PUBLIC

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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COMMISSIONERS: **Maureen K. Ohlhausen, Acting Chairman**
Terrell McSweeny

In the Matter of

Louisiana Real Estate Appraisers Board,
Respondent

DOCKET NO. 9374

COMPLAINT COUNSEL'S OPPOSITION TO RESPONDENT'S MOTION TO DISMISS THE COMPLAINT

Geoffrey M. Green
Assistant Director

Lisa B. Kopchik
Christine M. Kennedy
Michael J. Turner
Attorneys

Federal Trade Commission
Bureau of Competition
600 Pennsylvania Ave., N.W.
Washington, DC 20580
Facsimile: (202) 326-3496
Telephone: (202) 326-3139
Email: LKopchik@ftc.gov

Counsel Supporting the Complaint

Dated: December 8, 2017

TABLE OF AUTHORITIES

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I. INTRODUCTION

This case challenges conduct of the Louisiana Real Estate Appraisers Board ("Respondent") that unreasonably restrains price competition for real estate appraisal services provided to appraisal management companies ("AMCs"). Respondent is a state agency controlled by a panel of licensed real estate appraisers. Beginning in 2013, Respondent has regulated the fees that AMCs pay to real estate appraisers for appraisal services, a form of price fixing. In an earlier filing, Complaint Counsel showed that Respondent's actions from 2013 through 2016 were not adequately supervised by an independent, disinterested state actor, and that the conduct at issue in this case does not constitute state action. Complaint Counsel's Motion

regime were now in place, this would not entitle Respondent to a dismissal. For any number of reasons, a supervision regime that looks fine on paper may fail in execution. *See, e.g.*, *F.T.C. v. Ticor Title Ins. Co.*, 504 U.S. 621, 638 (1992). Recognizing this reality, the Commission has concluded that post-complaint amendments to a state supervision regime "cannot immunize" any unlawful conduct the respondent "engaged in before the amendment[s] went into effect" and that such amendments do not moot the underlying litigation. *See In re New England Motor Rate Bureau* ("*NEMRB*"), 112 F.T.C. 200, 264 (1989), *modified on other grounds sub nom. New England Motor Rate Bureau v. F.T.C.*, 908 F.2d 1064 (1st Cir. 1990).[1]

The Commission has been down this road before. Suppose (contrary to fact) that a satisfactory supervision regime were now in place in Louisiana. Following a finding of antitrust liability for past conduct, the proper recourse here, as in previous cases, is a Commission order that enjoins unreasonable private restraints on competition—qualified by an order proviso that expressly allows Respondent to engage in future conduct that falls within the contours of the state action doctrine (referred to hereafter as a "State Action Proviso"). *See, e.g.*, *In re Ticor Title Ins. Co.*, 112 F.T.C. 344, 466 (Final Comm'n Order 1989) ("Provided that nothing in this order shall prohibit respondents from collectively setting or adhering to prices for title search and examination services in any state where such collective activity is engaged in pursuant to clearly articulated and affirmatively expressed state policy and where such collective activity is actively supervised by a state regulatory body."), *rev'd sub nom. Ticor Title Ins. Co. v. F.T.C.*, 922 F.2d 1122 (3d Cir. 1991), *rev'd* 504 U.S. 621 (1992). The remedial order described here would

[1] The Commission concluded that NEMRB violated Section 5 by filing collective motor carrier rates in both Massachusetts and New Hampshire. NEMRB appealed, challenging only the Commission's finding as to the absence of sufficient state supervision in Massachusetts, and the First Circuit reversed the Commission's decision.

supplement but not interfere with the state's supervision of concerted action by market participants.

"[A]s long as a court has the ability to fashion some form of meaningful relief, a case is not moot." *F.T.C. v. Actavis, Inc.*, No. 1:09-CV-955, 2017 U.S. Dist. LEXIS 84438, at *16 (N.D. Ga. June 2, 2017). Applying this standard, the present case is not moot. Respondent is entitled to no more than an opportunity at trial to show, on the basis of an evidentiary record, that the Commission's remedial order should include a State Action Proviso. The Commission should therefore deny Respondent's motion to dismiss.

