. Best practices for higher education financial literacy.

SEC. 2. DEFINITIONS.

In this Act:

(1) APPROPRIATE FEDERAL BANKING AGENCY; COMPANY; DEPOSITORY INSTITUTION; DEPOSITORY INSTITUTION HOLDING COMPANY.—The terms “appropriate Federal banking agency”, “company”, “depository institution”, and “depository institution holding company” have the meanings given those terms in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813).
(2) BANK HOLDING COMPANY.—The term “bank holding company” has the meaning given the term in section 2 of the Bank Holding Company Act of 1956 (12 U.S.C. 1841).

TITLE I—IMPROVING CONSUMER ACCESS TO MORTGAGE CREDIT

SEC. 101. MINIMUM STANDARDS FOR RESIDENTIAL MORTGAGE LOANS.

Section 129C(b)(2) of the Truth in Lending Act (15 U.S.C. 1639c(b)(2)) is amended by adding at the end the following:

“(F) SAFE HARBOR.—

“(i) DEFINITIONS.—In this subparagraph—
“(I) the term ‘covered institution’ means an insured depository institution or an insured credit union that, together with its affiliates, has less than \$10,000,000,000 in total consolidated assets;
“(II) the term ‘insured credit union’ has the meaning given the term in section 101 of the Federal Credit Union Act (12 U.S.C. 1752);
“(III) the term ‘insured depository institution’ has the meaning given the term in section 3 of

the Federal Deposit Insurance Act (12 U.S.C. 1813);

“(IV) the term ‘interest-only’ means that, under the terms of the legal obligation, one or more of the periodic payments may be applied solely to accrued interest and not to loan principal; and

“(V) the term ‘negative amortization’ means payment of periodic payments that will result in an increase in the principal balance under the terms of the legal obligation.

“(ii) SAFE HARBOR.—In this section—

“(I) the term ‘qualified mortgage’ includes any residential mortgage loan—

“(aa) that is originated and retained in portfolio by a covered institution;

“(bb) that is in compliance with the limitations with respect to prepayment penalties described in subsections (c)(1) and (c)(3);

“(cc) that is in compliance with the requirements of clause (vii) of subparagraph (A);

“(dd) that does not have negative amortization or interest-only features; and

“(ee) for which the covered institution considers and documents the debt, income, and financial resources of the consumer in accordance with clause (iv); and

“(II) a residential mortgage loan described in subclause (I) shall be deemed to meet the requirements of subsection (a).

“(iii) EXCEPTION FOR CERTAIN TRANSFERS.—A residential mortgage loan described in clause (ii)(I) shall not qualify for the safe harbor under clause (ii) if the legal title to the residential mortgage loan is sold, assigned, or otherwise transferred to another person unless the residential mortgage loan is sold, assigned, or otherwise transferred—

“(I) to another person by reason of the bankruptcy or failure of a covered institution;

“(II) to a covered institution so long as the loan is retained in portfolio by the covered institution to which the loan is sold, assigned, or otherwise transferred;

“(III) pursuant to a merger of a covered institution with another person or the acquisition of a covered institution by another person or of another person by a covered institution, so long as the loan is retained in portfolio by the person to whom the loan is sold, assigned, or otherwise transferred; or

“(IV) to a wholly owned subsidiary of a covered institution, provided that, after the sale, assignment, or transfer, the residential mortgage loan is considered to be an asset of the covered institution for regulatory accounting purposes.

“(iv) CONSIDERATION AND DOCUMENTATION REQUIREMENTS.—The consideration and documentation requirements described in clause (ii)(I)(ee) shall—

“(I) not be construed to require compliance with, or documentation in accordance with, appendix Q to part 1026 of title 12, Code of Federal Regulations, or any successor regulation; and
“(II) be construed to permit multiple methods of documentation.”.

SEC. 102. SAFEGUARDING ACCESS TO HABITAT FOR HUMANITY HOMES.

Section 129E(i)(2) of the Truth in Lending Act (15 U.S.C. 1639e(i)(2)) is amended—

(1) by redesignating subparagraphs (A) and (B) as clauses (i) and (ii), respectively, and adjusting the margins accordingly;

(2) in the matter preceding clause (i), as so redesignated, by striking “For purposes of” and inserting the following:

“(A) IN GENERAL.—For purposes of”; and

(3) by adding at the end the following:

“(B) RULE OF CONSTRUCTION RELATED TO APPRAISAL DONATIONS.—If a fee appraiser voluntarily donates appraisal services to an organization eligible to receive tax-deductible charitable contributions, such voluntary donation shall be considered customary and reasonable for the purposes of paragraph (1).”.

