



Office of Policy Planning
Bureau of Competition
Bureau of Economics

UNITED STATES OF AMERICA
Federal Trade Commission
WASHINGTON, D.C. 20580

June 30, 2017

The Honorable Roberta A. Ouellette
Assistant Attorney General
Services to State Agencies Section
5830 Six Forks Road
Raleigh, NC 27609

Re: North Carolina House Bill 829, An Act to Clarify the Definition of Reasonable and Customary Compensation for Real Estate Appraisers

Dear Assistant Attorney General Ouellette:

The Directors of the Federal Trade Commission's ("FTC" or "Commission") Office of Policy Planning, Bureau of Competition, and Bureau of Economics¹ respectfully submit this comment in response to your request for our views regarding the competitive impact of North Carolina House Bill 829 ("HB-829" or "the bill"). The proposed bill would prescribe a single method for determining customary and reasonable appraisal fees paid to real estate appraisers by appraisal management companies ("AMCs"), which would preclude the negotiation of market-based rates. The bill also would direct the North Carolina Appraisal Board ("Board") to adopt rules necessary to enforce the new law.

For the reasons described below, we urge the North Carolina General Assembly to consider whether the proposed bill is consistent with federal legislation regarding compensation for real estate appraisal services, as well as with U.S. Supreme Court precedents that set forth the requirements to qualify for "state action" immunity from the federal antitrust laws.

I. Interest and Experience of the Federal Trade Commission

Congress has charged the FTC with enforcing the Federal Trade Commission Act, which prohibits unfair methods of competition and unfair or deceptive acts or practices in or affecting commerce.² Free-market competition is a core driver of America's economy.³ Vigorous competition gives consumers the benefits of lower prices, higher quality goods and services, greater access to goods and services, and innovation,

consistent with providing competitive returns to efficient suppliers.⁴ Pursuant to its statutory mandate, the FTC seeks to identify business practices, laws, and regulations that may impede competition without providing countervailing benefits to consumers.

In addition, the FTC has a long history as the nation's consumer protection agency, particularly in the real estate services industry. The Commission has used law enforcement, rulemaking, research, conferences and workshops, and educational efforts to protect consumers of mortgage loans from deceptive, unfair, and other unlawful conduct. The FTC has engaged in rigorous empirical research on mortgage disclosures and has long been an advocate for comprehensive reforms to improve consumer understanding of these disclosures.⁵

On May 30, 2017, the FTC filed an administrative complaint against the Louisiana Real Estate Appraisers Board ("FTC Louisiana Board Complaint"), alleging that the board is unreasonably restraining price competition for appraisal services in Louisiana, in violation of federal antitrust law.⁶ North Carolina HB-829 appears to raise several issues similar to those described in the FTC Louisiana Board Complaint.

II. Background on Federal Laws Governing Real Estate Appraisal Fees

In response to the financial crisis of 2007-08, Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank"). This act amended the federal Truth in Lending Act ("TILA") to include provisions intended to ensure that real estate appraisers would operate independently from lenders or other parties with a financial interest in mortgage transactions.⁷ For covered transactions, Dodd-Frank requires lenders and their agents to compensate appraisers "at a rate that is customary and reasonable for appraisal services performed in the market area of the property being appraised."⁸

In October 2010, the Board of Governors of the Federal Reserve System (the "Federal Reserve") issued an Interim Final Rule ("IFR") implementing Dodd-Frank's appraisal independence requirements.⁹ In its commentary to the IFR, the Federal Reserve interpreted the statutory requirements that lenders pay "customary and reasonable" appraisal fees to mean "that the marketplace should be the primary determiner of the value of appraisal services, and hence the customary and reasonable rate of compensation" for appraisers.¹⁰

The IFR specifies that lenders and their agents presumptively comply with the statutory customary and reasonable appraisal fee requirement if they use one of two optional methods to determine fees. Under the first method ("six-factor method"), a lender or its agent is presumed to comply with the customary and reasonable fee requirement if it pays a fee "reasonably related to recent rates paid for comparable appraisal services performed in the geographic market of the property," as informed by six identified factors: (1) the type of property; (2) the scope of work; (3) the time in which the appraisal must be performed; (4) the appraiser's qualifications; (5) the appraiser's experience and professional record; and (6) the appraiser's work quality.¹¹