II. STATEMENT OF FACTS

Appraisal Management Companies ("AMCs") are independent companies engaged by lenders to retain real estate appraisers, and to obtain from these appraisers an assessment of the value of real property. This means that AMCs are often the direct customers of appraisers. Complaint ¶¶ 8, 15.[2]

Respondent Louisiana Real Estate Appraisers Board is an agency of the state of Louisiana charged with licensing and regulating AMCs and real estate appraisers. Complaint ¶¶ 8, 9. Respondent is empowered to discipline an AMC that violates any applicable Louisiana statute or regulation, including by revoking the AMC's license and imposing fines or civil penalties. Complaint ¶ 9.

Respondent is governed by a multi-member board, with each member appointed by the Governor and confirmed by the Senate. La. R.S. 37:3394. At all relevant times, a majority of

[2] On a motion to dismiss, the Commission assumes that all facts alleged in the Complaint and true and correct. *In re S.C. State Board of Dentistry*, 138 F.T.C. 229, 232–33 (Comm'n Order 2004) (citations omitted).

Respondent's board members have been licensed real estate appraisers actively engaged in the provision of appraisal services in Louisiana. Complaint ¶¶ 10–11. Appraisers have an obvious financial interest in securing from AMCs supra-competitive appraisal fees.

In the wake of the financial crisis of 2007–2008, policy makers perceived that inflated appraisals had contributed to a housing "bubble," *i.e.*, an unsustainable run-up in housing prices. One concern was that some appraisers experienced undue pressure from, or had ties to, lenders or other parties with financial interests in mortgage transactions. Complaint ¶ 16. In response to these concerns, Congress included in the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank") provisions intended to ensure that appraisers would operate independently, shielded from inappropriate influence exerted by lenders and other interested parties. Complaint ¶ 17. To promote appraisal independence, 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." Complaint ¶ 19. Federal banking agencies charged with enforcing Dodd-Frank have advised that whether an appraisal fee is judged customary and reasonable shall depend upon an assessment of all relevant facts and circumstances, but that the marketplace should be the primary determiner of whether the compensation paid to appraisers by AMCs is customary and reasonable. Complaint ¶¶ 22, 24.

In 2012, the Louisiana legislature enacted legislation that, similar to Dodd-Frank, requires AMCs to compensate appraisers at a rate that is "reasonable and customary." Complaint ¶ 28. In 2013, Respondent promulgated Rule 31101, specifying how AMCs shall comply with Louisiana's customary and reasonable fee requirement. Specifically, Rule 31101 directs that an

AMC shall pay appraiser fees as determined by one of three prescribed methods: (i) based on a survey of fees recently paid by lenders in the relevant geographic area; (ii) based on a fee

Louisiana law does *not* clearly articulate an intention to displace competition in the setting of appraisal fees. Complaint ¶ 52. Throughout the pre-complaint period, Respondent's actions have *not* been supervised by independent state officials, that is, by persons who are not participants in the Louisiana appraisal industry. Complaint ¶ 53.

Subsequent to the issuance of the Complaint, there have been efforts in Louisiana to adopt and implement procedures for supervision of Respondent's anticompetitive activities. Initially, on July 11, 2017, the Governor issued an Executive Order that (1) directs the Louisiana Commissioner of Administration ("COA") to approve, modify, or reject any customary and reasonable fee regulation promulgated by Respondent; and (2) directs Re

Replacement Rule 31101. There is no record evidence that the legislative oversight committees voted to approve Replacement Rule 31101. There is no record evidence that Replacement Rule 31101 was reviewed by the Governor.

In or around July 2017, Respondent and DAL signed a Memorandum of Understanding ("MOU"). Resp. Mot. Dismiss Exhibit 8. Under the terms of the MOU, DAL will review any administrative complaint proposed by Respondent that alleges a violation of Replacement Rule 31101. DAL will also review any resolution of a previously-reviewed administrative complaint. DAL's scope of review is limited, as described more fully *infra*.

The Louisiana AMC Act provides that a Louisiana court may review questions of law arising in an adjudicatory proceeding conducted by Respondent. The scope of review is limited, as described more fully *infra*. La. R.S. 37:3415.20(B).