SEC. 103. EXEMPTION FROM APPRAISALS OF REAL PROPERTY LOCATED IN RURAL AREAS.

Title XI of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (12 U.S.C. 3331 et seq.) is amended by adding at the end the following:

“SEC. 1127. EXEMPTION FROM APPRAISALS OF REAL ESTATE LOCATED IN RURAL AREAS.

“(a) DEFINITIONS.—In this section—

“(1) the term ‘mortgage originator’ has the meaning given the term in section 103 of the Truth in Lending Act (15 U.S.C. 1602); and

“(2) the term ‘transaction value’ means the amount of a loan or extension of credit, including a loan or extension of credit that is part of a pool of loans or extensions of credit.

“(b) APPRAISAL NOT REQUIRED.—Except as provided in subsection (d), notwithstanding any other provision of law, an appraisal in connection with a federally related transaction involving real property or an interest in real property is not required if—

“(1) the real property or interest in real property is located in a rural area, as described in section 1026.35(b)(2)(iv)(A) of title 12, Code of Federal Regulations;

“(2) not later than 3 days after the date on which the Closing Disclosure Form, made in accordance with the final rule of the Bureau of Consumer Financial Protection entitled ‘Integrated Mortgage Disclosures Under the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z)’ (78 Fed. Reg. 79730 (December 31, 2013)), relating to the federally related transaction is given to the consumer, the mortgage originator or its agent, directly or indirectly—

Exhibit 43

115TH CONGRESS } HOUSE OF REPRESENTATIVES { REPORT
 2d Session } 115-528

HOUSING OPPORTUNITIES MADE EASIER ACT

JANUARY 29, 2018.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. HENSARLING, from the Committee on Financial Services,
submitted the following

R E P O R T

[To accompany H.R. 2255]

[Including cost estimate of the Congressional Budget Office]

The Committee on Financial Services, to whom was referred the bill (H.R. 2255) to clarify that nonprofit organizations may accept donated mortgage appraisals, and for other purposes, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

PURPOSE AND SUMMARY

Introduced by Representative Trott, H.R. 2255, the “Housing Opportunities Made Easier Act” amends the Truth in Lending Act (TILA) to deem mortgage appraisal services donated by a fee appraiser to an organization that is eligible to receive tax-deductible charitable contributions to be customary and reasonable.

BACKGROUND AND NEED FOR LEGISLATION

Title XIV of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd Frank Act)(P.L. 111-203), also known as the Mortgage Reform and Anti-Predatory Lending Act, made a number of changes to the regulation of property appraisals. The Dodd-Frank Act set new federal standards for the independence of appraisers, mandated independence for appraisers, and created rules for customary and reasonable fees.

Section 1472(i) of the Dodd-Frank Act directed the Bureau of Consumer Financial Protection (CFPB) to establish reasonable and customary fees for fee appraisers, professionals who furnish appraisal services for a fee. The definition of fee appraiser excludes employees of banks and appraisal management companies. Under

this provision, fee appraisers are to receive payment that is “customary and reasonable” for appraisal services performed in the market area of the property being appraised. 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) also directs relevant federal agencies¹ to exclude fees that are connected to assignments ordered by appraisal management companies. The CFPB promulgated rules to implement the statute, which went into effect in 2014.²

However, the CFPB’s use of the terms “customary” and “reasonable” in its rule created an issue for non-profit housing organizations, such as Habitat for Humanity, who enlist individuals and groups in local communities all over the world to help build or improve dwellings for low-income and impoverished families. In many cases these organizations require volunteer labor and monetary donations to complete projects, help build homes and obtain affordable mortgages. In 2017 alone Habitat for Humanity assisted more than 30 thousand low-income Americans construct or rehabilitate their dwellings. This figure could have been substantially higher if organizations such as Habitat for Humanity were permitted to receive appraisals at no cost.³

As a result, the CFPB’s definition for the cost of appraisals has hindered certain non-profit housing organizations’ ability to provide cost effective residences for the needy because the CFPB could interpret appraisal donations as a violation of the law. With appraisal costs reaching up to more than \$1000 each, Habitat for Humanity has said that the “provisions in [the Dodd-Frank Act], including appraisal independence regulations, created unintended consequences for Habitat for Humanity and other nonprofit organizations providing responsible homeownership opportunities to families without access to bank mortgages.”