Under the second method (“survey method”), a lender or its agent is presumed to comply with the requirement if it pays a fee based on “objective third-party information,” including fee schedules, studies, and independent surveys of recent appraisal fees (excluding fees paid by AMCs).¹²

In its commentary to the IFR, the Federal Reserve clarified that the two identified presumptions of compliance are not the only permissible ways to comply with the customary and reasonable fee requirement under Dodd-Frank, leaving AMCs the option to pay fees determined by free-market competition. The commentary explains that if a lender or its agent arrives at an appraisal fee in another way (separate from the two presumptions), whether the fee is customary and reasonable shall depend on all relevant facts and circumstances, without a presumption of either compliance or violation.¹³

In 2015, the federal banking agencies promulgated the Minimum Requirements for Appraisal Management Companies Final Rule (“Final Rule”), implementing a Dodd-Frank provision intended to establish minimum requirements for states that choose to regulate AMCs.¹⁴ The Final Rule provides that any state that chooses to regulate AMCs must require any AMC that is not regulated by a federal banking agency to “[e]stablish and comply with processes and controls reasonably designed to ensure that the AMC conducts its appraisal management services in accordance with [Dodd-Frank’s appraisal independence requirements].”¹⁵ This would include the requirement to pay customary and reasonable fees.

As alleged in the FTC Louisiana Board Complaint, we believe that the Final Rule does not require states to impose upon AMCs standards for customary and reasonable fees beyond what federal law provides, or to set customary and reasonable fees at any particular level.¹⁶

III. North Carolina House Bill 829

HB-829 purports to clarify the definition of customary and reasonable compensation for real estate appraisers paid by AMCs.¹⁷ Four elements of the bill are relevant to our analysis.

- The bill states that “[c]ompensation and offers of compensation provided to an appraiser shall be presumed reasonable” if the amounts are “reasonably related to recent rates paid by the consumer for comparable appraisal services performed in the geographic market of the property being appraised.”
- The bill then states that “[r]ecent rates paid shall not include those amounts paid by appraisal management companies.”
- The bill further states that “[c]ustomary and reasonable rates shall be based on objective third-party information, such as academic studies, government fee surveys, and independent private sector surveys.”

- Finally, the bill requires the Board to “adopt rules necessary to enforce this subsection.”¹⁸

IV. North Carolina House Bill 829 Contains Restrictions Beyond Federal Legal Requirements and Which Do Not Promote Competition

The method proposed by HB-829 for determining customary and reasonable fees for appraisal services is not mandated by – and, in fact, may be inconsistent with – federal law. Contrary to the Federal Reserve’s commentary to the IFR, HB-829 would require AMCs to pay fees set pursuant to a single prescribed method. The method described in the bill most closely resembles the federal survey method. Although the bill also includes some language from the six-factor method, as currently drafted, it is unclear whether that method would be permissible in actual practice. To the extent that HB-829 mandates the survey method and/or the six-factor method as the exclusive way(s) for setting customary and reasonable fees, it would effectively preclude AMCs from negotiating market-based fees with appraisers. We are concerned that this approach restricts free-market determination of appraisal fees and therefore may ultimately result in higher prices for consumers.

Furthermore, the bill expands the definition of customary and reasonable appraisal fees beyond the definition in federal law to include “offers of compensation,” which could unnecessarily constrain negotiations for market-based appraisal fees. The bill also expands this definition to include “recent rates *paid by the consumer*.”¹⁹ We question whether it is appropriate for appraisers to receive the full rate that the consumer pays. Typically, the consumer pays for additional services beyond the appraisal (e.g., other services provided by the AMC), the costs of which might be recovered by the lender as a lump-sum fee for the loan. Thus, this provision also might have the effect of inflating the prices paid by AMCs for appraisal services, above the levels that would otherwise exist in a competitive market.

To the extent that the legislative intent behind HB-829 is for the Board to require AMCs to pay appraisal fees based on a survey, this approach also removes the free market from any role in determining the price of appraisal services, and might inflate appraisal fees above competitive levels. In other states that have commissioned fee surveys, methodology issues have resulted in a report of appraisal fees that may not accurately reflect market rates, and may have been significantly higher than market rates.²⁰ These fees, when paid by AMCs, are then passed on to consumers. Where surveys report only median or average fees, rather than a range, the surveys fail to account for the variability of appraisal circumstances and fluctuations in the real estate market.