Replacement Rule 31101 became effective on November 20, 2017. Resp. Mot Dismiss, Exhibit 14.

III. LEGAL STANDARD

A. Legal Standard for Mootness

On a motion to dismiss, it is a respondent's burden to demonstrate that a lawsuit is moot, and this burden "is a heavy one." *United States v. W. T. Grant Co.*, 345 U.S. 629, 633 (1953). A lawsuit is properly dismissed as moot only where "it is impossible for a court to grant any effectual relief whatever to the prevailing party." *Chafin v. Chafin*, 586 U.S. 165, 172 (2013) (citation omitted). As long as a court has the ability to fashion some form of meaningful relief, a case is not moot. *See Church of Scientology of California v. United States*, 506 U.S. 9, 12–13 (1992). "A defendant cannot . . . automatically moot a case simply by ending its unlawful

has recognized, "there is a real danger" that competitors serving as board members will act to further their "own interests, rather than the governmental interests of the State." *Id.* at 1112 (quoting *Patrick v. Burget*, 486 U.S. 94, 100 (1988)).

In order to guard against this danger, where a state regulatory agency is controlled by active market participants, the state action defense requires a showing that the allegedly anticompetitive actions were (1) undertaken in furtherance of a clearly articulated and affirmatively expressed state policy; and (2) actively supervised by the state itself. *Id.* at 1110; *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980).[4]

C. Legal Standard for Active Supervision

N.C. Dental identifies four "constant requirements" for a state's active supervision of conduct alleged to violate the antitrust laws:

1. the supervisor must review the substance of the decision, not merely the procedures used to produce it;

2. the supervisor must have the power to veto or modify the particular decision to ensure that it accords with state policy;

3. the supervisor must undertake an actual review and decision, potential supervision is not sufficient; and

4. the supervisor must not be an active market participant. *N.C. Dental*, 135 S. Ct. at 1106, 1114.

"The Supreme Court has made clear that the standard for active state supervision is a

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415 (Comm'n Op. 2005). As the Court held in *Midcal*, "[t]he national policy in favor of competition cannot be thwarted by casting such a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement." Instead, State officials must engage in a "pointed re-examination" of the private conduct, *Midcal*, 445 U.S. at 106, such that "the details of the rates or prices have been established as a product of deliberate state intervention." *Ticor*, 504 U.S. at 634. *See also Kentucky Movers*, 139 F.T.C. at 415 ("The purpose of the active supervision requirement is not to impose normative standards on state regulatory practices, but rather to ensure that a state, in displacing federal law, takes appropriate steps to ensure that its own standards are met.").

State action is an affirmative defense, and the burden of proof falls on the Respondent. *See Kentucky Movers*, 139 F.T.C. at 436–37. When assessing whether a state has actively supervised challenged conduct, the Commission focuses upon three key elements of the supervision regime. *See, e.g.*, *In re North Carolina Bd. Dental Exam'rs* (*"N.C. Dental"*), 151 F.T.C. 607, 629 (Comm'n Order Granting Partial Summ. J. Feb. 3, 2011). *First*, the Commission considers whether the state supervisor is capable of developing, and has developed, an adequate factual record from which to assess the validity of the conduct. *Id.* The record should include facts sufficient for the reviewing authority to assess the nature and impact of the challenged conduct, and then to determine whether the State's substantive regulatory requirements have been achieved. *See Kentucky Movers*, 139 F.T.C. at 416–17; *In re Indiana Household Movers and Warehousemen, Inc.* ("*Indiana Movers*"), 135 F.T.C. 535, 555–57 (Consent Order, Analysis to Aid Public Comment, 2005). "Additionally, in assembling an adequate factual record, the procedural value of notice and opportunity to comment is well established. These procedural