HEARINGS

The Committee on Financial Services held a hearing examining matters relating to H.R. 2255 on April 26, 2017 and April 28, 2017.

COMMITTEE CONSIDERATION

The Committee on Financial Services met in open session on January 17, 2018 and January 18, 2018 and ordered H.R. 2255 to be reported favorably by a recorded vote of 55 yeas to 0 nays (Record vote no. FC-139), a quorum being present.

¹ Term “agencies” collectively refers to the Office of Comptroller of the Currency (OCC), the Federal Reserve Board, the Federal Deposit Insurance Corporation (FDIC), the National Credit Union Association (NCUA), the Consumer Financial Protection Bureau (CFPB), and the Federal Housing Finance Agency (FHFA).

²<https://www.federalregister.gov/documents/2013/01/31/2013-01384/disclosure-and-delivery-requirements-for-copies-of-appraisals-and-other-written-valuations-under-the>

³<https://www.habitat.org/sites/default/files/annual-report-FY2017-web.pdf>.

COMMITTEE VOTES

Clause 3(b) of rule XIII of the Rules of the House of Representatives requires the Committee to list the record votes on the motion to report legislation and amendments thereto. The sole recorded vote was on a motion by Chairman Hensarling to report the bill favorably to the House without amendment. The motion was agreed to by a recorded vote of 55 yeas to 0 nays (Record vote no. FC-139), a quorum being present.

Record vote no. FC-139

Representative	Yea	Nay	Present	Representative	Yea	Nay	Present
Mr. Hensarling	X	.....	.....	Ms. Maxine Waters (CA)	X	.....	.....
Mr. McHenry .....	.....	.....	.....	Mrs. Carolyn B. Maloney (NY)	X	.....	.....
Mr. King .....	.....	.....	.....	Ms. Velázquez	X	.....	.....
Mr. Royce (CA)	X	.....	.....	Mr. Sherman	X	.....	.....
Mr. Lucas	X	.....	.....	Mr. Meeks	X	.....	.....
Mr. Pearce	X	.....	.....	Mr. Capuano	X	.....	.....
Mr. Posey	X	.....	.....	Mr. Clay .....	.....	.....	.....
Mr. Luetkemeyer	X	.....	.....	Mr. Lynch	X	.....	.....
Mr. Huizenga	X	.....	.....	Mr. David Scott (GA)	X	.....	.....
Mr. Duffy	X	.....	.....	Mr. Al Green (TX)	X	.....	.....
Mr. Stivers .....	.....	.....	.....	Mr. Cleaver	X	.....	.....
Mr. Hultgren	X	.....	.....	Ms. Moore	X	.....	.....
Mr. Ross	X	.....	.....	Mr. Ellison	X	.....	.....
Mr. Pittenger	X	.....	.....	Mr. Perlmutter	X	.....	.....
Mrs. Wagner	X	.....	.....	Mr. Himes	X	.....	.....
Mr. Barr	X	.....	.....	Mr. Foster	X	.....	.....
Mr. Rothfus	X	.....	.....	Mr. Kildee	X	.....	.....
Mr. Messer .....	.....	.....	.....	Mr. Delaney	X	.....	.....
Mr. Tipton	X	.....	.....	Ms. Sinema	X	.....	.....
Mr. Williams	X	.....	.....	Mrs. Beatty	X	.....	.....
Mr. Poliquin	X	.....	.....	Mr. Heck	X	.....	.....
Mrs. Love	X	.....	.....	Mr. Vargas	X	.....	.....
Mr. Hill	X	.....	.....	Mr. Gottheimer	X	.....	.....
Mr. Emmer	X	.....	.....	Mr. Gonzalez (TX)	X	.....	.....
Mr. Zeldin	X	.....	.....	Mr. Crist	X	.....	.....
Mr. Trott	X	.....	.....	Mr. Kihuen	X	.....	.....
Mr. Loudermilk	X	.....	.....	.....	.....	.....	.....
Mr. Mooney (WV)	X	.....	.....	.....	.....	.....	.....
Mr. MacArthur	X	.....	.....	.....	.....	.....	.....
Mr. Davidson	X	.....	.....	.....	.....	.....	.....
Mr. Budd	X	.....	.....	.....	.....	.....	.....
Mr. Kustoff (TN)	X	.....	.....	.....	.....	.....	.....
Ms. Tenney	X	.....	.....	.....	.....	.....	.....
Mr. Hollingsworth	X	.....	.....	.....	.....	.....	.....