V. The Antitrust Laws Apply to the North Carolina Board

State professional boards controlled by active market participants can violate the antitrust laws if they promulgate and enforce regulations that restrain price competition in

the industry in which they participate. Under certain circumstances, the antitrust laws may not apply to conduct by state boards. Under the state action doctrine, non-sovereign actors – such as state boards controlled by market participants – are afforded an exemption from antitrust laws only if “‘the challenged restraint . . . [is] clearly articulated and affirmatively expressed as state policy,’ and . . . ‘the policy . . . [is] actively supervised by the State.’”²¹

We are concerned that HB-829 may have the effect of displacing competition for the setting of appraisal fees and ultimately harming consumers in the form of higher prices. Although the legislative intent is unclear, as currently drafted, HB-829 may be deemed to express an intent to displace competition in the appraisal services market (which is not required by federal law), and without substituting for free-market competition any state regulatory regime to protect consumers. To the extent that HB-829 is intended as an application of Dodd-Frank requirements, we note that Dodd-Frank includes a provision known as an “antitrust savings clause,” which states that “[n]othing in this Act . . . shall be construed to modify, impair, or supersede the operation of any of the antitrust laws.”²² Thus, as the FTC Louisiana Board Complaint alleges, Congress specifically directed that Dodd-Frank was not intended to displace generally applicable antitrust principles, including the prohibition on unreasonable agreements in restraint of trade.²³

In addition, we note that the Board appears to be controlled by active market participants. Thus, as currently constituted, the Board’s regulatory and enforcement activities mandated by HB-829 would be subject to federal antitrust law unless independent state officials actively supervise the Board’s activities, assuming the bill satisfies the clear articulation requirement. As the U.S. Supreme Court explained in *NC Dental*, in order to invoke the state action defense, active supervision by independent state officials is required in these situations because competitor-controlled licensing boards present the “structural risk of market participants confusing their own interest with the State’s policy goals.”²⁴ We urge the North Carolina General Assembly to consider whether the Board’s actions should be supervised by independent state officials who are not participants in the North Carolina appraisal industry. Under *NC Dental*, “a state board on which a controlling number of decisionmakers are active market participants in the occupation the board regulates must satisfy . . . [the] active supervision requirement in order to invoke state-action antitrust immunity.”²⁵

The 2015 Final Rule requires states to ensure that “appraisals are conducted independently and free from inappropriate influence and coercion pursuant to the appraisal independent standards” set forth in Dodd-Frank.²⁶ As we alleged in the FTC Louisiana Board Complaint, however, neither the Final Rule nor Dodd-Frank requires states to delegate enforcement of customary and reasonable fee requirements to active market participants.²⁷ States may comply with Dodd-Frank requirements in ways that promote the goals of competition law.

VI. Conclusion

We urge the North Carolina General Assembly to consider whether HB-829 will promote competition and benefit consumers. We are concerned that, if HB-829 were enacted, real estate appraisal fees in North Carolina might not be based on competitively-set market rates, and that AMCs – and, ultimately, consumers – might face higher prices for real estate appraisal services.

As evidenced by the recent filing of the FTC Board Louisiana Complaint, we will continue to investigate and, where appropriate, recommend that the Commission challenge potentially anticompetitive actions by real estate appraisal boards.

Respectfully submitted,

Tara Isa Koslov, Acting Director
Office of Policy Planning

Abbott Lipsky, Acting Director
Bureau of Competition

Ginger Jin, Director
Bureau of Economics

¹ This letter expresses the views of the Directors of the Office of Policy Planning, Bureau of Competition, and Bureau of Economics. It does not necessarily represent the views of the Commission or of any individual Commissioner. The Commission has not reviewed this letter and did not vote to authorize the submission of these comments.

² Federal Trade Commission Act, 15 U.S.C. § 45.

³ *Standard Oil Co. v. FTC*, 340 U.S. 231, 248 (1951) (“The heart of our national economic policy long has been faith in the value of competition.”).