submitted and whether it relied on accurate and representative samples of data." *Indiana Movers*, 135 F.T.C. at 559; *see also Yeager's Fuel v. Pa. Power & Light Co.*, 22 F.3d 1260, 1271 (3rd Cir. 1994) (agency "actually considered complaints about the [electricity rate] and decided that it served energy conservation and load management purposes"); *Cnty. of Stanislaus v. Pac. Gas & Elec. Co.*, No. CV-F-93-5866, 1994 U.S. Dist. LEXIS 21032, at *78 (E.D. Cal. Aug. 25, 1994) (agency conducted a "searching and thorough" annual review of the reasonableness of utility's rates that included the "application of criteria to consider competitive concerns"); *Kentucky Movers*, 139 F.T.C. at 422 (activities that support a determination of active supervision of collective ratemaking include a review of profit levels, and developing and applying relevant standards or measures); FTC Office of Policy Planning, REPORT OF THE STATE ACTION TASK FORCE at 22 (Sept. 2003) ("The state's supervision must reach the *substantive merits* of the challenged conduct, and the state's involvement must be meaningful." (emphasis in original)).

Third, the Commission will consider whether the state supervisor has issued a written decision explaining whether and why the private action conforms with state policy. *See N.C. Dental*, 151 F.T.C. at 629; *Kentucky Movers*, 139 F.T.C. at 420; *Indiana Movers*, 135 F.T.C. at 555. "Though not essential, the existence of a written decision is normally the clearest indication that [the state supervisor] (1) genuinely has assessed the legislature's stated standards and (2) has directly taken responsibility for that determination. Through a written decision . . . [the state supervisor] would provide analysis and reasoning, and supporting evidence, that the private conduct furthers the legislature's objectives." *Indiana Movers*, 135 F.T.C. at 557–58. *See also DFW Metro Line Servs. v. Sw. Bell Tel.*, 988 F.2d 601, 606 (5th Cir. 1993) ("[P]ublished decisions reflect that the PUC has conducted other broad-based ratemaking proceedings");

Green, 2003 U.S. Dist. LEXIS 4958, at *23–24 ("Upon conclusion of the hearings, the ICC

described above, the Commission has provided extensive guidance regarding the procedural elements of a facially satisfactory supervision regime. But, where a supervision regime is introduced in the midst of a litigation, in a procedural posture in which the complaint allegations are assumed to be true, the Commission is properly skeptical of the claim that the new and untested procedures are fully sufficient to protect against future antitrust violations.

2000 WL 669997, at *11 (Consent Order May 18, 2000).

According to Respondent, all of Respondent's "future . . . conduct constitutes state action." Resp. Mot. Dismiss at 25. Respondent points to the Governor's Executive Order No. 17-16 ("Executive Order") and a recent contract with the Division of Administrative Law ("DAL"), under which the DAL is supposed to "exercise informed review of all Board enforcement actions against AMCs." Resp. Mot. Dismiss at 21. With these documents in hand, we are told, "it is not

Ticor, 504 U.S. at 637 (discussed above) ("The mere potential for state supervision is not an adequate substitute for a decision by the State."). If private conduct is not submitted to state supervisors for review, or if the state supervisors do not execute appropriately, then the active supervision requirement is not satisfied, and th

active supervision), with the following proviso: NEMRB was permitted to engage in collective rate setting—in states other than New Hampshire and Massachusetts—if the requirements of the state action defense (clear articulation and active supervision) were satisfied. *Id.* at 287–88. As to New Hampshire (with its new but unproven supervision statute) and Massachusetts, the order's prohibition on collective rate setting was unqualified. *Id.* at 287.

Two years later, NEMRB filed a petition requesting that the Commission reopen the proceeding and set aside the order in its entirety (akin to contending that the order was now moot). *In re New England Motor Rate Bureau, Inc.* ("*NEMRB II*"), 114 F.T.C. 536, 536 (Mod. Order Sept. 4, 1991). In the Commission's judgment, the petition sufficiently showed that, as of 1991, New Hampshire had in place a satisfactory active supervision program. *Id.* at 540 ("[S]tate officials in New Hampshire have and exercise the power to review [proposed] rates and to disapprove those that do not meet the statutory requirements that rates be just and reasonable and not discriminatory."). Still, the Commission declined to set aside the remedy. Instead, the Commission modified the order to permit collective rate setting in New Hampshire but only where the requirements of the state action defense are satisfied. *Id.* at 541. The lesson here is clear and simple: the existence of a facially sufficient supervision scheme, adopted after the antitrust violation, does not obviate the need for an injunctive remedy.