COMMITTEE OVERSIGHT FINDINGS

Pursuant to clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the findings and recommendations of the Committee based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

PERFORMANCE GOALS AND OBJECTIVES

Pursuant to clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, the Committee states that H.R. 2255 will allow mortgage appraisal services donated by a fee appraiser to an organization that is eligible to receive tax-deductible charitable contributions to be deemed customary and reasonable.

NEW BUDGET AUTHORITY, ENTITLEMENT AUTHORITY, AND TAX EXPENDITURES

In compliance with clause 3(c)(2) of rule XIII of the Rules of the House of Representatives, the Committee adopts as its own the estimate of new budget authority, entitlement authority, or tax expenditures or revenues contained in the cost estimate prepared by the Director of the Congressional Budget Office pursuant to section 402 of the Congressional Budget Act of 1974.

CONGRESSIONAL BUDGET OFFICE ESTIMATES

Pursuant to clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the following is the cost estimate provided by the Congressional Budget Office pursuant to section 402 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, January 26, 2018.

Hon. JEB HENSARLING,
Chairman, Committee on Financial Services,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 2255, the HOME Act.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Stephen Rabent.

Sincerely,

KEITH HALL,
Director.

Enclosure.

H.R. 2255—HOME Act

Under current law, mortgage lenders are required to compensate property appraisers at a customary and reasonable rate for performing appraisal services. H.R. 2255 would deem appraisal services donated to an organization that is eligible to receive tax-deductible charitable contributions to be customary and reasonable for purposes of that requirement.

Using information from the Consumer Financial Protection Bureau (CFPB), CBO estimates that enacting H.R. 2255 would cost \$1

million over the 2018–2020 period for several agencies to prepare an interagency rule amending their regulations to reflect the new appraisal requirements.

Costs incurred by the Federal Deposit Insurance Corporation, the National Credit Union Administration, the Office of the Comptroller of the Currency, and the Federal Housing Finance Agency are recorded in the budget as increases in direct spending. Those agencies are authorized to collect premiums and fees from the financial institutions they regulate to fully cover such administrative expenses. The CFPB is permanently authorized to spend amounts transferred from the Federal Reserve. Because that activity is not subject to appropriation, the CFPB’s expenditures are recorded in the budget as direct spending. In total, CBO estimates that enacting H.R. 2255 would increase net direct spending by less than \$500,000 over the 2018–2020 period.

Costs to the Federal Reserve System reduce remittances to the Treasury, which are recorded in the budget as revenues. CBO estimates that enacting H.R. 2255 would decrease such revenues by less than \$500,000 over the 2018–2020 period.

The net effect on the deficit would be insignificant. Because enacting H.R. 2255 would affect direct spending and revenues, pay-as-you-go procedures apply.

CBO estimates that enacting H.R. 2255 would not significantly increase net direct spending or on-budget deficits in any of the four consecutive 10-year periods beginning in 2028.

H.R. 2255 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act.

The CBO staff contact for this estimate is Stephen Rabent. The estimate was approved by H. Samuel Papenfuss, Deputy Assistant Director for Budget Analysis.

FEDERAL MANDATES STATEMENT

This information is provided in accordance with section 423 of the Unfunded Mandates Reform Act of 1995.

The Committee has determined that the bill does not contain Federal mandates on the private sector. The Committee has determined that the bill does not impose a Federal intergovernmental mandate on State, local, or tribal governments.

ADVISORY COMMITTEE STATEMENT

No advisory committees within the meaning of section 5(b) of the Federal Advisory Committee Act were created by this legislation.

APPLICABILITY TO LEGISLATIVE BRANCH

The Committee finds that the legislation does not relate to the terms and conditions of employment or access to public services or accommodations within the meaning of the section 102(b)(3) of the Congressional Accountability Act.

EARMARK IDENTIFICATION

With respect to clause 9 of rule XXI of the Rules of the House of Representatives, the Committee has carefully reviewed the provisions of the bill and states that the provisions of the bill do not

contain any congressional earmarks, limited tax benefits, or limited tariff benefits within the meaning of the rule.

