

CLIENT ALERT

FTC Flexes Enforcement Authority against Louisiana Real Estate Regulatory Agency for Anticompetitive Policies

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The Federal Trade Commission continues to test limits in its efforts to enforce federal antitrust laws against state regulatory agencies engaged in policies that may unreasonably restrain competition. On May 31, 2017, the FTC filed a complaint alleging the Louisiana Real Estate Appraisers Board (the Board) unreasonably restrained price competition for appraisal services provided to appraisal management companies (AMCs) in Louisiana through a complex, rate-floor-setting scheme. This is the first FTC complaint against a state regulatory agency since the Supreme Court affirmed the FTC's ability to prosecute inadequately supervised state agencies in *North Carolina State Board of Dental Examiners v. FTC*. Akin to North Carolina's Dental Board, the Louisiana Board consists primarily of licensed members of Louisiana's appraisal industry, who regulate and enforce standards for Louisiana's appraisal industry. Also akin to its position in the North Carolina case, the FTC alleges that the Board is inadequately supervised by the State to be immune from federal antitrust laws. The FTC's Complaint serves as a reminder to similar regulatory bodies that they too can be subject to federal antitrust scrutiny for pricing or other competition-influencing policies they may promulgate at the state level.

The Board's Alleged Conduct

Residential real estate purchases are commonly financed by a mortgage, which typically requires a real estate appraisal performed by a licensed appraiser for a fee. In the wake of the 2008 financial crisis, policy makers were concerned that appraisers would continue to experience inappropriate influence from parties financially interested in real estate transactions. To address this concern, Congress included a provision in the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act requiring 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."

As of November 20, 2013, the Board adopted a regulation purportedly implementing Dodd Frank's "customary and reasonable" fee requirement for appraisal services. Under the regulation, AMCs must compensate appraisers at a rate determined by one of three methods: (1) a survey of fees recently paid by lenders in the relevant geographic area; (2) a fee schedule established by the Board; or (3) a fee based on recently paid fees adjusted by six specified factors. To implement the first method, the Board commissioned a survey, which produced several reports identifying the median fees paid by different types of lenders throughout Louisiana.

The FTC alleges that by requiring appraisers to set fees by one of these three methods, the Board has prevented AMCs and appraisers from negotiating and selecting fees pursuant to free market principles. The FTC also alleges that the Board unlawfully restrained price competition through its aggressive enforcement of the new regulation, including at least two instances in which

the Board commenced investigations that ended in AMCs agreeing to use median fees “at or above” those set forth in the Board’s commissioned reports. The FTC alleges that these efforts have effectively caused AMCs operating in Louisiana to use the median fees published by the Board’s report to avoid fines or disciplinary action.

Implications for Self-Regulated Professional Industries

The FTC’s action signals its intent to continue monitoring the actions of state professional and regulatory bodies it considers to be “unsupervised” for anticompetitive behavior. . As explained by Acting Director of the Bureau of Competition, Abbott Lipsky: “The Bureau is committed to the judicious exercise of its enforcement discretion as mapped out by the Supreme Court in the *North Carolina State Board of Dental Examiners* case” and “will exercise its prescribed authority when economically sound and otherwise consistent with the public interest.”

Notably, this enforcement action steps beyond the FTC’s win in *North Carolina Dental* by targeting a policy that purports to implement both federal and state law. Although *North Carolina Dental* holds that state regulatory agencies do not enjoy automatic antitrust immunity under the state action doctrine if they are composed primarily of active market participants and are not actively supervised by the state, the case centered on a state agency *policy* with no specific authorization in state law. By contrast, the Board attempted to promulgate regulations it purports were necessary to enforce Louisiana’s statute implementing Dodd-Frank’s “customary and reasonable” fee provision.

Finally, the FTC’s enforcement action against the Board is the latest reminder of the importance of antitrust compliance for other self-regulating professional bodies. Even policies that appear to have compelling justifications—such as the Board’s attempt to implement regulations protecting the integrity of the housing and mortgage markets—may still be seen by regulators as impermissibly anticompetitive. The value of a proactive compliance approach – incorporating effective antitrust policies, training, and counseling – have never been more vital for state-level professional regulatory bodies. For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

Ryan C. Tisch

Partner – Washington, D.C.
Phone: +1 202.624.2674
Email: rtisch@crowell.com

Andrew I. Gavil

Senior Of Counsel – Washington, D.C.
Phone: +1 202.628.2823
Email: agavil@crowell.com

Chahira Solh

Partner – Orange County
Phone: +1 949.798.1367
Email: csolh@crowell.com