Texas Surgeons is similar. 2000 WL 669997, at *11. The Commission's complaint alleged that competing medical practice groups agreed to deal with third-party payers only on collectively determined terms. After this conduct occurred, the State of Texas adopted a state action regime: the new legislation permitted certain collective negotiations between health plans and groups of competing physicians if approved by the Attorney General. *In re Texas Surgeons,*

P.A., No. 3944, (Analysis to Aid Public Comment May 18, 2000) slip op. *available at* https://www.ftc.gov/sites/default/files/documents/cases/2000/04/ftc.gov-texasana.htm. Once again, the Commission determined that "[e]nactment of the statute does not eliminate the need for an order." *Id.* The Commission explained that "[i]t is necessary and appropriate . . . to provide a remedy against future conduct that is not approved and supervised by the State of Texas." *Id.* Thus, the Commission entered an order enjoining respondents from engaging in collective negotiations with payers, qualified by a State Action Proviso. *Texas Surgeons,* 2000 WL 669997, at *11.

In *Kentucky Movers*, the Commission challenged an association of movers that prepared and filed joint tariffs with a state agency, the Kentucky Transportation Cabinet ("KTC"). *Kentucky Movers,* 139 F.T.C. at 406–07. Although Kentucky law required supervision of joint rate setting by movers, the KTC "[had] not taken the steps that the state legislature itself has identified as important." *Id.* at 427. In the absence of a viable state action defense, the Commission concluded that the association's ratemaking activities constituted unlawful horizontal price fixing. *Id.* at 433. Similar to our Respondent, the Kentucky association sought to avoid an order, arguing that, after the ALJ's initial decision, the KTC had taken steps "to augment the level of supervision it exercises" over household goods carrier rates.

B. The Principles and Cases Cited by Respondent are Inapplicable Here

Respondent cites three cases for the proposition that a violation cannot recur where the legislation or regulation challenged in the lawsuit has been repealed and will not be re-enacted. Resp. Mot. Dismiss at 25–26. This proposition is not applicable here, as Respondent has already re-promulgated Prior Rule 31101 as Replacement Rule 31101. In this context, the dispute concerning the legality of Respondent's efforts to regulate appraisal rates is not moot. *See Northeast Florida v. Jacksonville*, 508 U.S. 656, 662 & n.3 (1992) (noting that a matter is not mooted where the challenged regulation is repealed and replaced by one that "differs only in some insignificant respect"); *Mesquire v. Aladdin*, 455 U.S. 283, 289 (1982) (noting that where the defendant can just re-enact the challenged regulation, repeal of that regulation does not moot the matter); *Citizens for Responsible Gov't State PAC v. Davidson*, 236 F.3d 1174, 1182 (10th Cir. 2000) ("Where a new statute 'is sufficiently similar to the repealed [statute] that it is permissible to say that the challenged conduct continues,' the controversy is not mooted by the change, and a federal court continues to have jurisdiction." (citation omitted; alteration in original)).

Next, Respondent implies that, because Respondent is a state agency, the Commission should credit its representation that any illegal conduct has ceased and will not recur. Resp. Mot. Dismiss at 26–28. This contention fails for three reasons. *First*, none of the cases cited by Respondent involves the antitrust laws.[6] *Second*, in the cases cited by Respondent, the

[6] *Brown v. Buhman*, 822 F.3d 1151 (10th Cir. 2016) (constitutionality of a bigamy statute); *Bench Billboard Co. v. City of Cincinnati*, 675 F.3d 974 (6th Cir. 2012) (constitutionality of advertising restrictions); *Am. Cargo Transp., Inc. v. United States*, 625 F.3d 1176 (9th Cir. 2010) (improper application of the Cargo Preference Act); *Rio Grande*

government actor in fact altered its practices.[7] Here, in contrast, Respondent has not ceased its efforts to restrain price competition among appraisers. Indeed, Prior Rule 31101 and Replacement Rule 31101 are identical, letter for letter. Respondent itself has represented that its enforcement activity will not change. *Third*, Respondent is a state agency controlled by active market participants. As the Supreme Court has recognized, agencies controlled by active market participants are apt to "confus[e] their own interests with the State's policy goals." *N.C. Dental*, 135 S. Ct. at 1114. This is the very reason for requiring independent supervision, as opposed to trusting to the good faith of the agency. *Id*.