DUPLICATION OF FEDERAL PROGRAMS

In compliance with clause 3(c)(5) of rule XIII of the Rules of the House of Representatives, the Committee states that no provision of the bill establishes or reauthorizes: (1) a program of the Federal Government known to be duplicative of another Federal program; (2) a program included in any report from the Government Accountability Office to Congress pursuant to section 21 of Public Law 111–139; or (3) a program related to a program identified in the most recent Catalog of Federal Domestic Assistance, published pursuant to the Federal Program Information Act (Pub. L. No. 95–220, as amended by Pub. L. No. 98–169).

DISCLOSURE OF DIRECTED RULEMAKING

Pursuant to section 3(i) of H. Res. 5, (115th Congress), the following statement is made concerning directed rulemakings: The Committee estimates that the bill requires no directed rulemakings within the meaning of such section.

SECTION-BY-SECTION ANALYSIS OF THE LEGISLATION

Section 1. Short title

This section cites H.R. 2255 as the “Housing Opportunities Made Easier Act” or the “HOME Act”.

Section 2. Exemption from Truth in Lending Act

This section amends the Truth in Lending Act (TILA) to allow mortgage appraisal services donated by fee appraisers to an organization that is eligible to receive tax-deductible charitable contributions as defined by Section 170(c)(2) of the Internal Revenue Code of 1986, be deemed customary and reasonable.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, and existing law in which no change is proposed is shown in roman):

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (new matter is printed in italic and existing law in which no change is proposed is shown in roman):

SECTION 129E OF THE TRUTH IN LENDING ACT

* * * * *

§ 129E. Appraisal independence requirements

(a) IN GENERAL.—It shall be unlawful, in extending credit or in providing any services for a consumer credit transaction secured by the principal dwelling of the consumer, to engage in any act or practice that violates appraisal independence as described in or pursuant to regulations prescribed under this section.

(b) APPRAISAL INDEPENDENCE.—For purposes of subsection (a), acts or practices that violate appraisal independence shall include—

(1) any appraisal of a property offered as security for repayment of the consumer credit transaction that is conducted in connection with such transaction in which a person with an interest in the underlying transaction compensates, coerces, extorts, colludes, instructs, induces, bribes, or intimidates a person, appraisal management company, firm, or other entity conducting or involved in an appraisal, or attempts, to compensate, coerce, extort, collude, instruct, induce, bribe, or intimidate such a person, for the purpose of causing the appraised value assigned, under the appraisal, to the property to be based on any factor other than the independent judgment of the appraiser;

(2) mischaracterizing, or suborning any mischaracterization of, the appraised value of the property securing the extension of the credit;

(3) seeking to influence an appraiser or otherwise to encourage a targeted value in order to facilitate the making or pricing of the transaction; and

(4) withholding or threatening to withhold timely payment for an appraisal report or for appraisal services rendered when the appraisal report or services are provided for in accordance with the contract between the parties.

(c) EXCEPTIONS.—The requirements of subsection (b) shall not be construed as prohibiting a mortgage lender, mortgage broker, mortgage banker, real estate broker, appraisal management company, employee of an appraisal management company, consumer, or any other person with an interest in a real estate transaction from asking an appraiser to undertake 1 or more of the following:

(1) Consider additional, appropriate property information, including the consideration of additional comparable properties to make or support an appraisal.

(2) Provide further detail, substantiation, or explanation for the appraiser's value conclusion.

(3) Correct errors in the appraisal report.

(d) PROHIBITIONS ON CONFLICTS OF INTEREST.—No certified or licensed appraiser conducting, and no appraisal management company procuring or facilitating, an appraisal in connection with a consumer credit transaction secured by the principal dwelling of a consumer may have a direct or indirect interest, financial or otherwise, in the property or transaction involving the appraisal.

(e) MANDATORY REPORTING.—Any mortgage lender, mortgage broker, mortgage banker, real estate broker, appraisal management company, employee of an appraisal management company, or any other person involved in a real estate transaction involving an appraisal in connection with a consumer credit transaction secured by the principal dwelling of a consumer who has a reasonable basis

to believe an appraiser is failing to comply with the Uniform Standards of Professional Appraisal Practice, is violating applicable laws, or is otherwise engaging in unethical or unprofessional conduct, shall refer the matter to the applicable State appraiser certifying and licensing agency.

(f) NO EXTENSION OF CREDIT.—In connection with a consumer credit transaction secured by a consumer's principal dwelling, a creditor who knows, at or before loan consummation, of a violation of the appraisal independence standards established in subsections (b) or (d) shall not extend credit based on such appraisal unless the creditor documents that the creditor has acted with reasonable diligence to determine that the appraisal does not materially misstate or misrepresent the value of such dwelling.