⁴ *See Nat’l Soc. of Prof. Eng’rs v. United States*, 435 U.S. 679, 695 (1978) (The antitrust laws reflect “a legislative judgment that ultimately competition will produce not only lower prices, but also better goods and services. . . . The assumption that competition is the best method of allocating resources in a free market recognizes that all elements of a bargain – quality, service,

-
- safety, and durability – and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers.”).
- ⁵ See, e.g., FTC Staff Comment Before the CFPB on Notice of Proposed Rulemaking: Integrated Mortgage Disclosures Under the Real Estate Settlement Procedures Act (Reg X) and the Truth In Lending Act (Reg Z), Section II. FTC Authority and Experience (Sept. 25, 2012), https://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-staff-comment-cfpb-notice-proposed-rulemaking-integrated-mortgage-disclosures-under-real-estate/1209cfpbmortgagedisclosures.pdf.
 - ⁶ Federal Trade Commission, Complaint In the Matter of Louisiana Real Estate Appraisers Board, Docket No. 9374 (May 30, 2017), <https://www.ftc.gov/system/files/documents/cases/d09374louisianareappraiserscomplaint.pdf> [hereinafter “FTC Louisiana Board Complaint”].
 - ⁷ Truth in Lending Act, 15 U.S.C. § 1601 et seq., § 129E (2010). Appraisal independence requirements.
 - ⁸ Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Section 1472(a). Covered transactions are loans that extend consumer credit secured by the consumer’s principal dwelling, such as mortgages and home equity loans. The statute further states the following: “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.” Dodd-Frank Act, Section 1472 (i)(1).
 - ⁹ 12 C.F.R. § 226.42 (2010).
 - ¹⁰ Truth in Lending Interim Final Rule, Supplemental Information, 75 Fed. Reg. 66554, 66569 at 42(f) (Oct. 28, 2010) (codified at 12 C.F.R. pt. 226) (“TILA Regulation Commentary”).
 - ¹¹ 12 C.F.R. § 226.42(f)(2) (2010).
 - ¹² 12 C.F.R. § 226.42(f)(3) (2010).
 - ¹³ TILA Regulation Commentary at 66572, 66586.
 - ¹⁴ Minimum Requirements for Appraisal Management Companies, 12 C.F.R. §225.193 (2015) (“Final Rule”). The Final Rule is *not* the final version of the IFR. The Appraisal Subcommittee is composed of representatives of the banking agencies (FED, OCC, FDIC, NCUA, FHFA and CFPB).
 - ¹⁵ Final Rule, 12 C.F.R. §225.193(b)(5).
 - ¹⁶ FTC Louisiana Board Complaint at ¶ 26.
 - ¹⁷ North Carolina House Bill 829, An Act To Clarify The Definition Of Reasonable And Customary Compensation For Real Estate Appraisers, Gen. Assembly of North Carolina Session 2017 (Apr. 13, 2017), <http://www.ncleg.net/Sessions/2017/Bills/House/PDF/H829v1.pdf> [hereinafter “HB-829”].
 - ¹⁸ HB-829, Section 1., G.S. § 93E-2-4(i).
 - ¹⁹ HB-829, Section 1., G.S. § 93E-2-4(i). (emphasis added). “Consumer” is defined as “The borrower or owner of the property interest for which an appraiser’s services are utilized.” HB-829, Section 2. G.S. § 93E-2-2. (a)(5a).
 - ²⁰ Other states that have commissioned fee surveys include Louisiana, Texas, Kentucky, Georgia, Utah, and Virginia.
 - ²¹ *FTC v. Phoebe Putney Health System, Inc.* 133 S.Ct. 1003, 1010 (2013) (quoting *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105).
 - ²² Dodd-Frank §6, Antitrust Savings Clause, codified at 12 U.S.C. 5303.
 - ²³ FTC Louisiana Board Complaint at ¶ 20.
 - ²⁴ *N.C. State Bd. of Dental Exam’rs v. FTC*, 135 S. Ct. at 1106, 1114 (2015).

²⁵ *N.C. State Bd. of Dental Exam'rs v. FTC*, 135 S. Ct. at 1106, 1114 (2015). See also FTC Staff Guidance on Active Supervision of State Regulatory Boards Controlled by Market Participants (Oct. 2015), https://www.ftc.gov/system/files/attachments/competition-policy-guidance/active_supervision_of_state_boards.pdf.

²⁶ Dodd-Frank § 1473, codified at 12 U.S.C. 3353(a)(4).

²⁷ FTC Louisiana Board Complaint at ¶¶ 25-26.