In addition, in the past Respondent has evaded a theoretically available mechanism of supervision. For several years, Respondent has commissioned the Southeastern Louisiana University Business Research Center ("SLU") to conduct a survey of recent appraiser rates in Louisiana. Under the guise of enforcing Prior Rule 31101, Respondent has coerced certain AMCs to pay appraiser fees as specified in a fee schedule derived from the SLU survey. Respondent treated the fee schedule as separate and apart from Prior Rule 31101, and did not submit the fee schedule for legislative review, a review that was available under the Louisiana APA. (As discussed below, whether the legislature would have elected to review the fee schedule is a separate question.)

To recap, the existence of a facially adequate active supervision regime does not

[7] *Brown*, 822 F.3d at 1169 (noting that the state department substantively changed its enforcement policy); *Bench Billboard*n, d(A23cF.3dThis23c9814.6

22. Below we discuss the principal defects attendant to each of the four procedures. We then describe conduct by Respondent that is potentially anticompetitive, but falls outside of the Louisiana supervision regime.

A. Supervision of Rulemaking by th

to collective rate-making in *Ticor*, 504 U.S. at 638, and *Kentucky Movers*, 139 F.T.C. at 498.

B. Supervision of Rulemaking By the Louisiana Legislature is Facially Flawed

The Louisiana Administrative Procedure Act provides that the legislature may, at its option, review the exercise of rule-making authority by a state agency. La. R.S. 49:968(B). This is the procedure referenced in the DOA General Counsel's correspondence (quoted above). Respondent's Brief states that "*every rule* promulgated by the Board *must be reviewed* by the Senate and House Commerce Committee legislative oversight subcommittees." Resp. Mot. Dismiss at 19 (emphasis added). The contrary is actually true: legislative review is wholly optional. *See* La. R.S. 49:968(D)(1)(a); La. R.S. 49:968(E)(2).

Pursuant to the Louisiana APA, the state agency files with the legislature a report on its proposed rule, which is then referred to the appropriate House and Senate oversight subcommittees. La. R.S. 49:968(B). The subcommittees *may* elect to hold hearings regarding the adoption of the proposed rule, but they are not required to do so. La. R.S. 49:968(D)(1)(a). At a hearing, a subcommittee may: (i) determine "whether the rule change . . . is in conformity with the intent and scope of the [relevant] enabling legislation," and (ii) determine whether the rule change is acceptable or unacceptable to the subcommittee. La. R.S. 49:968(D)(3). Each such determination "shall require an affirm-2.415g.17 a4a9(f)3.g, e m2).

49:968(E)(2), (H). Accordingly, there is no assurance that, when in the future Respondent exercises its rule-making authority in a manner that harms competition, such conduct will be actively supervised by the Louisiana legislature. Again, an unexercised state authority to supervise does not transform the actions of market participants into exempt state action. *See Ticor*, 504 U.S. at 638; *Kentucky Movers*, 139 F.T.C. at 505. The legislative supervision procedure is therefore facially flawed.

Respondent appends to its brief an email authored by the Executive Director of the

Rule 31101 by the Louisiana Legislature. By statute, such approval would require actual hearings and an actual vote by the legislators. The mere possibility of legislative review, as an option not exercised, is not enough to satisfy the active supervision requirement. *See Ticor*, 504 U.S. at 638; *Kentucky Movers*, 139 F.T.C. at 505.

For purposes of this motion, the Commission need not determine whether the adoption of Replacement Rule 31101 constitutes antitrust-exempt state action. That said, the record properly before the Commission shows no active supervision by the legislative branch.