(g) RULES AND INTERPRETIVE GUIDELINES.—

(1) IN GENERAL.—Except as provided under paragraph (2), the Board, the Comptroller of the Currency, the Federal Deposit Insurance Corporation, the National Credit Union Administration Board, the Federal Housing Finance Agency, and the Bureau may jointly issue rules, interpretive guidelines, and general statements of policy with respect to acts or practices that violate appraisal independence in the provision of mortgage lending services for a consumer credit transaction secured by the principal dwelling of the consumer and mortgage brokerage services for such a transaction, within the meaning of subsections (a), (b), (c), (d), (e), (f), (h), and (i).

(2) INTERIM FINAL REGULATIONS.—The Board shall, for purposes of this section, prescribe interim final regulations no later than 90 days after the date of enactment of this section defining with specificity acts or practices that violate appraisal independence in the provision of mortgage lending services for a consumer credit transaction secured by the principal dwelling of the consumer or mortgage brokerage services for such a transaction and defining any terms in this section or such regulations. Rules prescribed by the Board under this paragraph shall be deemed to be rules prescribed by the agencies jointly under paragraph (1).

(h) APPRAISAL REPORT PORTABILITY.—Consistent with the requirements of this section, the Board, the Comptroller of the Currency, the Federal Deposit Insurance Corporation, the National Credit Union Administration Board, the Federal Housing Finance Agency, and the Bureau may jointly issue regulations that address the issue of appraisal report portability, including regulations that ensure the portability of the appraisal report between lenders for a consumer credit transaction secured by a 1-4 unit single family residence that is the principal dwelling of the consumer, or mortgage brokerage services for such a transaction.

(i) CUSTOMARY AND REASONABLE FEE.—

(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.

(2) FEE APPRAISER DEFINITION.—For purposes of this section, the term “fee appraiser” means a person who is not an employee of the mortgage loan originator or appraisal management company engaging the appraiser and is—

(A) a State licensed or certified appraiser who receives a fee for performing an appraisal and certifies that the appraisal has been prepared in accordance with the Uniform Standards of Professional Appraisal Practice; or

(B) a company not subject to the requirements of section 1124 of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (12 U.S.C. 3331 et seq.) that utilizes the services of State licensed or certified appraisers and receives a fee for performing appraisals in accordance with the Uniform Standards of Professional Appraisal Practice.

(3) EXCEPTION FOR COMPLEX ASSIGNMENTS.—In the case of an appraisal involving a complex assignment, the customary and reasonable fee may reflect the increased time, difficulty, and scope of the work required for such an appraisal and include an amount over and above the customary and reasonable fee for non-complex assignments.

(4) RULE OF CONSTRUCTION RELATED TO APPRAISAL DONATIONS.—*For purposes of paragraph (1), if a fee appraiser voluntarily donates appraisal services to an organization described in section 170(c)(2) of the Internal Revenue Code of 1986, such voluntary donation shall be deemed customary and reasonable.*

(j) SUNSET.—Effective on the date the interim final regulations are promulgated pursuant to subsection (g), the Home Valuation Code of Conduct announced by the Federal Housing Finance Agency on December 23, 2008, shall have no force or effect.

(k) PENALTIES.—

(1) FIRST VIOLATION.—In addition to the enforcement provisions referred to in section 130, each person who violates this section shall forfeit and pay a civil penalty of not more than \$10,000 for each day any such violation continues.

(2) SUBSEQUENT VIOLATIONS.—In the case of any person on whom a civil penalty has been imposed under paragraph (1), paragraph (1) shall be applied by substituting “\$20,000” for “\$10,000” with respect to all subsequent violations.

(3) ASSESSMENT.—The agency referred to in subsection (a) or (c) of section 108 with respect to any person described in paragraph (1) shall assess any penalty under this subsection to which such person is subject.

* * * * *



Notice of Electronic Service

I hereby certify that on June 25, 2018, I filed an electronic copy of the foregoing LREAB Supplemental Brief in Opposition Regarding Good Faith Regulatory Compliance, with:

D. Michael Chappell
Chief Administrative Law Judge
600 Pennsylvania Ave., NW
Suite 110
Washington, DC, 20580

Donald Clark
600 Pennsylvania Ave., NW
Suite 172
Washington, DC, 20580

I hereby certify that on June 25, 2018, I served via E-Service an electronic copy of the foregoing LREAB Supplemental Brief in Opposition Regarding Good Faith Regulatory Compliance, upon:

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