C. Supervision of Respondent's Enforcement Actions by the Division of Administrative Law is Facially Flawed

In or about July 2017, Respondent entered into a Memorandum of Understanding ("MOU") with the Division of Administrative Law ("DAL"), pursuant to a directive in the Governor's Executive Order. Resp. Motion Dismiss, Exhibit 9. This document establishes a procedure for review by an administrative law judge where Respondent takes certain enforcement actions against an AMC. Subject to that review are administrative complaints, and actions that resolve a previously-reviewed administrative complaint, *e.g.*, dismissal, informal or formal settlement, or an order. We here focus on enforcement proceedand ni0A(jmAMLJdum)4.9T

interest groups, AMCs, economic experts, industry experts, *etc*. Second, the ALJ is required to

> economic studies; reviews profit levels and develops standards or measures such as operating ratios; disapproves rates that fail to meet the state's standard; conducts hearings; and issues a written decision.

139 F.T.C. at 417. Respondent has not shown, with evidence, that Louisiana's administrative law judges have the experience, know-how, authority, tools and resources that are needed for active supervision of collective rate-making. Hence, the MOU process is facially flawed.

D. Supervision of Respondent's Enforcement Actions by a State Court is Facially Flawed

Following the ALJ process discussed above, an AMC may seek review of Respondent's enforcement proceeding in state court. The Supreme Court has not determined whether judicial review can ever provide the requisite state action supervision. *See Patrick*, 486 U.S. at 104 (declining to decide "the broad question whether judicial review of private conduct can constitute active supervision"). But, even setting this aside, judicial review is plainly insufficient here for two reasons.

First, there is no guarantee that a state court will review Respondent's enforcement

by Respondent against an AMC will be limited to assessing whether the Respondent “has regularly pursued its authority and has not acted arbitrarily.” L3.7 Tas not l Estate

activity. Resp. Mot. Dismiss, Exhibit 10 at 2. Because Respondent conducts investigations without first issuing an administrative complaint, any agreement that terminates an investigation will not be subject to Division of Administrative Law review, and cannot be shielded by the state action doctrine. Resp. Mot. Dismiss, Exhibit 9 ¶ 5(b) (stating that only the resolution of a "DAL-approved" enforcement action will be reviewed).

In addition, a regulation promulgated by Respondent pursuant to any statute other than La. R.S. 37:3415(A), or an administrative complaint alleging violation of a rule other than replacement Rule 31101, will not be reviewed by any state supervisor, and thus will not be shielded by the state action doctrine. Resp. Mot. Dismiss, Exhibit 2 ¶ a.

VII. CONCLUSION

This case challenging Respondent's price-fixing activity is not moot. Following a finding of liability, the Commission can and should issue a cease and desist order that prohibits Respondent from repeating its anticompetitive conduct. At present, Louisiana does not have in place a facially satisfactory regime of active supervision. For this reason, a State Action Proviso is not advisable. Under Commission Rule of Practice 2.51, Respondent may later seek modification of the order, such as the inclusion of a State Action Proviso, if Respondent can show that an effective state action regime will supervise its actions. This is the procedure followed by the Commission in *NEMRB*, 112 F.T.C. at 287–88.

December 8, 2017

Respectfully submitted,

/s/ Geoffrey M. Green
Geoffrey M. Green
Lisa B. Kopchik
Michael Turner
Christine Kennedy
Thomas H. Brock

Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580
(202) 326-3139
LKopchik@ftc.gov

Counsel Supporting the Complaint

CERTIFICATE OF SERVICE

I hereby certify that on December 8, 2017, I filed the foregoing document electronically using the FTC's E-Filing System and served the following via email:

Donald S. Clark
Secretary
Federal Trade Commission
600 Pennsylvania Ave., NW, Rm. H-113
Washington, DC 20580
ElectronicFilings@ftc.gov

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

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

W. Stephen Cannon
Constantine Cannon LLP
1001 Pennsylvania Avenue, NW
Suite 1300N
Washington, DC 20004
scannon@constantinecannon.com

Counsel for Respondent Louisiana Real Estate Appraisers Board.

Dated: December 8, 2017

By: /s/ Lisa B. Kopchik
Lisa B. Kopchik, Attorney